Mediplex of Danbury *and* Dolores J. Casey. Case 34–CA–6002

July 21, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND DEVANEY

On November 22, 1993, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief, to which the General Counsel filed an answering brief; the Respondent subsequently filed a reply brief to the General Counsel's answering brief. In addition, the General Counsel filed cross-exceptions and a supporting brief, to which the Respondent filed an answering brief.

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

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

This proceeding involves employees' protected union organizing activity at an incipient stage in late 1992 and early 1993,[2] and the Respondent's reaction to it. The amended complaint alleges that the Respondent, which operates a skilled-care nursing home in Danbury, Connecticut, discharged employee Dolores Casey, a principal in the organizing activity, in violation of Section 8(a)(3) and (1), and engaged in multiple instances of conduct which violated Section 8(a)(1). The judge found that the Respondent unlawfully discharged Casey on January 14 because of her protected union activity. He also found that the Respondent violated Section 8(a)(1) by coercively interrogating a group of its employees on or about January 25, but recommended dismissal of all the other 8(a)(1) allegations.[3] Although we agree with the judge's findings of unfair labor practices,[4] we also conclude that the Respondent violated Section 8(a)(1) in three other instances, as specified and explained below.

1. On January 25 and 26, Ann Rogers, the Respondent's administrator, held a series of five employee meetings to address the organizing activity then occurring at the facility. The judge concluded that at least one of these meetings, Rogers initiated her discussion by inquiring whether any employees in the group had been approached by the Union. As more fully detailed in his decision, the judge, accounting for all the relevant circumstances, including the unlawful discharge of employee Casey about 10 days earlier, concluded that this was an unlawful interrogation. He recommended dismissal of other 8(a)(1) allegations arising from these meetings, including alleged threats to discharge employees should they engage in a strike and to close the facility if they chose union representation. Regarding these two allegations in particular, he found that the evidence was insufficient to conclude that Rogers unlawfully threatened employees either explicitly or implicitly. We find merit in the General Counsel's cross-exceptions to the judge's recommended dismissal of these two allegations.

It appears that the judge based his dismissal on a review of several employees' testimony regarding what was said at a number of the five meetings held by the Respondent. We find it necessary to consider Rogers' remarks at only one of these meetings, based on the credited testimony of employees Barrett and Torpey, who both attended the same meeting on January 25. According to the credited testimony, after her unlawful inquiry concerning contacts with the Union, Rogers spoke of several matters, including the signing of union authorization cards and payment of union dues. She also discussed a situation which she said had occurred previously at a nursing home in nearby Westport. As Rogers told it, after the employees voted in a union at the Westport facility, they went on strike. As a result, Rogers told the group, the nursing home closed and the patients were moved, the striking employees were terminated, and the facility subsequently reopened operating with permanent-replacement employees.[5]

Rogers' remarks about the Westport nursing home raise legal questions involving the interplay of two essential principles of the Act: an employer's free-speech right, set forth in Section 8(c), and the Section 7 right of employees to self-organize, protected by Section 8(a)(1). The Supreme Court established the general standard for evaluating the lawfulness of employer

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

[2] All dates hereafter are in 1993.

[3] No exceptions were taken to the dismissal of the loss-of-direct-access-to-management allegation, and the allegation that the Respondent suggested to employees the futility of selecting the Union.

[4] Regarding the unlawful discharge of Casey, we do not rely on fn. 2 of the judge's decision concerning Casey's asserted failure to apply ''Silvadine lotion'' to a patient. Rather, on our review of the record, we conclude that, contrary to the representations in its exceptions, the Respondent did not establish that Casey failed to perform the Silvadine treatment, or that she falsified any records in this respect, or that the Respondent asserted and relied on any such ''falsification'' at the time it discharged her.

[5] It is apparent that the Respondent purchased the Westport facility at some point after the strike.

statements addressing employees' Section 7 activity in *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969). In essence, *Gissel* indicates that the analytical question is whether the employer's statement constitutes an unlawful threat of retaliation in response to protected activity, or a lawful, fact-based prediction of economic consequences beyond the employer's control. See 395 U.S. at 617–619. With particular regard to statements concerning the employer's privilege to hire permanent replacements for economic strikers, the Board's view is that truthful, albeit legally incomplete, explanations of the privilege are protected by Section 8(c), ''[u]nless the statement may be fairly understood as a threat of reprisal against employees or is explicitly coupled with such threats . . . .'' *Eagle Comtronics, Inc*., 263 NLRB 515, 515–516 (1982). More generally, a significant component in the analysis of an employer's remarks to employees which involve protected activity is ''the context of its labor relations setting,'' *Gissel*, supra, 395 U.S. at 617. In other words, the Board considers the totality of the relevant circumstances, id. at 589; *NLRB v. Virginia Electric & Power Co*., 314 U.S. 469, 477–479 (1941); see also, e.g., *Harrison Steel Castings Co*., 293 NLRB 1158, 1159 fn. 4 (1989) (a background of other unlawful conduct or union animus represents significant context for evaluating the lawfulness of an employer's statements).

Initially, we note that Rogers held the January 25 meeting about 10 days after the Respondent unlawfully discharged Casey, a leader in the union activity at the facility. In addition, Rogers began the meeting by engaging in an unlawful interrogation of the entire group of employees. In our view, these factors set a coercive tone for the Westport statements that followed at the meeting. Further, it is indisputable on this record that the point of Rogers' rendition of the Westport situation was analogical, i.e., what happened at the nearby Westport nursing home could also happen at a similar facility like Danbury if the employees chose union representation.

Considering the relevant circumstances, Rogers' description of the striking Westport employees as having been ''terminated,'' i.e., discharged, in addition to being permanently replaced on the facility's reopening, is not merely an inaccurate statement of the law; it is a clear contradiction of the *Laidlaw*[6] reinstatement rights afforded to economic strikers. This remark ''may be fairly understood as a threat of reprisal'' against the Respondent's employees should they choose union representation and engage in a strike. *Eagle Comtronics*, supra at 515–516. Accordingly, we agree with the complaint allegation that the Respondent violated Section 8(a)(1) at the January 25 meeting by threatening implicitly to discharge employees if they should go on strike. See, e.g., *Baddour, Inc*., 303 NLRB 275 (1991).[7]

With respect to Rogers' reference to the closure of the Westport nursing home because of the strike, that remark was joined specifically with the unlawful threat to discharge strikers found above. Further, it was unaccompanied by any objective factual information which, under *Gissel*, might have identified it as a lawful prediction of economic consequences devoid of retaliatory content. In light of the contemporaneous unfair labor practices, we find that Rogers' remark concerning the closure of the Westport facility was reasonably interpretable by the employees at the meeting as an implicit threat to close the Danbury nursing home if the employees chose the Union and subsequently engaged in a strike. Accordingly, it violated Section 8(a)(1). See, e.g., *Texas Super Foods*, 303 NLRB 209, 218–219 (1991); *Matheson Fast Freight*, 297 NLRB 63, 66–67 (1989); *Mack's Supermarkets*, 288 NLRB 1082 fn. 3, 1091–1092 (1988).

