Jupiter Medical Center Pavilion *and* Service Employees International Union, 1199 Florida.[1] Cases 12–CA–22478, 12–CA–22560, and 12–CA–22705

March 13, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On September 22, 2003, Administrative Law Judge Keltner W. Locke issued the attached bench decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has considered the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions to the extent consistent with this Decision and Order.[3]

Background

The Respondent is a nursing care facility. The Union unsuccessfully attempted to organize the Respondent's employees in 1999 and 2002.[4] The Respondent engaged in certain conduct during and after the 2002 campaign that is alleged to be unlawful.

For the reasons stated by the judge, we agree with his findings that the Respondent lawfully instructed certified nursing assistant (CNA) Dieuseul Mirtil to take off his union button while he was working with a patient. For the reasons explained below, we also agree with the judge's finding that the Respondent lawfully disciplined CNA Paula Thimot on a number of occasions, but we reverse his finding that the Respondent did not impliedly threaten Thimot with discharge.[5]

Instruction to Remove Union Button

On September 5, 2002, CNA Miritil reported to work. As a CNA, Mirtil often must physically handle the elderly patients at the facility. On the date in question, Mirtil wore on his uniform a pin which read: "LOCAL 1199 FLORIDA, SEIU STRONGER." The button was square, with sides measuring approximately 2-1/4 inches each. While providing care to one of the Respondent's elderly patients, Mirtil was approached by Director of Nursing Linda Nelson, who asked Mirtil to remove the pin. The judge credited Nelson's testimony that she told Mirtil that she was concerned that the squared edges of the pin could possibly tear the fragile skin of an elderly patient.[6]

Citing *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773 (1979), the judge reasoned that a health care facility may prohibit solicitations in patient care areas. Because CNA Mirtil was in a patient's room providing care at the time he was instructed to remove his button, the judge found that the Respondent acted lawfully. Additionally, although not "totally convinced" that the button could cause injury to a patient, the judge concluded that it was not implausible, and, in any case, on issues involving patient safety, it was better "to err on the side of caution." Accordingly, the judge dismissed the allegation pertaining to removal of the union button.

We agree with the judge's dismissal of this allegation. In the health care industry, rules prohibiting the wearing of buttons in patient care areas are presumptively valid, and a health care facility may prohibit the wearing of buttons in areas where patients are treated. *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 507 (1978). We agree with the judge that, in such circumstances, the Respondent lawfully chose to put a premium on patient safety.

There is no evidence that the Respondent had tolerated the wearing of other kinds of pins or buttons in patient care areas, where the wearing of such insignia carries the risk of endangering patients. More particularly, the General Counsel has not shown that the other employees were wearing their buttons while physically handling a patient. We recognize that edges of the pin *may* not be sharp enough to injure a patient, even in such close physical proximity. However, this does not diminish the Respondent's concern that this could occur. Given the need for extraordinary care in physically dealing with elderly patients, we would not fault the Respondent for erring on the side of caution. We therefore adopt the judge's dismissal of this allegation.

Implied Threat of Discharge

The judge dismissed the allegation that the Respondent impliedly threatened to discharge employee Jermaine

[1] We have amended the caption to reflect the disaffiliation of the Service Employees International Union from the AFL–CIO effective July 25, 2005.

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

[3] We shall modify the judge's recommended Order to conform to the Board's standard language and substitute a corresponding notice to employees.

[4] All dates refer to 2002, unless stated otherwise.

[5] In the absence of exceptions, we affirm the violations found by the judge.

[6] We do not rely on the judge's secondary finding that Nelson's request that Mirtil remove his button was justified under the Respondent's ban on "advertising." Rather, we agree with the judge that Nelson's primary concern was preventing injury to patients.

(Paula) Thimot during a meeting with employees in late September. We disagree.

The record establishes that Thimot was hired as a CNA at the facility in February and became active in the Union's second organizing campaign there. The Respondent's administrator, Jay Mikosch, and Director of Nursing Linda Nelson conducted a number of meetings with employees for the purpose of presenting arguments against union representation. After one such presentation at a meeting held on September 26, Thimot commented that the Respondent spent a lot of time and money trying to find out who started the Union instead of figuring out the problems. When Mikosch asked Thimot what the problem was, she answered that the Respondent treated employees "like shit." Nelson replied that Thimot "seem[ed] unhappy here," and Thimot responded that Nelson would be unhappy, too, if she had to work under the same conditions. Thereafter, Nelson asked each of the employees at the meeting how long they had worked for the Respondent. After learning that Thimot was relatively new, Nelson told Thimot, "Maybe this isn't the place for you . . . there are a lot of jobs out there." Thimot questioned whether that was the solution, and Nelson answered, "If you are unhappy here, and you seem to be unhappy, then yes." The judge found that the suggestion that Thimot find other employment was ambiguous, and dismissed the allegation.

The Board has long found that comparable statements made either to union advocates or in the context of discussions about the union violate Section 8(a)(1) because they imply that support for the union is incompatible with continued employment. *Rolligon Corp.*, 254 NLRB 22 (1981). Suggestions that employees who are dissatisfied with working conditions should leave rather than engage in union activity in the hope of rectifying matters coercively imply that employees who engage in such activity risk being discharged.

Consistent with this precedent, we find that Nelson impliedly threatened Thimot with discharge by suggesting that she leave rather than engage in union activity. Thimot was a vocal union supporter, and her complaints about the treatment that employees received were raised in a meeting of employees that the Respondent had called, in part, to campaign against the Union. They followed Thimot's comment that management spent more time and money on trying to find out who started the organizing effort than on resolving employees concerns that led to the effort. Nelson's retort that the Respondent's facility may not be the place for Thimot and that "there are a lot of jobs out there" suggested that disgruntled employees should leave the Respondent's employ rather than bring in a union. The message was made abundantly clear after Thimot asked if "that" (i.e., quitting) was the answer and Nelson reiterated that it was if Thimot was unhappy.

Thus, we do not agree with our dissenting colleague that Nelson's comments were unrelated to union activity. The meeting itself was to discuss the union campaign, and Thimot's comments involved working conditions which, in her opinion, motivated employees to seek union representation. Furthermore, we would not find that other, more severe, unfair labor practices are required to find a violation in this instance. In any event, the Respondent has committed a number of other unfair labor practices.[7] Further, the fact that the Respondent may have tolerated other discussions of the Union does not legitimize the Respondent's reactions to Nelson's protected remark here. Under Board law, it is unlawful to suggest that such remarks are inconsistent with continued employment. Finally, Nelson made the remark in the presence of a number of employees, thereby broadening its impact. Accordingly, we find that the Respondent violated Section 8(a)(1) by impliedly threatening to discharge Thimot.

October 15 Discipline

We agree with the judge that the Respondent lawfully disciplined Thimot on three occasions. Our reasons for upholding the discipline imposed on October 15, however, differ from those of the judge.

Nelson issued Thimot an oral warning on September 26 for changing shifts without notifying a supervisor. Nelson memorialized the oral warning on October 4, the same day she issued Thimot a written warning for, among other things, failing to turn bedridden patients and leaving them in urine-soaked undergarments. On October 15, Nelson issued another written warning to Thimot—this one for her part in confrontations with two coworkers on October 6.

The judge found, and we agree, that Thimot was lawfully disciplined for changing shifts without permission and for deficient patient care. However, the judge mistakenly found that the warning for changing shifts was given on October 4 and that for deficient care on October 15, rather than on September 26 and October 4, respectively. The judge did not analyze the actual October 15 warning for the October 6 confrontations or discuss in detail the conduct that led to that warning. Nonetheless, we find, on the basis of the record evidence and the

[7] In addition to the finding that the Respondent unlawfully threatened employee Thimot for speaking out at an employee meeting, discussed below, the judge also found that the Respondent maintained an unlawful no-solicitation rule and unlawfully prohibited employees from discussing wage rates with employees other than their supervisor. There were no exceptions to these latter findings.

judge's credibility determinations, that the October 15 warning did not violate Section 8(a)(1).

The October 6 confrontations took place 2 days after the Union lost the October 4 election. The record establishes that during the evening shift, on a residential hallway of the facility, CNA Jean Edouard approached Thimot and asked if she'd brought him something back from her recent trip to New York. She answered, "No, just like you voted in the election." By her own admission, Thimot told Edouard he was less than a man. The two began yelling at each other. Edouard reported the incident to Nelson, and LPN Kathy Kainbach and Thimot also submitted written reports of the incident to Nelson.

That same evening, according to the testimony of CNA Margareth Torres, Thimot approached Torres and began yelling at her about the election, threatening to spit in her face for voting against the Union. Torres reported this incident to Nelson, saying she feared Thimot. After investigating the two incidents, Nelson issued Thimot a written warning on October 15 for threatening fellow employees and using abusive language.

We recognize that there are conflicting versions of the incident involving Thimot and Edouard and the incident involving Thimot and Torres. However, both Edouard and Torres reported their versions of the incidents to Nelson, the director of nursing. It is clear that the Respondent on October 15 was motivated by those reports.[8] Since the reported activity was unprotected, the discipline was lawful.

That the two October 6 confrontations occurred is not in dispute. There is a dispute over who instigated the confrontations and whether Thimot verbally abused and threatened the other employees. Thimot denied doing so. Based on his observations of Thimot's testimony, however, the judge concluded that she was not a reliable witness. The judge stated, "[F]or example, while testifying about an encounter she had with another employee, Thimot depicted herself as calm and not raising her voice. However, even during her testimony, when she described this particular incident her voice became louder and more strident." Significantly, the judge was describing Thimot's demeanor when testifying about one of the October 6 confrontations. The judge further stated that in other respects Thimot's demeanor did not inspire confidence in her testimony and, "to the extent it conflicts with that of other witnesses, [he did] not credit it."

We accept the judge's finding, implicit in his discussion of Thimot's demeanor and credibility, that Thimot's version of the October 6 confrontations was not believable. As noted above, the judge found Thimot to be an unreliable witness generally, and specifically with regard to the October 6 confrontations. We, therefore, conclude that, consistent with Torres' testimony and contrary to Thimot's denials, Thimot verbally abused Edouard and Torres and threatened Torres.