2. The judge also dismissed a complaint allegation that the Respondent, through Supervisor Susan McElroy, violated Section 8(a)(1) on January 27 by informing employee Carole Richter that Casey had been discharged because of her union activities. As a matter of background for this allegation, on January 11 Casey had solicited McElroy for her support in the organizing activity; McElroy immediately reported the matter to higher management; and Casey was unlawfully discharged 3 days later. In the January 27 incident, which is more fully detailed below, McElroy told Richter that she had reported Casey's union solicitation. The judge concluded that in the absence of McElroy's telling Richter that Casey was in fact fired because of her union activity, her discussion with Richter did not violate the Act. We disagree.

[6] *Laidlaw Corp*., 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1969).

[7] While Chairman Gould questions the validity of the holding in *Eagle Comtronics* that does not oblige an employer to disclose *Laidlaw* reinstatement rights in employer speeches regarding permanent replacements, it is clear that even under *Eagle Comtronics*, the Respondent's statements here violated Sec. 8(a)(1).

In agreeing with his colleagues that the Respondent's reference to termination of striking employees violated Sec. 8(a)(1), Member Devaney finds the Respondent's statements in this regard to be distinguishable from the discussion of *Laidlaw* reinstatement rights in *Baddour*, supra, which he would have found to be lawful. Thus, Member Devaney notes that the employer in *Baddour*, unlike here, advised employees that ''you could wind up losing your job by being permanently replaced with a new permanent workforce,'' during the course of remarks which were otherwise free of unfair labor practices. In this case, the Respondent also interrogated employees about their union activities and threatened plant closure during its January 25 captive audience speech and, in discussing what would happen in the event of a strike, spoke of ''terminating'' strikers. Under these circumstances, and considering the Respondent's having unlawfully terminated a leading union supporter only 10 days earlier, Member Devaney agrees with his colleagues that the Respondent unlawfully implicitly threatened to discharge employees if they should go on strike.

According to the credited testimony, Richter, whose schedule differed from Casey's, first learned of the discharge on January 27. During a discussion with other employees at the nurses desk in Richter's work area, someone mentioned that Casey had been fired. Richter asked why, and an employee said that she'd heard that Casey had neglected a patient. Immediately thereafter, Richter and Supervisor McElroy, who had witnessed this discussion, began to walk the short distance between the nurses desk and the medication room. As the two approached the medication room, McElroy told Richter that Casey earlier had asked her if she would be interested in meeting with a union representative. McElroy added, ''You know, I had to take that to the office.'' The record contains no additional details which would provide context for McElroy's remarks independent of the just-completed exchange between Richter and other employees regarding Casey's termination.

The basic test for a violation of Section 8(a)(1) is whether under all the circumstances the employer's conduct reasonably tended to restrain, coerce, or interfere with employees' rights guaranteed by the Act. See, e.g., *Sunnyside Home Care Project*, 308 NLRB 346 fn. 1 (1992), citing *American Freightways Co*., 124 NLRB 146, 147 (1959). In the discussion at the nurses desk, Richter asked why Casey had been fired, and was told by another employee that word was going around that she had neglected a patient, and that this was the reason for the discharge. Immediately following that discussion, Supervisor McElroy told Richter, as they walked to the medication room, that she had reported Casey to higher management because of her union activity. Given the immediate proximity of McElroy's statement to the conversation at the nurses desk and the absence of any intervening topic, it is reasonable to view her remark as an extension of that discussion and, more specifically, as a second response to Richter's question: why was Casey fired? Thus, although McElroy did not explicitly state that Casey was discharged because of her union activity, the reasonable inference in the circumstances is that this is exactly what McElroy was communicating to Richter. See, e.g., *NKC of America*, 291 NLRB 683, 688 (1988). Accordingly, we conclude that McElroy's remark constituted unlawful interference under Section 8(a)(1) because of its likely chilling effect on Richter's exercise of her Section 7 rights.[8]

ORDER

The National Labor Relations Board adopts the recommended order of the administrative law judge as modified below and orders that the Respondent, Mediplex of Danbury, Danbury, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following paragraphs after paragraph 1(a) and reletter the subsequent paragraphs accordingly.

''(b) Threatening to discharge employees in reprisal if they should engage in a strike.

''(c) Threatening to close its facility in reprisal if employees should engage in a strike.

''(d) Informing employees that other employees were discharged because of their union activities.''

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

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

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

WE WILL NOT interrogate our employees about their activities on behalf of, or their support for, New England Health Care Employees Union, District 1199, SEIU, AFL–CIO or any other labor organization.

WE WILL NOT threaten to discharge our employees in reprisal if they should engage in a strike.

WE WILL NOT threaten to close our facility in reprisal if our employees should engage in a strike.

WE WILL NOT inform our employees that other employees were discharged because of their union activities.

WE WILL NOT discharge or otherwise discriminate against our employees because of their support for, or activities on behalf of, 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 offer Dolores Casey immediate and 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 and WE WILL make her whole

[8] We note in passing that McElroy's communication to Richter also constitutes additional evidence of unlawful motive with respect to the 8(a)(3) discharge of Dolores Casey.

for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL notify Casey that we have removed from our files any reference to her discharge and that the discharge will not be used against her in any way.

MEDIPLEX OF DANBURY

Michael Marcionese, Esq. and *Ursala Haerter, Esq.*, for the General Counsel.

Lewis H. Silverman, Esq. and *Susan Corcoran, Esq. (Jackson, Lewis, Schnitzler & Krupman)*, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on August 4 and 5, 1993,[1] in Hartford, Connecticut. The amended complaint here issued on April 7 and was based on a charge and first and second amended charges filed on February 1 and March 19 and 30 by Dolores Casey. The complaint alleges that since about September 1, 1992, Mediplex of Danbury (Respondent) has maintained a section in its employee handbook entitled ''What About Unions'' and that this has threatened employees with loss of direct access to management representatives and diminished terms and conditions of employment and unspecified reprisals if the employees selected a union as their bargaining representative in violation of Section 8(a)(1) of the Act. It is further alleged that Respondent, by Ann Rogers, its administrator, and Dee Skidmore, its assistant director of nursing, on about January 20, at its facility, violated Section 8(a)(1) of the Act by interrogating its employees about their union activities, informing its employees that it would be futile for them to select a union as their bargaining agent, threatening employees with loss of direct access to management if they selected a union as their bargaining representative, threatening employees with discharge if they engaged in a strike, and threatening employees that it would close its facility if the employees selected a union as their bargaining representative. It is further alleged that Respondent, by Susan McElroy, a supervisor, violated Section 8(a)(1) of the Act by informing employees that other employees were discharged because of their union activities. Finally, the complaint alleges that Respondent discharged Casey on about January 14 because of her support for, and activities on behalf of, the New England Health Care Employees Union, District 1199, SEIU, AFL–CIO (the Union), thereby violating Section 8(a)(1) and (3) of the Act.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with its office and place of business located in Danbury, Connecticut (the facility), is engaged in the operation of a nursing home providing skilled nursing care. During the 12-month period ending February 28, Respondent derived gross revenue in excess of $100,000. During the same period, Respondent purchased and received at the facility goods valued in excess of $5000 directly from points located outside the State of Connecticut. Respondent admits, and I find, that it has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and is a health care institution within the meaning of Section 2(14) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