The dissent says that Thimot's account of her confrontation with Edouard was uncontradicted by other testimony. But that does not mean that it was credible. As discussed, the judge found Thimot to be incredible. The dissent also says that Thimot's account of who started the confrontation was corroborated by LPN Patrick Leary. But even crediting Leary in this regard does not undercut the testimony that Thimot verbally abused Edouard and Torres and threatened Torres.

The issue, then, is whether the Respondent violated Section 8(a)(3) by issuing a written warning to Thimot based on that conduct.

We assume, from the Respondent's knowledge of Thimot's union advocacy and its implied threat to discharge her, that the General Counsel established that animus toward Thimot's union activities was a motivating factor in the Respondent's decision to issue her a written warning for her role in the October 6 confrontations.[9] We nevertheless find that the Respondent demonstrated that it would have imposed the same discipline even absent Thimot's union activities.[10]

Nelson testified that she investigated the two confrontations and that she issued the warning because she concluded that Thimot was the antagonist in each incident. That conclusion is consistent with the judge's explicit discrediting of Thimot's testimony that she did not raise her voice during her encounter with Edouard. It is also consistent with Torres' testimony concerning her confrontation with Thimot. The record does not indicate (and the General Counsel does not contend) that the Respondent ever imposed less serious discipline, or no discipline, on any employee who had verbally abused or threatened another employee. Thus, the credible evidence establishes that Nelson had a valid reason to issue Thimot a written warning, and we find that Nelson would have done so irrespective of Thimot's union advocacy. Accordingly, we find that the Respondent did not violate Section 8(a)(3) by issuing a written warning to Thimot on October 15.

[8] *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir, 1981), cert. denied 455 U.S. 989 (1982).

[9] As noted in his partial dissent, Member Schaumber does not join the majority in finding that the Respondent impliedly threatened to discharge Thimot. He therefore does not rely on this incident as evidence of animus. However, even assuming that animus was present, he joins the majority in finding that the Respondent has proved it would have disciplined Thimot even in the absence of her union activities.

[10] *Wright Line,* supra.

Our colleague would remand this case for further fact-finding and credibility determinations. Our colleague argues that the judge failed to make explicit credibility findings with regard to the incidents for which Thimot was disciplined. We disagree and do not find that remand is necessary in this case. The issue was fully litigated and, as discussed above, the judge made all of the necessary credibility findings to support his conclusion that no violation had occurred. Our dissenting colleague contends that part of Thimot's account of the events was corroborated by another witness as it relates to one of the exchanges between Thimot and employee Edouard. However, as shown, that does not support reversing the judge's credibility determinations or compel a different conclusion. As noted above, we disagree that employee Leary's account corroborated Thimot's in critical respects. And, even if it did as to the issue of instigation, that testimony would not support a finding of a violation, as his testimony goes only to one aspect of one of the altercations at issue, and not to whether Thimot engaged in the abusive confrontations for which she was warned.

ORDER

The National Labor Relations Board orders that the Respondent, Jupiter Medical Center Pavilion, Jupiter, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating, maintaining, or enforcing any rule that prohibits employees from wearing union buttons or other insignia in nonpatient care areas of the Respondent's facility.

(b) Promulgating, maintaining, or enforcing any rule that prohibits employees from espousing union membership but does not prohibit espousing views against union membership.

(c) Enforcing any no-solicitation rule in a manner that restricts the expression of opinions about union representation or membership to a greater extent than it restricts the expression of opinions about any other subject.

(d) Promulgating, maintaining, or enforcing any rule that prohibits employees from discussing their wage rates or other terms and conditions of employment with other employees.

(e) Impliedly threatening employees with discharge because they support the Union.

(f) 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) Rescind the unlawful no-solicitation/no-distribution rule described in paragraphs 1(a) and (b) above and the unlawful wage discussion rule described in paragraph 1(d) above.

(b) Furnish all current employees with inserts for the current employee handbook that (1) advise that the unlawful rules have been rescinded, or (2) provide the language of lawful rules; or publish and distribute revised handbooks that (1) do not contain the unlawful rules, or (2) provide the language of lawful rules.

(c) Within 14 days after service by the Region, post at its facility in Jupiter, Florida, copies of the attached notice marked "Appendix B."[11] Copies of the notice, on forms provided by the Regional Director for Region 12, 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 September 5, 2002.

(d) 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.

MEMBER LIEBMAN, dissenting in part.

The majority errs in finding that the Respondent lawfully disciplined union supporter Paula Thimot for her role in two confrontations with coworkers. Because the judge made no factual findings or explicit credibility determinations concerning those episodes and did not analyze the evidence in light of relevant law, and because the record evidence arguably would support finding a violation, we should remand that issue.

I.

The majority finds that the Respondent lawfully disciplined CNA Paula Thimot on October 15 for her role in earlier confrontations with two other employees, even though the judge made no factual findings or explicit credibility determinations concerning those episodes. The majority bases its finding on credibility resolutions

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the Notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

that it thinks the judge would have made if he had analyzed the testimony. A remand is more appropriate.

Thimot was hired in February 2002 and became an outspoken union advocate. On September 26, at an employee meeting conducted by the Respondent as part of its campaign against the Union, Director of Nursing (DON) Linda Nelson impliedly threatened Thimot with discharge for her union support, in violation of Section 8(a)(1).

Beginning later that day, and over the next several days, Nelson lawfully disciplined Thimot for switching shifts with another CNA without notifying a supervisor, for serious deficiencies in patient care, and for tardiness. On October 15, Nelson issued a written warning to Thimot for her involvement in October 6 confrontations with two antiunion CNAs, Jean Edouard and Margareth Torres, about the Union. Thimot was the only employee who was disciplined for the incidents.

The judge confused the dates of the various disciplinary actions and failed to address Thimot's October 6 conduct, or the discipline resulting from it, at all. Thus, he did not summarize the evidence concerning the October 6 confrontations, or analyze or make findings about the October 15 discipline that ensued. He did find that Thimot was not a generally believable witness and declined to credit her testimony where it conflicted with that of other witnesses.

II.

The majority seizes on the judge's credibility determination to find, in effect, that whatever Thimot said, the judge would have found the opposite to be true. It, therefore, finds that the Respondent lawfully warned Thimot for verbally abusing the other two employees and threatening Torres. But the judge's credibility determination cannot bear the weight assigned to it by the majority. Even granting that Thimot may not have been a totally reliable witness, the record here should prevent the majority from assuming that, had the judge properly examined the evidence, he would still have found no violation.

The evidence here at least arguably supports finding a violation. Although the judge discredited Thimot's testimony where it conflicted with that of other witnesses, Thimot's account of her confrontation with Edouard is uncontradicted by any other testimony. Moreover, it is substantially corroborated by the evidence of LPN Patrick Leary, who indicated that Edouard was the instigator and that both employees were loud and angry.[1] Further, resolution of the issues presented here turns (or should turn) in part on the credibility of Nelson and other witnesses to the October 6 events. Depending on his credibility determinations, the judge might have found significance in the Respondent's having asked Torres—but not Thimot—to provide a description of their confrontation, or in the fact that of the three CNAs involved in the altercations, the only one disciplined was Thimot, the sole union supporter.

III.

The majority acknowledges "that there are conflicting versions" of the incidents for which Thimot was disciplined, but asserts that "[i]t is clear that the Respondent was motivated by [the] reports" received from Thimot's coworkers and that "the reported activity was unprotected." Thus, on the majority's view, "the discipline was lawful."[2] Given the unlawful threat directed against Thimot herself, the Respondent's unfair labor practices demonstrating antiunion animus, the Respondent's failure to seek Thimot's version of the incident with Torres, and the fact that only Thimot, the sole union supporter involved in the altercations, was disciplined, I cannot say that Respondent's motive was so "clear" that further fact-finding is unnecessary.

Accordingly, I would remand the case to the judge to fully consider the facts, evidence, and law with respect to Thimot's October 15 discipline.

MEMBER SCHAUMBER, dissenting in part.

Contrary to my colleagues, I would adopt the judge's finding that the Respondent did not threaten to discharge Paula Thimot at an employee meeting in late September, 2002. I agree with the judge that Director of Nursing Linda Nelson's comments were at best ambiguous, and, given the surrounding circumstances, not violative of the Act. I do not share my colleagues' view that the purpose of the meeting at which the remarks were made determines the meaning of the remarks. Rather, we must examine the immediate context surrounding the statements. Nelson's statement that "maybe this isn't the place for you" was not in direct response to Thimot's prounion statements, but rather, occurred after Nelson had inquired how long Thimot had worked for the Respondent, and compared her tenure to that of other, presumably happier, employees.

While it is true that the Board has found some similar statements to be violative, in those cases the statements directly referenced union activity and occurred in a context of other severe unfair labor practices, a situation not present here. See, e.g., *Equipment Trucking Co.,* 336 NLRB 277, 283 (2001).

[1] Edouard did not testify, so Thimot's testimony that Edouard used abusive language toward her in unrebutted.

[2] The General Counsel does not contend that Thimot's conduct was protected. Thus, the issue of the protected, concerted nature of her activity is not before the Board.

Not only did Nelson's remark not occur in a context of other severe unfair labor practices; the evidence indicates that the Respondent tolerated open and vigorous discussion and support of the Union among its employees. For example, Thimot herself was a vocal union advocate who was permitted to freely express her views, including in the very meeting at which Nelson's allegedly violative remarks occurred. Thimot never experienced retaliation from the Respondent for her prounion views. Other employees were also freely permitted to express their views on the Union, including prounion employee Mirtil.

Given the totality of the circumstances, I cannot find that Nelson's ambiguous statements could reasonably be interpreted as threats. I, therefore, dissent and would adopt the judge's findings on this matter.

APPENDIX B

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 NOTpromulgate, maintain, or enforce any rule that prohibits you from wearing union buttons or other insignia in nonpatient care areas of our facility.

WE WILL NOT promulgate, maintain, or enforce any rule that prohibits you from espousing union membership but does not prohibit espousing views against union membership.

WE WILL NOT enforce any no-solicitation rule in a manner that restricts your expression of opinions about union representation or membership to a greater extent than it restricts your expression of opinions about any other subject.

WE WILL NOT promulgate, maintain, or enforce any rule that prohibits you from discussing your wage rates or other terms and conditions of employment with other employees.

WE WILL NOT impliedly threaten you with discharge because you support the Union.