Initially it is alleged that Respondent's employee handbook violates Section 8(a)(1) of the Act. More specifically, it is alleged that the section of the handbook entitled, ''What About Unions,'' beginning at page 31, threatened employees with unspecified reprisals, diminished terms and conditions of employment, and loss of direct access to management representatives if they selected a union as their bargaining representative. The General Counsel alleges that the section entitled, ''What About Unions,'' violates the Act. It states:

> We strive to create an environment where each employee is treated as an individual and as an important participant in the operation of our facility.
>
> We value open, direct communication where we can talk to you and you can talk to us. We hope to keep it this way.
>
> For this reason, in today's uncertain world where there are many pressures and anxieties, we want to keep this facility free from any artificially created interruptions which may arise when a union is on the scene. Most health care employees have chosen not to join a union. We think this is a commendable choice.
>
> Mediplex LTC strongly believes that individual consideration in the employee/supervisor relationship provides the best climate for your maximum development, teamwork and the attainment of your goals and those of the facility. We do not believe that union representation of our employees would be in the best interest of either the employee, resident or the facility. We believe that a union would only serve to divide, not unite, its employees and would harm the close working relationship so necessary in achieving the important objective of quality resident care. We sincerely believe that any outside third party would seriously impair the relationship between the facility and the employees and could retard the growth of our facility and the progress of our employees.
>
> We have enthusiastically accepted our responsibility to provide you with good working conditions, good wages, good benefits, fair treatment and the personal respect and dignity which is rightfully yours. All this is part of your job with Mediplex and need not be ''purchased'' at significant personal cost to you from an outside third party.
>
> We know that you want to express your problems, suggestions and comments to us so that we can understand each other better. You have that opportunity at Mediplex. This can be done without having a union cut

[1] Unless indicated otherwise, all dates referred to here relate to the year 1993.

> off the direct communication between you and your supervisor and administration. Here you can speak for yourself—directly to us. We will listen and we will do our best to give you a responsible reply.

This handbook was distributed to employees beginning in about June 1992.

In about Thanksgiving 1992, Casey discussed with several employees the idea of getting a union to represent them. Sometime between Thanksgiving and Christmas 1992, she called the Union and was directed to David Pickus, vice president of the Union. She asked him what the employees had to do to get the Union to represent them. He said that she should speak to her fellow employees to be sure that enough were interested and to get him a list of all employees. She spoke to many of her fellow employees and determined that there was sufficient support. She spoke to Pickus around Christmas time and a meeting was originally scheduled for January 13; about the day before, one of the other primary union supporters withdrew her support and this meeting was canceled. The meeting was rescheduled and took place on about January 19, after she was fired. Ann Rogers, Respondent's administrator, testified that she became aware of union activity at the facility in about late November or early December 1992. At that time, an employee and a supervisor informed her that they had heard that aides at the facility were discussing unions. Respondent learned definitely about Casey's union interest on Monday, January 11. On that day, about 7 a.m., Casey was discussing the residents with Susan McElroy, the supervisor on the 11 p.m. to 7 a.m. shift. Casey testified that McElroy was complaining about the prior evening or the prior two evenings. Casey said to her: ''You know, I'm trying to organize the Union and bring the Union in. Would you be interested?'' McElroy answered: ''I could never do that; besides, I'm a supervisor.'' Casey testified that, at that point, I ''choked on my words, knew I put my foot in my mouth.'' McElroy testified that, on the morning in question, Casey asked her what she would think of a union coming to the facility. She answered that it was not a good idea. That she had previously been a union member and they did not help her when she needed it. In addition, as a supervisor, she was not eligible to be in the Union. McElroy immediately went to the nursing office and told Elaine Brennan, the day supervisor at the facility, of what Casey had said to her. She also left a note for Pam Engingro, the director of nursing, telling her what Casey said. Engingro called her about 2 hours later and McElroy told her what Casey said to her and what she told Casey. Sometime later that morning, Engingro told Rogers about Casey's comments to McElroy.

Rogers conducted meetings with groups of employees on January 25 and 26. The sign-in sheet for these meetings indicates that there were four meetings on January 25 and one meeting on January 26. The number of employees attending ranged from a low of 5 to a high of 16. It is alleged that at these meetings Rogers interrogated employees about their union activities, informed its employees that it would be futile for them to select a union as their collective-bargaining representative, threatened employees with the loss of direct access to management representatives if they selected the Union as their bargaining representative, threatened employees with discharge if they engaged in a strike, and threatened the employees that it would close the facility if they selected the Union as their bargaining representative. Rogers testified that the meetings had a dual purpose: to introduce Dee Skidmore as the new director of nursing and to tell the employees that she had heard rumors at the facility about a union ''and to give them some facts on unions.'' She testified that she did not ask the employees if they were for or against the Union and did not ask them if they were involved with the Union. Skidmore told the employees about how union stewards work. She said that unions often appoint stewards or representatives and ''their preference is that you go to that person rather than go directly to management.'' At these meetings she told the employees that during a strike an employer can bring in permanent replacements to cover the strikers' positions. In this regard she told them of a situation at a different nursing home in Connecticut, since purchased by Respondent. Under the former management, the employees struck, the residents were transferred elsewhere, and the facility was temporarily closed. In answer to questions specific to the allegations of the complaint, Rogers denied saying everything that is alleged in the complaint.

A number of the employees also testified about these meetings. The testimony of the employees, and Rogers, is that she had notes in her hand and that she referred to these notes in speaking, but did not read from the notes. Eileen Barrett, who has been employed by Respondent as a certified nurses aide (CNA) for about 8 years, testified that Rogers began the meeting by saying that she heard that union representatives were soliciting employees and she asked if anybody had been approached by a union representative. She said: ''But, you really don't have to answer that question.'' All those present answered no, but said that they had heard of other employees who had been approached. She said that having a union representing the employees ''would lead to a very cold working environment because if we had a problem we couldn't go talk to her. We wouldn't be allowed to, we would have to talk to a Union representative that would talk to her.'' The difference, she said, was that now the employees are free to talk to anybody in administration. She also said that if a majority of the employees signed cards for the Union, union dues could be deducted directly from their paycheck and ''the rest of us would have no choice but to join the Union whether we wanted to or not.'' She said that if the employees joined the Union and the Union called a strike, the employees would have to strike and put their patients in jeopardy. If they didn't strike, the Union could fine them. She told them of the situation that had occurred at the nursing home that has since become Mediplex of Westport (and owned by Respondent). The union called a strike under the prior management and the nurses aides went on strike. They were replaced by new workers and terminated and the home closed and later opened under Respondent's ownership. Willia Brown, who has been employed by Respondent as a CNA for 3 years, testified that Rogers began the meeting by saying that she called the people together to talk about the Union and that she knew that they were soliciting the employees and handing out pamphlets, but that they wouldn't be fired for talking to the union representatives, but that if the Union approached them, they should tell her or somebody else from administration. If the Union became their bargaining representative, they would have to pay union dues, which could be deducted from their pay, and if the

Union came in the ''family'' atmosphere at the facility would be no more; they would no longer have the ''closeness as employees'' with the ability to speak directly to her. She or Skidmore then said that with a union there was always the possibility of a strike. She told of a situation where a union called a strike, and the home closed and later reopened.

Nancy Torpey, who has been employed by Respondent for 5 years as a CNA, testified that Rogers began by introducing Skidmore as the acting director of nursing. She said that she had heard that the Union was trying to organize the employees and asked if any of them had been contacted by the Union. She said that if the Union asked them to sign cards, they did not have to sign them, and if they were worried or scared about it, they could come to her. She said that if the Union became their representative they would no longer be able to have these informal meetings and they would no longer be able to speak directly to her, they would have to go through a union representative. She said that the employees at the Westport home went on strike and the patients were moved and the home was temporarily closed. Subsequently, the home reopened with permanent replacements. She asked them if they could leave their patients and go out on strike if the Union told them to do so because they would have to do so. Lillian Grube, who has been employed by Respondent as an LPN for 14 years, testified that Rogers told them that with a union they could not speak directly to management, they would have to go through the union delegate who would then speak to management. She or Skidmore said that if the Union called a strike, they would have to leave their patients and walk on a picket line.

The final 8(a)(1) allegation is that on about January 27, McElroy informed employees that other employees were discharged because of their union activities. Carole Richter, who has been employed by Respondent as an LPN for 8 years, testified that she knows Casey, but usually works different days. She didn't learn of Casey's discharge until about January 27, 13 days after she was fired. Sometime that morning at about 7 a.m., somebody told her that Casey was fired. An employee asked why she was fired and another employee said that she heard that Casey was fired because she had neglected a patient. Shortly thereafter, when Richter was alone with McElroy, McElroy told her that Casey asked her if she would be interested in meeting with a union representative; she told Richter: ''You know, I had to take that to the office.'' She did not tell Richter that Casey had been fired because of her union activity.

The final allegation here is that on about January 14, Respondent terminated Casey because of her union activity in violation of Section 8(a)(1) and (3) of the Act. Casey had been employed by Respondent as an LPN since 1984. At the time of her discharge on January 14, she was working the 7 a.m. to 7 p.m. shift 3 days a week on the third floor west wing. Prior to 1992, the third floor was an ICF level of care (intermediate care) meaning that the patients were ambulatory and required less care. Sometime that year, Respondent began bringing skilled patients on the floor, i.e., patients requiring more care and supervision. This change required an additional nurse on the floor and Casey was that nurse. Respondent admits that Casey was fired on January 14. It defends that she was fired for two reasons: falsification of records in not changing a resident's dressing and an inappropriate response to a resident who had fallen on the floor.[2] Because of the necessity for confidentiality of patient's names in the industry, the patient involved in the alleged falsification situation will be referred to as patient 1 and the patient who fell and allegedly was not properly cared for will be referred to as patient 2.

Skidmore was the agent of Respondent principally involved with these situations although she neither fired Casey nor did she recommend that Casey be fired. She was made aware of the situations, became involved in them, and informed Engingro of the situations. Casey was fired after Rogers informed Respondent's human resources department of the situations.

Skidmore testified that in late December 1992 or early January, two employees and McElroy informed her of their ''concern'' that dressings were not being done. McElroy testified that she informed Skidmore of these rumors ''a few weeks'' prior to January 11.

On Sunday, January 10, Skidmore instructed June Fisher, the 3 to 11 p.m. supervisor, to place an identifiable mark on the dressing on patient 1 in order to determine whether Casey changed it the following day. The treatment proscribed for patient 1 was a dressing and bacitracin ointment two times a day. Skidmore worked the 7 a.m. to 3 p.m. shift on Monday, January 11; Casey worked from 7 a.m. to 7 p.m. that day. When Skidmore checked patient 1 at about 3 she saw that the marked dressing was still on the patient, although the patient's Kardex, with Casey's initials, indicated that the treatment had been done. On that same day she told the director of nursing of what had occurred and she wrote a note to Casey's file regarding patient 1:

> It was observed that the dressing order on Patient 1—Bacitracin F/B Dressing BID. The dressing was noted to be dated 1/10/93 . . . .
>
> The 3–11 Supervisor placed that marking at my request. I observed on 1/11/93 that the actual dressing was not changed during 7–3 shift. Myself and DNS rechecked the dressing at 3 p.m. It still had not been done at that time. The treatment Kardex reflects that Dolores Casey LPN signed that she did the treatment.

On January 11, Skidmore had the dressing on patient 1 marked again. She testified that when she last checked the dressing at 3 p.m. that day, it had not been changed and she informed Engingro that the dressing had not been changed on January 12. However, at 3:30 that day Casey, who was, again, working the 7 a.m. to 7 p.m. shift, removed the dressing, replaced it with a bandaid, and wrote on the Kardex: ''1/13/93[3] bandaid on—area healed.'' January 12 was the seventh and final day that this treatment had been prescribed. These were the only occasions that Skidmore ever marked a dressing while she was employed by Respondent. She testified that she did not mark a dressing previous to January 10

[2] Near the conclusion of the hearing, Skidmore testified about a situation where Casey allegedly failed to apply sylvadine lotion to a resident. As this was not referred to earlier as a cause of her discharge, and as Skidmore testified that it was not a reason for her discharge, it will not be discussed further.

[3] As January 12 was Casey's last day of employment with Respondent, this was obviously a mistake, and the date was really January 12.

because that was the first occasion that a doctor had prescribed a dressing change to be done on the 7 a.m. to 3 p.m. shift. In addition, she never spoke to Casey about her failure to change these dressings nor did she direct any other nurse to change the dressing that Casey had, apparently, failed to change.

Rogers testified that on January 11 Engingro told her that they had some evidence that Casey was not doing her treatments and that Skidmore had marked a dressing to check the truth of the allegation. Later that day Engingro told Rogers that Casey had not changed the dressing that day and that they were going to mark the dressing again to see if there was a pattern. She said that they were giving Casey the benefit of the doubt. On the following afternoon, Engingro told her that Casey had not changed the dressing on that day as well, although she had signed that it was done. Rogers then called Alan Zampini, Respondent's director of operations for the State of Connecticut, and told him of these facts. Zampini told her to get all the facts together and call him the following day. Prior to calling him on January 13, ''another incident came to light''—the incident involving patient 2.