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

WE WILL rescind the unlawful no-solicitation/no-distribution rule and the unlawful rule prohibiting discussions of wage rates and other terms and conditions of employment contained in the employee handbook.

WE WILL supply all of you with inserts for the current employee handbook that (1) advise you that the unlawful no-solicitation/no-distribution rule and the unlawful rule prohibiting discussions of wage rates and other terms and conditions of employment have been rescinded or (2) provide the language of lawful rules; or WE WILL publish and distribute revised handbooks that (1) do not contain the unlawful rules or (2) provide the language of lawful rules.

JUPITER MEDICAL CENTER PAVILION

Shelley Plass, Esq. for the General Counsel.
Robert L. Norton, Esq. (Allen, Norton & Blue), of Coral Gables, Florida, for the Respondent.
Carnell Harrison, for the Charging Party.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. I heard this case on August 18 and 19, 2003, in Miami, Florida. On August 21, 2003, I heard oral argument, and also on August 21, 2003, I issued a bench decision pursuant to Section 102.35(a)(1) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach as "Appendix A," the portion of the transcript containing this decision.[1] The conclusions of law, remedy, Order, and notice provisions are set forth below.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I recommend that it be ordered to cease and desist engaging in such unfair labor practices and to take certain affirmative action designed to effectuate the policies of the Act, including posting the notice to employees attached as Appendix B.

Additionally, Respondent should be ordered to rescind the unlawful no-solicitation rule and the unlawful rule prohibiting

[1] The bench decision appears in uncorrected form at pp. 454 through 470 of the transcript [omitted from publication]. The final version, after correction of oral and transcriptional errors, is attached as app. A to this certification. Corrections include a clarification of my finding that Respondent's no-solicitation rule violated Sec. 8(a)(1) of the Act. Because the rule fails to distinguish between patient care areas and nonpatient care areas, and because its literal wording would bar advocating but not opposing unionization, I conclude that it is violative on its face. Additionally, I conclude that Respondent applied the rule in a discriminatory manner by allowing the wearing of buttons advocating some causes but not the wearing of buttons supporting the Union.

employees from discussing their wages and to delete these unlawful rules from its employee manual and any other announcements or summaries of its rules and policies which it provides to employees.

CONCLUSIONS OF LAW

1. Respondent, Jupiter Medical Center Pavilion, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Thr Charging Party, Service Employees International Union, 1199 Florida, AFL–CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining a no-solicitation rule that (a) prohibited employees from advocating representation by or membership in a labor organization but did not prohibit employees from expressing opposition to union representation or membership; and (b) effectively prohibited employees from wearing buttons and other insignia expressing their views concerning the Union in nonpatient care areas of the facility.

4. Respondent violated Section 8(a)(1) of the Act by applying the no-solicitation rule described in paragraph 3, above, in a disparate manner by allowing employees to wear buttons advocating some causes but not informing employees that they could wear buttons espousing union representation and membership.

5. Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining a rule which prohibited employees from discussing "their wages and rates with employees other than supervisor or Human Resources Department."

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

7. The Respondent did not engage in the unfair labor practices alleged in the consolidated complaint not specifically found herein.

[Recommended Order omitted from publication.]

APPENDIX A

This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations. I find that Respondent violated Section 8(a)(1) but not 8(a)(3) of the Act.

Procedural History

This case began on September 6, 2002, when the Charging Party, Service Employees International Union, 1199 Florida, AFL–CIO, CLC (which I will call the "Union") filed its initial unfair labor practice charge in Case 12–CA–22478. The Union later amended this charge.

On October 15, 2002, the Union filed an unfair labor practice charge in Case 12–CA–22560, and later amended this charge. On December 20, 2002, the Union filed an unfair labor practice charge in Case 12–CA–22705.

After an investigation, the Regional Director for Region 12 of the National Labor Relations Board issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing on January 31, 2003. The Regional Director issued an Order Further Consolidating Cases, Consolidated Complaint and Notice of Hearing on February 26, 2003. I will refer to this latter pleading simply as the "Complaint." In issuing the Complaint, the Regional Director acted on behalf of the General Counsel of the Board, whom I will refer to as the "General Counsel" or as the "government."

Respondent filed a timely Answer to the Complaint.

On August 18, 2003, a hearing in this matter opened before me in Miami, Florida. The parties presented evidence on August 18 and 19, 2003. On August 21, 2003, counsel presented oral argument. Also on August 21, 2003, after a recess to consider the evidence and the parties' arguments, I am issuing this bench decision.

Admitted Allegations

Based on the admissions in Respondent's Answer and its stipulations during the hearing, I find that the government has proven the allegations raised by Complaint paragraphs 1(a) through 1(e), 2(a) through 2(c), 3, and 4. More specifically, I find that the government has established the filing and service of the unfair labor practice charges, as alleged.

Further, I find that Respondent is a Florida corporation operating a nursing home in Jupiter, Florida and that at all times material to this case, it has been an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act. Therefore, it is appropriate for the Board to assert jurisdiction. I also find that at all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

Additionally, I find that at all material times, Administrator Jay Mikosch and Director of Nursing Linda Nelson have been Respondent's supervisors and agents within the meaning of Sections 2(11) and 2(13) of the Act, respectively.