Casey testified that since only some of the 30 residents on her wing were skilled-care patients, ''there weren't a lot of treatments.'' Only about 7 of the 30 residents required specific treatments. Her daily procedure, prior to her discharge, was to look over the residents' Kardexes, note what had to be done, sign the Kardex, and do the rounds and treatments. She testified that she and the other nurses did not take the Kardexes with them when they did treatments, because they were large and cumbersome and didn't fit well on the medication cart. The only time that she and a lot of the other nurses took the Kardexes with them was when the state inspectors were present. She was asked whether she did the treatment on patient 1 on January 11; she testified: ''I don't know'' and ''[n]ot to my knowledge.'' On the afternoon of January 12, she cut off the dressing on patient 1, saw that it was completely healed, put medication and a band-aid on it, and wrote that on the Kardex. This was the final day indicated for treatment. Lillian Grube, who has been employed by Respondent as an LPN for 14 years, and was working on three east in January, testified that each morning, she usually sits at her desk looking at the Kardexes for her treatments and signs for those treatments at that time. If a patient refuses treatment she circles it when she returns. She does not take the Kardexes with her during treatments, because ''it's just awkward to carry the thing with you . . . .'' She has been following this procedure during the entire period of her employment at the facility. She does take her Kardexes with her during treatments when state inspectors are at the facility.

The other incident that allegedly contributed to Casey's discharge involved patient 2, who often fell and had to be assisted back on his feet. Skidmore was principally involved in this situation as well, but, again, not the ultimate determination to fire Casey because of it. Skidmore testified that she was made aware of this situation on January 13 by Robin Sardone, a nurses aide, who began her employ with Respondent 2 weeks earlier. On that day she was meeting with Sardone who, as a new employee, ''needed the guidance.'' Sardone ''broke down, gave me information about an incident, some incidents with a resident.'' She asked Sardone to put this in writing, which she did:

> On Thursday 1–7–93 I heard a resident yelling for approximately 30 minutes . . . . I went into room 328 and found [patient 2] hanging from chest up off the bed with the rest of his body on the floor. I noted a blood spot on the sheets. I assisted the resident back into bed first lying on stomach and then positioned on his back.
>
> I went to the front desk to report to the blonde nurse [apparently Casey] that the resident in 328 was on the floor, bleeding, and I helped him back to bed. The nurse responded: ''He's always on the floor.'' Why did you pick him up? She proceeded to yell at me while walking to resident room for reporting it. I asked her why wasn't I right in reporting it . . . This occurred in the afternoon.

Sardone also prepared a note of an incident with the same patient falling on January 8:

> I went to report this to the blonde nurse that he had fallen and she yelled at me. The nurse went to the room yelling at the resident while laughing too. At the same time CNAs already in the room yelled: ''You fell on the floor again and this time you're staying on the floor. I'm not picking you up. Maybe this will teach you a lesson.'' The blonde nurse responded, just leave him on the floor and she left the room for 15–20 minutes . . . . The resident stayed on the floor for 15–20 minutes. The charge nurse—blonde—continued to yell at me. I left the unit at 3 p.m. The resident was still on the floor and crying to be picked up.

Skidmore testified that after speaking to Sardone, and getting these reports, she did not speak to Casey, Grube, the day supervisor, or any of the CNAs who were involved.

Sardone testified that on January 7 at about 2:30 p.m. she saw patient 2 hanging from his bed, half on and half off. She testified that she saw that he had removed the restraints that had been put on him. Prior to Casey's telling her to check on the resident she heard him screaming for help for about 30 minutes. Sardone lifted him back into bed from his hanging position and went down the hall to report the incident to Casey. She initially testified that it took Casey a long time before she got to the resident's room; subsequently, she testified that it took a ''couple of minutes.'' When she got there she yelled at Sardone for moving the resident. Sardone said that she didn't feel it was appropriate to have him continue hanging from the bed and Casey asked her why she bothered to pick him up. She testified that Casey then yelled at the resident, but she doesn't remember what was said because she walked away at that time. On the following day, patient 2 fell on the floor while Sardone was in the hallway. Sardone and some other aides ran into the room and patient 2 asked them to help him. Sardone went to tell Casey and Casey yelled at her for reporting the situation and went to the room with her and told them not to pick him up, but to keep the resident on the floor and let him learn from what he did. The resident kept asking them to pick him up, but they refused. Sardone told them that it wasn't right to let him remain on the floor, but to no avail, and he remained there for about 10 to 15 minutes. Sardone testified that over that weekend, January 9 and 10, she thought about the incidents and ''felt miserable about it.'' When she reported for work on Monday, January 11, she told Skidmore what happened

and Skidmore told her to put the incidents in writing, which she did. She testified that she could not remember whether she went to Skidmore's office to tell her of the incidents or whether she told Skidmore of these incidents during counseling sessions that Skidmore was conducting with her.

Casey testified that she was familiar with patient 2; he has been falling since he has been a resident at the facility. He fell many times on January 7 and 8, when Casey worked two 12-hour shifts. She does not believe that she witnessed any of the falls, but, on each occasion, a nurses aide found him sitting on the floor. On none of the occasions was he injured, ''which kind of made me suspicious.'' His doctor was regularly evaluating him and trying different medicines that would make him more steady. On each occasion that he fell on those days, she evaluated him (with the LPN on three east, Grube) prior to picking him up off the floor, which is the accepted procedure when a patient falls. The evaluation includes temperature, pulse, respiration, and blood pressure. In addition, the supervisor, family, and personal physician were notified. She testified that on one of the occasions with patient 2, Sardone came to her and said that the patient almost fell out of bed, but she got him back into bed. She asked Sardone: ''What do you mean almost fell?'' She said that he started to fall, but she got a hold on him. Casey then asked her if he hit the floor, and Sardone answered that he almost fell. Casey then explained that the difference was important because, if the resident hits the floor, reports have to be prepared and people notified. Casey ended it by saying, ''If he almost fell, then he didn't fall. That doesn't count . . . you got him back in bed, that's fine.'' She testified that she never yelled at Sardone during this incident; she did ask her repeatedly whether he fell or did not fall and she never refused to check on patient 2. As to whether she ever left patient 2 lying on the floor during the 2 days in question, she testified that on some occasions when residents fall, she would put a pillow under the resident's head and leave them on the floor (with an aide present) while she went to get a supervisor or, possibly, to call for an ambulance if there was a serious injury:

> under no circumstances would I go in and see a patient that fell on the floor and then we're all going to leave the room and leave them there, no, but they can lay on the floor. We've had fractured hips where they lay on the floor for a half an hour if necessary. Not alone I might add.

Casey testified further that she never asked an aide why she helped a resident or why didn't she leave him on the floor. As to whether she ever told anybody that she was sick and tired of the patient falling, she testified that she doesn't know and she didn't believe so, but ''I was tired of him falling.'' Rogers testified that sometime during this period, Casey told her that she was sick and tired of this resident falling. As to whether in January a patient fell out of bed and was crying and pleading for help and she just left him on the floor, Casey testified: ''Absolutely not.'' Her answer was the same to the question of whether she laughed at a patient who was lying on the floor crying. Casey also testified that on either January 7 or 8, because patient 2 had fallen so many times she and the nursing supervisor put him in his bed with the sides up. After he climbed over the side rails she became fearful that he would injure himself and she put a vest restraint on him. Later that day his grandson came to visit him and began screaming at Casey when he saw the restraint on him. The resident's chart provided for the use of restraint if necessary. The grandson threatened to have her fired for putting the restraint on him. Rogers testified that this complaint did not contribute to Respondent's decision to fire Casey. She wrote up the entire incident in the resident's file. Casey testified that she later received a letter of apology from the family for the grandson's actions.

Barrett testified that she was present on one occasion when patient 2 fell; he was lying on the floor with a pillow under his head and they were waiting for a supervisor to check him out. Casey never said anything to the resident about leaving him on the floor. It was on that day that the resident's grandson came to visit him. Richter testified that the proper procedure to follow with a resident who fell out of bed is to examine and assess the patient prior to moving him. Torpey, who was working on the floor on one of the days that patient 2 kept falling, testified that he fell on a number of occasions that day. On that day, his grandson visited him and when he saw that he was wearing a restraint, he ''made a big commotion over it, threatening to have Dolores fired, to have her job.'' Casey attempted to explain that he was being restrained for his own safety, but the grandson would not listen. When the restraint was removed (presumably as a result of the grandson's actions) patient 2 fell again. Torpey, Casey, Grube, Sardone, and the supervisor (who arrived later) were present. When they arrived, Sardone asked why they didn't get him off the floor. It was explained to her that they had to check him over first and get all vital signs before picking him up and putting him back in bed. Casey put a pillow under his head while he was on the floor. Casey never yelled at Sardone or patient 2, nor did Casey leave him on the floor unattended. Grube testified that she was present on the third floor on the 2 days in question when patient 2 fell on a number of occasions. On one of these days he fell three times and on each occasion both she and Casey went to assess his condition. On each of these occasions he remained on the floor until they completed their evaluation of his condition. Then they picked him up off the floor. During this period, Casey never yelled at the patient. At one point, she said ''jokingly'' to him: ''My God, this is the third time. We should leave you there.'' She said it ''kiddingly'' and he laughed.

There was a substantial amount of testimony about Sardone and her working history at the facility. Skidmore testified (reluctantly, it appeared to me) that Respondent had problems with Sardone's work performance. In addition, she received complaints from other CNAs and nurses about Sardone. On one occasion, she met with the CNAs to discuss their complaints about Sardone. In addition, she or other supervisors met with Sardone for counseling sessions on January 4, 5, 6, 11, and 14. Torpey testified that she had a lot of problems with Sardone, who lied, cried, and did not perform her job properly. Torpey and some of the other CNAs asked to speak to management about their problems with her and met in about February with Skidmore about her. The employees complained that they couldn't work with her anymore, and Skidmore told them that she knew that Sardone lied. Grube also testified about problems that she had with Sardone: ''Very insecure. I several times caught her lying.''

She informed her supervisor of these problems, and sometime after Casey was fired Skidmore met with some employees to discuss Sardone. As stated above, Sardone was terminated on March 22 for the reason: ''Terminated due to inability to comply with job description and perform duties thoroughly and safely.''

Rogers testified that on Wednesday, January 13, the patient 2 ''incident came to light.'' Engingro told her what Sardone had told Skidmore about patient 2. On that day she spoke to Zampini and told him of the situations involving Casey and patients 1 and 2; she recommended that Casey be fired.

Casey was fired on Thursday, January 14. Her final day of work for Respondent was Tuesday, January 12; she was next scheduled to work on Saturday, January 16. On about January 13, she received a call from Elaine Brennan, one of the supervisors at the facility, saying that Engingro wanted to speak to her; a meeting was arranged for January 14 at 2 p.m. in Engingro's office. Casey, Engingro, and Skidmore were at this meeting. Engingro told her that since she transferred to three west her work performance was not up to par: treatments had not been performed or were not performed in a timely fashion, and she had been negligent in her work. Additionally, one of her patients fell and she left him lying on the floor for 15 minutes. Casey told Engingro that this allegation was a lie. Engingro told her that the allegations were so serious that she was being terminated. Casey asked about being given a warning rather than being fired and Engingro said that the allegations were so serious that termination was warranted.

As stated above, Casey has been employed by Respondent since 1984. The General Counsel moved into evidence her final three evaluations from Respondent, dated December 1991, October 1990, and October 1989. These evaluations have 10 categories and 5 boxes for each. In addition, there is an overall evaluation at the end of each appraisal with five categories from unsatisfactory to outstanding. In Casey's 1989 evaluation she received one check in the highest category and nine checks in the next best category. Her overall evaluation was the highest category—outstanding. In the 1990 evaluation, she received the highest rating in one category, the second highest rating in seven categories, and a check mark between the highest and second highest rating in the remaining two categories. She received an above average overall rating. Her final evaluation in December 1991 gave her the highest rating in three categories and the second highest rating in the remaining seven categories; there was no overall evaluation in this appraisal. Respondent moved into evidence three written warnings and one verbal warning that Casey received from Respondent. They are dated September 1986, September 1989, September 1989, and May 1990.

IV. ANALYSIS

Initially,[4] the General Counsel alleges that the contents of Respondent's employee handbook, more particularly the portion entitled, ''What About Unions,'' at page 31, violates Section 8(a)(1) of the Act. I disagree. I find that the message in this portion of the employee handbook comes within the protection of Section 8(c) of the Act. It contains no threats and does not state that Respondent will take any action in retaliation for the employees' union activity. Rather, in it, Respondent states why it believes that the employees and the facility are better off without the Union, something Respondent is entitled to do. I shall therefore recommend that this allegation be dismissed.