Complaint paragraph 7(a) alleges that on or about October 4, 2002, Respondent issued verbal and written discipline to Jermaine Paula Thimot. Respondent's Answer admits that it issued a written reprimand to Thimot on that date. I so find.

Additionally, Respondent's Answer admits the allegations raised in Complaint paragraph 7(b). Based on that admission, I find that on or about October 15, 2002, Respondent issued written discipline to Jermaine Paula Thimot.

Respondent has denied other allegations raised by the Complaint. I now turn to those controverted issues.

Disputed Allegations

On October 4, 2002, the Board conducted a representation election at Respondent's facility in Jupiter, Florida. The Union lost that election. The representation case has not been consolidated into this proceeding and therefore is not before me. However, facts about the Union's organizing campaign are relevant to the unfair labor practice allegations raised by the Complaint.

Complaint Paragraph 5(a)

Complaint paragraph 5(a) alleges that on or about September 5, 2002, Director of Nursing Linda Nelson directed employees to remove their Union buttons. Complaint paragraph 8 alleges that Respondent thereby violated Section 8(a)(1) of the Act.

Dieuseul Mirtil works for Respondent as a certified nursing assistant, or "CNA." He supported the Union in its organizing campaign and served as its observer during the election.

While at work on September 5, 2002, Mirtil wore a Union button on his uniform. The square button, about 2-1/4 inches on a side, stated:

LOCAL 1199 Florida
SEIU Stronger

Mirtil was in a patient's room providing care when Director of Nursing Nelson called him outside and told him to remove the button. According to Mirtil, he asked Nelson why, and Nelson said because he was "advertising for another company." According to Mirtil, he replied that the button had nothing to do with advertising, and Nelson answered that it might upset the patient.

Director of Nursing Nelson admitted telling Mirtil to remove the Union button on this occasion. However, she testified that she gave Mirtil two reasons for this instruction. She characterized her primary concern as patient safety, explaining that one of the square button's corners could cut the thin, fragile skin of an elderly patient.

Although Mirtil's testimony does not directly and unequivocally corroborate Nelson on this point, it also does not explicitly contradict her. Based on my observations of the witnesses, I conclude that Nelson's testimony is reliable and that she did raise the patient safety issue with Mirtil on this occasion.

Nelson also testified that she gave Mirtil a second reason for her instruction to remove the button. She told Mirtil that the button was "advertising" because it had the name of something other than the company on it. I conclude that Nelson was alluding to the no-solicitation/no-distribution rule which Respondent published in its employee handbook. That rule states, in part, as follows:

> Solicitation is defined as any act of urging or persuading of individuals, by peaceful or other means, to accept a product or service for sale, a doctrine to follow, or an organization to join. An act of urging or persuading can be precipitated through oral or written communication, or by the wearing of any article which bears the name, insignia or other identifying symbol of a product, service or organization.
>
> No solicitation of, or by, employees is permitted on Jupiter Medical Center premises during working time. No unauthorized distribution of literature or other printed matter is permitted in work areas on Medical Center premises. Any solicitation and/or distribution of literature which may, in any way, interfere with safety, patient care or effective operations is prohibited.

Mirtil testified that he has seen other employees wear buttons on their uniforms. These buttons display messages such as "God Bless America" and "I Love Jesus." According to Mirtil, these buttons typically were smaller than the Union button which Nelson asked him to remove, and employees wore these smaller buttons on their identification badges.

Based on my observations of the witnesses, I credit Mirtil's testimony on this point, which is essentially uncontradicted. Accordingly, I find that Respondent at least acquiesced in the wearing of buttons with messages such as "God Bless America" and "I Love Jesus."

Additionally, the record establishes that Respondent allowed an employee to wear a larger button referring to a hospital, Jupiter Medical Center, which is near the Respondent's nursing home. The button stated:

Jupiter Medical Center
#1
Preferred Hospital

The record suggests that Jupiter Medical Center and Respondent's facility—Jupiter Medical Center *Pavilion*—may share common ownership. Even if true, that fact would not affect my analysis of the issue raised by Complaint paragraph 5(a).

In general, a health care facility may prohibit solicitations in patient care areas, including corridors and treatment rooms. See *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773 (1979). For this reason, and because Mirtil had been in a patient's room and providing care when Director of Nursing Nelson called him aside and told him to remove the Union button, I conclude that Nelson's action was lawful.

Additionally, although I am not totally convinced by Respondent's argument concerning the possibility that the button could cut a patient's skin while the CNA was moving the patient, this argument is not totally implausible. Indeed, in issues involving patient safety, it is better to err on the side of caution. Therefore, I conclude that Respondent had the right to prohibit Mirtil from wearing the button and recommend that the Board not find that Respondent violated the Act as alleged in Complaint paragraph 5(a).

This finding, however, does not mean that the more general rule, appearing in the employee handbook, is lawful. This rule prohibits solicitations on Respondent's premises on working time without distinguishing between patient care and nonpatient care areas. The lawfulness, or unlawfulness of this rule will be discussed further later in this decision.

Complaint Paragraph 5(b)

Complaint paragraph 5(b) alleges that in or around late September/early October 2002, on a date not more specifically known, Respondent's Director of Nursing Nelson impliedly threatened employees with discharge because they assisted and supported the Union. Complaint paragraph 8 alleges that Respondent thereby violated Section 8(a)(1) of the Act.

During the union organizing campaign, Respondent conducted a number of meetings of employees during which it presented its arguments against the union. At one of those meetings, employee Jermaine Paula Thimot, also known as Paula Thimot, told management, in the presence of other employees, that management treated the employees "like shit."

According to Thimot, Director of Nursing Nelson observed "Paula, you seem to be unhappy here." To that, Thimot replied "You'd be unhappy, too if you had to work under these conditions."

Thimot testified that Nelson then stated "maybe this isn't the place for you" and observed that there were a lot of jobs "out there." Although Nelson's account differs in some respects, it generally corroborates Thimot. I find that she did suggest that if Thimot were unhappy, perhaps she should find other employment.

In some instances, circumstances will provide a context in which an ambiguous statement carries a threatening message. A comment that an employee perhaps should find another job can constitute a threat if, under the circumstances, employees would reasonably interpret it as a warning of discharge.

In the present case, however, no evidence establishes that Respondent made any other more explicit statement which would make an employee fearful of being discharged. Therefore, I do not interpret Nelson's ambiguous comment as a threat to discharge Thimot. Therefore, I recommend that the Board dismiss the allegations in Complaint paragraph 5(b).

Complaint Paragraph 5(c)

Complaint paragraph 5(c) alleges that on or about October 4, 2002, Director of Nursing Nelson threatened employees with discharge because they assisted and supported the Union. Complaint paragraph 8 alleges that Respondent thereby violated Section 8(a)(1) of the Act.

On October 4, 2002, the day of the election, Director of Nursing Nelson sent word that she wanted to speak with Paula Thimot at the end of Thimot's shift. During this meeting, Nelson discussed two topics with Thimot.

Thimot had switched shifts with another employee without notifying Respondent in accordance with its established procedure. Additionally, Thimot had signed a sheet stating she would work an extra shift, but then failed to do so. Stated another way, Thimot had volunteered to work two 8–hour shifts "back to back," but at the end of the first shift, she just left, leaving the facility shorthanded. The record leaves little doubt that Thimot actually had committed these infractions of Respondent's rules.

Based on my observations while Thimot was testifying, I do not conclude that she is a reliable witness. For example, while testifying about an encounter she had with another employee, Thimot depicted herself as calm and not raising her voice. However, even during her testimony, when she described this particular incident her voice became louder and more strident. In other respects, her demeanor as a witness did not inspire my confidence in her testimony and, to the extent it conflicts with that of other witnesses, I do not credit it.

Instead, based on the testimony of Nelson, whom I credit, I find that Respondent did not engage in the conduct alleged in Complaint paragraph 5(c). Therefore, I recommend that the Board dismiss these allegations.

Complaint Paragraph 6(a)

Complaint Paragraph 6(a) alleges that at all material times, Respondent has maintained a rule which prohibits employees from wearing union buttons or other union insignia. Complaint paragraph 8 alleges that Respondent thereby violated Section 8(a)(1) of the Act.

In discussing the allegations in Complaint paragraph 5(a), I quoted relevant portions of this rule, which appears in Respondent's employee handbook. Clearly, the rule included within its definition of "solicitation" the wearing of a union button. Thus, the rule defines "solicitation" to include "any act of urging or persuading individuals" and states that such an act "can be precipitated" by wearing any "article which bears the name, insignia or other identifying symbol of a product, service or organization." A Union button certainly falls within that definition.

Employees wear other buttons on their uniforms without being required to remove them. Arguably, a button saying "God bless America" or "I love Jesus" does not identify a "product, service or organization." However, such messages do fall within the rule's general definition of solicitation, because they certainly urge the acceptance of "a doctrine to follow, or an organization to join."

By condoning these messages, Respondent has applied its no–solicitation rule in a way which allows employees to communicate their views on matters which do not fall within the protection of the Act but which discourages employees from communicating their views on matters which do come within the Act's protection. Moreover, this disproportionate impact on Section 7 rights is not limited to the wearing of buttons. The rule explicitly defines solicitation to include *any* act of urging or persuading individuals.

In this regard, the no-solicitation rule does not exist in isolation but as one of a number of workplace rules. Reasonably, an employee would understand the gravamen of the no-solicitation rule by considering it in the context of Respondent's other rules.

As will be discussed later in this decision, Respondent also has promulgated a rule prohibiting employees from discussing their wage rates with each other. Taken together, the rule prohibiting employee discussion of wages and the selective application of the no–solicitation rule reasonably would have a broad chilling effect on the exercise of Section 7 rights.

In sum, I conclude that Respondent's no–solicitation rule, as applied, violates Section 8(a)(1) of the Act. Additionally, in two other ways, the same rule violates Section 8(a)(1) on its face.

Although the rule limits the prohibition to "working time," it does not distinguish between patient care areas and nonpatient care areas. By its terms, it prohibits solicitation on "Jupiter Medical Center premises" and thus applies to all of the facility, including nonpatient care areas. As written, the rule forbids solicitation in employee locker and rest rooms, staff lounges, break rooms and other areas where only employees, and not patients, would be present. Thus, the rule is overly, and unlawfully broad.