It is next alleged that Rogers and Skidmore's speech to the employees on about January 25 violated Section 8(a)(1) in a number of ways. Not surprisingly, there are a number of versions of Rogers' speech, even among the General Counsel's witnesses. This may be due to the fact that there were five separate meetings that Rogers had with the employees. Barrett, whom I found to be a credible, but nervous, witness, testified that Rogers began the meeting by saying that she heard that union representatives were soliciting employees and asked if anybody had been approached by the Union, adding, ''But you really don't have to answer that question.'' Torpey, who I found to be a very direct and credible witness, testified that Rogers said that she heard that the Union was trying to organize them, and she asked if any of them had been contacted by the Union. Rogers testified that she did not ask employees if they were in favor of, or were involved with, the Union. Although I did not find Rogers to be an incredible witness, I have no difficulty crediting the testimony of Barrett and Torpey over her testimony. Barrett and Torpey attended the same meeting with Rogers, so I find that in addition to asking the employees if they had been approached or contacted by the Union, she told them that they ''really'' didn't have to answer the question. In *Rossmore House*, 269 NLRB 1176 (1984), the Board said that in determining whether an interrogation violates Section 8(a)(1) of the Act they will look to ''whether under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.'' I find that under all the circumstances here, Rogers' statements to the employees reasonably tended to coerce them to cease engaging in union activities. Rogers was the administrator of the facility. Ten days earlier the lead employee in the union drive had been fired. When Rogers asked them if they had been contacted or approached by the Union, it is reasonable to assume that they would feel coerced and think twice about engaging in union activities. That all denied having been contacted by the Union reinforces this finding. Rogers' statement that they really didn't have to answer her question does not lessen this effect. I therefore find that Respondent violated Section 8(a)(1) of the Act by interrogating its employees about their union activities.

It is next alleged that, at this meeting, Respondent informed its employees that it would be futile for them to select the Union as their representative. I can find no evidence unrelated to one of the other allegations here to support this allegation. The General Counsel's brief appears to support this finding. In his brief, the General Counsel states: ''The entire tenor of the meetings with employees held by Rogers

[4] By motion to strike portions of Respondent's brief, dated October 21, the General Counsel requested that references in Respondent's brief to exhibits that I rejected at the hearing be stricken from the brief and that I not rely on these rejected exhibits or the arguments based on them. As I conclude that my original rulings rejecting these exhibits were correct, the General Counsel's motion is granted and the exhibits, and the arguments in the brief based on the exhibits, will not be considered.

and Skidmore was designed to instill in the employees a sense of futility regarding unionizing.'' Each of the other allegations has been, and will be, discussed separately; I recommend that this ''summary'' allegation be dismissed.

The next allegation is that, at this meeting, Respondent threatened employees with the loss of direct access to management representatives if they selected a union as their bargaining representative. Barrett testified that Rogers said that if a union represented them it would lead to a very cold working environment; if they had a problem, they would not be allowed to talk directly with her. They would have to talk to the union representative, who would then talk to her. Brown testified that Rogers said that if the Union came in the facility would cease to have a ''family'' atmosphere, and the employees would no longer have the ''closeness as employees'' and the ability to speak directly to her. Torpey testified that Rogers said that if the Union became their representative the employees would no longer be able to have these informal meetings, and they would not be able to speak directly to her, they would have to go through the Union. Grube testified that Rogers said that with a union they could not speak directly to management, they would have to go through a union delegate who would then speak to management. Rogers testified that at these meetings she told the employees that unions often appoint stewards or representatives and ''their preference is that you go to that person rather than go directly to management.'' As stated above, I credit the testimony of the employees over that of Rogers. I might add that I found Grube to be a totally credible and believable witness.

In *Tri-Cast, Inc.*, 274 NLRB 377 (1985), the Board stated: ''There is no threat, either explicit or implicit, in a statement which explains to employees that, when they select a union to represent them, the relationship that existed between the employees and the employer will not be as before.'' As the court stated in *NLRB v. Sacramento Clinical Laboratory*, 623 F.2d 110, 112 (9th Cir. 1980): ''[I]t is a 'fact of industrial life' that when a union represents employees they will deal with the employer indirectly, through a shop steward.'' See also *New Process Co.*, 290 NLRB 704 (1988). I find that Rogers' statements constitute a reasonable prediction of the effect that unionization would have in the work atmosphere, rather than constituting a threat of employer action in retaliation for their union activity. I, therefore, recommend that this allegation be dismissed.

It is next alleged that at these meetings Rogers threatened employees with discharge if they engaged in a strike and threatened to close the facility if the employees selected the Union as their bargaining representative. Barrett testified that Rogers said that if the employees joined the Union and they called a strike, the employees would have to strike and put their patients in jeopardy. If they didn't strike, the Union could fine them. She told the employees of the situation at the home that is presently Mediplex of Westport. The union called a strike and the aides went out, were replaced by new workers, and were then terminated. The home then closed and subsequently reopened as Mediplex of Westport. Brown testified that Rogers or Skidmore said that with a union there was always the possibility of a strike and she told them of a situation where a union called a strike and the facility closed. Torpey testified that Rogers asked the employees if they could leave their patients and go on strike if the Union told them to do so, because they would have to do so if the Union told them to strike. She also said that employees at the Westport home went on strike and the patients were moved and the home was temporarily closed and later reopened with permanent replacements. Grube testified that Rogers told them that if the Union called a strike they would have to leave their patients and walk a picket line. She also told the employees of a situation where the employees of a home went on strike and the home had to close and move the patients out, although she could not remember too much about this subject. Rogers testified that she told the employees that during a strike an employer can bring in permanent replacements to cover strikers' positions, and that in the Westport situation, under the prior management, the employees struck and the facility was temporarily closed and the patients were transferred elsewhere.

There is a very fine line between what is a lawful statement and what is an unlawful statement when an employer tells its employees of an employer's rights in replacing striking employees. In *Eagle Comtronics*, 263 NLRB 515 (1982), the Board set out the parameters that an employer must follow to stay within the law in these cases. As the Board stated in *Fern Terrace Lodge*, 297 NLRB 8 (1989):

> In *Eagle Comtronics* the Board recognized that an employer cannot be expected to fully articulate employees *Laidlaw* rights in every discussion concerning economic strikes. The Board stated that an employer ''may address the subject of strike replacement without fully detailing the protections enumerated in *Laidlaw*, so long as it doesn't threaten that, as a result of a strike, employees will be deprived of their rights in a manner inconsistent with those detailed in *Laidlaw*.''

This rule can best be understood and appreciated by the fact that some labor lawyers do not fully understand the rules set forth in *Laidlaw*; how then can we insist that employers discussing the issue with their employees explain all the nuances of this issue? The rule then is that in these situations an employer violates the Act if its comments may be fairly understood as a threat of reprisal and/or if they were explicitly coupled with such threats. *Gaso Pumps*, 274 NLRB 532 fn. 2 (1985), and *Mack's Supermarkets*, 288 NLRB 1082, 1091 (1988).

At this meeting, Rogers discussed strikes, permanent replacements, and the Westport situation. In discussing the possible replacement of strikers, she did not fully detail the protections of *Laidlaw* as she was not obligated to do. She gave the employees a brief summary of her view of the law. She also told them about the events at the Westport home, which was not owned by Respondent at that time. On the basis of all the evidence here, I find insufficient evidence of explicit or implicit threats of Respondent action should the employees choose to be represented by the Union. I therefor recommend that these allegations be dismissed.