Moreover, the rule defines solicitation to be persuasion to "*accept* a . . . doctrine to follow, or an organization to join." (Emphasis added.) Thus, by its literal terms, the rule prohibits both advocating the principle of collective-bargaining and persuading someone to join a labor organization, but it does not prohibit expressions of opposition to collective-bargaining and union membership.

In sum, both on its face and as applied, Respondent's no-solicitation rule interferes with, restrains and coerces employees in the exercise of their Section 7 rights. For all these reasons, I recommend that the Board find that this rule violates Section 8(a)(1) of the Act.

Complaint Paragraph 6(b)

Complaint paragraph 6(b) alleges that at all material times, Respondent has maintained a rule which prohibits employees from discussing their wages and rates with one another. Complaint paragraph 8 alleges that Respondent thereby violated Section 8(a)(1) of the Act.

It is uncontroverted that Respondent has established a rule prohibiting the "discussion of employee wages and rates with employees other than supervisor or Human Resources Department." Respondent argues that the rule has not been enforced and therefore constitutes a de minimis violation.

In *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992), the Board, citing *Heck's, Inc.*, 293 NLRB 1111, 1119 (1989), and *Waco, Inc.*, 273 NLRB 746 (1984), stated:

> Thus, *Heck's* and *Waco* make clear that the finding of a violation is not premised on mandatory phrasing, subjective impact, or even evidence of enforcement, but rather on the reasonable tendency of such a prohibition to coerce employees in the exercise of fundamental rights protected by the Act. [307 NLRB at 94.]

Therefore, the nonenforcement of the rule does not make it any more lawful. Further, the record does not establish that Respondent has rescinded the rule. Therefore, I reject the argument that this rule is a de minimis violation and recommend that the Board find that it violates Section 8(a)(1) of the Act.

Complaint Paragraph 7(a)

Complaint paragraph 7(a) alleges that on or about October 4, 2002, Respondent issued verbal and written discipline to employee Jermaine Paula Thimot. Complaint paragraph 9 alleges that Respondent thereby violated Sections 8(a)(1) and 8(a)(3) of the Act.

Respondent admits giving Thimot a warning on October 4, 2002. In analyzing the lawfulness of this action, I will apply the Board's test articulated in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must establish four elements by a preponderance of the evidence. First, the government must show the existence of activity protected by the Act. Second, the government must prove that Respondent was aware that the employees had engaged in such activity. Third, the General Counsel must show that the alleged discriminatees suffered an adverse employment action. Fourth, the government must establish a link, or nexus, between the employees' protected activity and the adverse employment action.

In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the respondent bears the burden of showing that the same action would have taken place even in the absence of the protected conduct. *Wright Line*, 251 NLRB 1083 at 1089. See also *Manno Electric, Inc.*, 321 NLRB 278, 280 at fn. 12 (1996).

The record clearly establishes that Thimot engaged in Union activities and that Respondent knew about her Union sympathies. She was quite outspoken on this subject at employee meetings. The record also establishes that she suffered an adverse employment action. The timing of this action, on the day of the election, as well as Respondent's violative rules, establish a link between the protected activities and the adverse employment action. Therefore, I conclude that the General Counsel has satisfied all for *Wright Line* elements.

However, I further conclude that Respondent has established that it would have imposed the same discipline in any case. Thimot's failure to follow company policies concerning her presence at work clearly had an impact on operation of the nursing home and on the wellbeing of the elderly residents. I find that these failings are so serious, and the penalty imposed—just a written warning—so relatively minor that it would have resulted even in the absence of protected activities. Therefore, I recommend that the Board dismiss the allegations in Complaint paragraph 7(a).

Complaint Paragraph 7(b)

Complaint paragraph 7(b) alleges that on or about October 15, 2002, Respondent issued written discipline to employee Jermaine Paula Thimot. Complaint paragraph 9 alleges that Respondent thereby violated Sections 8(a)(1) and 8(a)(3) of the Act.

The evidence establishes that Director of Nursing Nelson issued Thimot a written warning on October 15, 2002 for a number of serious failings in patient care. Most notably, she left incontinent patients soaked with urine without changing them.

I reject as implausible the argument that because the patients were on diuretic medicine, there was no way to keep all of them dry to the end of the shift. That might be true with respect to one patients, but when a number of patients are all wet, it becomes clear that the CNA has not been doing her duty.

Performing a *Wright Line* analysis similar to that for Paragraph 7(a), I conclude that the General Counsel has proven all four *Wright Line* elements. However, I further conclude that Respondent would have given a warning to any CNA who let patients lie in their own urine.

Considering that Respondent has a "five star" rating—the highest—by the authority which accredits nursing homes, and considering that Thimot's immediate supervisor, Tanya Conley, was a diligent nurse who imposed high standards on her staff, I have no doubt that Thimot would have received a written warning in any event. Therefore, I recommend that the Board dismiss the allegations in Complaint paragraph 7(b).

Conclusion

When the transcript of this proceeding has been prepared, I will issue a Certification which attaches as an appendix the portion of the transcript reporting this bench decision. This Certification also will include provisions relating to the Findings of Fact, Conclusions of Law, Remedy, Order and Notice. When that Certification is served upon the parties, the time period for filing an appeal will begin to run.

The hearing is closed.