The final 8(a)(1) allegation is that on about September 27, McElroy informed employees that other employees were discharged because of their union activities. The facts of this allegation are undisputed. When Richter came to work on January 27 a fellow employee told her that Casey had been fired about 2 weeks earlier. When somebody asked why she was fired, a fellow employee said that she heard that Casey was

fired because she neglected a patient. Shortly thereafter that morning, while Richter was alone with McElroy, McElroy told Richter that Casey had asked her if she would be interested in meeting with a union representative and she ''had to take that to the office.'' The General Counsel's brief alleges that this statement implies that Casey was discharged for her union activities. McElroy was making a factual statement to Richter; she did not tell her that Casey was fired because of her union activities. She only told her of her encounter with Casey on January 11. To allege that by this statement McElroy was telling Richter that Casey was fired because of her union activities is to stretch the statement beyond its reasonable parameters. I therefore recommend that this allegation be dismissed.

The final allegation is that by discharging Casey on January 14, Respondent violated Section 8(a)(1) and (3) of the Act. Under the rule set forth in *Wright Line*, 251 NLRB 1083 (1980), the General Counsel has the initial burden of making a prima facie showing to support the inference that the employee's protected conduct was a ''motivating factor'' in the employer's decision. If that has been established, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. There is absolutely no question that the General Counsel has sustained his initial burden here. Casey had been employed by Respondent for almost 9 years; in her last three evaluations she was rated above average and outstanding. During the period of her employment, Casey had received only four warnings, from September 1986 to May 1990. On Monday, January 11, she asked McElroy, a supervisor, if she was interested in joining the Union. Shortly thereafter, McElroy told Brennan, who told Engringo, who told Rogers about what Casey had said to McElroy. The following day was Casey's final day of employment with Respondent. It is difficult to imagine a more obvious initial finding of a violation under *Wright Line*, supra, and I so find.

The final issue then is whether Respondent has satisfied its burden that it would have fired Casey even if she had not been active for the Union. Respondent defends that it fired Casey because of her actions involving patient 1 and patient 2. These are two separate and distinct incidents evolving at different times. The situation with patient 1 came to Respondent's attention at the end of December 1992; Sardone first told Skidmore about the patient 2 incident on January 13. The credible evidence establishes that when the LPNs do their treatments, they determine what treatments have to be performed for their 30 residents and sign the Kardexes, but do not usually take the Kardexes with them when they do the treatments. This procedure is not unreasonable considering the testimony of Grube and Casey that the Kardex is awkward to carry and does not fit well on the medication cart. Casey signed the Kardex on January 11 that she did (or would) change the dressing on patient 1. She testified that she didn't know whether she actually did the treatment or whether she forgot to do it after signing the Kardex ahead of time. Since I found Skidmore to be a fairly credible witness (although one who was reluctant to make admissions during questioning by the General Counsel), I find that Casey did not do the treatment on January 11. She did the treatment on January 12, but at 3:30 p.m. rather than during the 7 a.m. to 3 p.m. shift.

In contrast to Casey's nonfeasance as regards patient 1, I find no credible evidence to establish any impropriety toward patient 2. The only testimony offered by Respondent in this regard was by Sardone, who I found to be an incredible and unbelievable witness. In contrast to her testimony, the General Counsel presented the more believable testimony of Casey, Barrett, Torpey, and Grube, each of whom were credible and believable witnesses. I therefore find that the evidence fails to support any finding that Casey mistreated patient 2.

The record here convinces me that Respondent was looking for a way to ''get'' Casey. Even as regards patient 1, it appears to me that Respondent used this situation as a pretext for a reason to fire her. At 3 p.m. on January 11 and 12, Skidmore saw that the marked dressing had not been changed. On the following day Respondent decided to fire Casey even though she did the treatment at 3:30 p.m. on January 12. Prior to making this decision, they never discussed the situation with Casey, nor did they attempt to get any input from other nurses on the floor. It appears to me that an employee of 9 years with good evaluations deserved more than that. In addition, Respondent stressed that her failure to do the treatment was a serious offense, yet Skidmore and Rogers did nothing to correct Casey's nonfeasance with the patient. Rather, they seemed interested only in what Casey did rather than how it affected the resident. The situation involving patient 2 is even more obvious. Skidmore and Rogers accepted as true the unsupported word of Sardone who, at the time, had been employed by Respondent for 2 weeks. During that 2-week period, other employees had complained to Skidmore about Sardone, her lying and her crying, and Skidmore had counseled her on a number of occasions. Yet Skidmore accepted her word, rather than questioning Barrett, Torpey, or Grube, who had direct knowledge of the incident and had been employed at the facility for a considerable period.

The ultimate question then is why did Respondent act this way toward Casey? Not properly investigating allegations against her. Not giving her an opportunity to answer these allegations. Seemingly being indifferent to the resident's condition and only being interested in finding a reason to discipline Casey. Not giving her a warning or a final warning, but firing her with no advance warning. The timing of these actions leads to the inescapable conclusion that Respondent fired Casey because of her union activities. Casey spoke to McElroy about the Union at about 7 a.m. on Monday, January 11. Although Skidmore testified that the first dressing was marked the prior evening, the remaining action, and extreme haste on the part of Respondent, took place after they learned of Casey's union activity. I find that Respondent's actions toward Casey to be so extreme as to only be explainable as a response to her union activities. I find that Respondent's reliance on the patients 1 and 2 incidents was a pretext; that Casey was fired because of her activities on behalf of the Union, which Respondent became aware of on the morning of January 11. I therefore find that by firing Casey on January 14, Respondent violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and is a

health care institution within the meaning of Section 2(14) of the Act.

2. The Union 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 interrogating its employees regarding their union activities.

4. Respondent violated Section 8(a)(1) and (3) of the Act by firing Dolores Casey on January 14, 1993.

5. Respondent did not violate the Act as further alleged in the amended complaint. Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

THE REMEDY

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

As I found that Respondent unlawfully discharged Casey on January 14, 1993, I shall recommend that Respondent be ordered to offer her immediate reinstatement to her former job or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority and other rights and privileges, and to expunge from its files any reference to the discharge. It is also recommended that Respondent be ordered to make Casey whole for any loss she suffered as a result of the discrimination against her. Backpay shall be computed in accordance with *F. W. Woolworth*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Mediplex of Danbury, Danbury, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees about their union activities.

(b) Discharging or otherwise discriminating against its employees, because of their activities on behalf of the Union.

(c) In any like or related manner interfering with, restraining, or coercing its 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) Offer Dolores Casey immediate reinstatement to her former job or, if that job no longer exists, to a substantially similar position without prejudice to her seniority or other rights and privileges, and make her whole for the loss she suffered as a result of the discrimination in the manner set forth above in the remedy section of this decision.

(b) Remove from its files any reference to the discharge of Casey, and notify her in writing that this has been done and that evidence of this unlawful activity will not be used as a basis of future actions against them.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due Casey under the terms of this Order.

(d) Post at its facility in Danbury, Connecticut, copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt 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.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] 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.''