Valley Hospital Medical Center, Inc. ***and*** **Nevada Service Employees Union, Local 1107, affiliated with Service Employees International Union.** Case 28–CA–21047

December 28, 2007

DECISION AND ORDER

BY MEMBERS LIEBMAN, KIRSANOW, AND WALSH

On May 23, 2007, Administrative Law Judge Lana H. Parke issued the attached decision. The Respondent filed exceptions and a supporting brief, the Charging Party and the General Counsel filed answering briefs, and the Respondent filed a reply brief. The Charging Party also filed exceptions and a supporting brief, the Respondent filed an answering brief, and the Charging Party filed a reply 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, and conclusions for the reasons set forth below and to adopt the judge's recommended Order as modified.[1]

[1] We will modify the judge's recommended Order to conform to the Board's standard remedial language, and we will substitute a new notice to conform to the Order as modified.

We reject the Charging Party's request for additional remedies, specifically, rescission of the Respondent's employee communications policy and a provision requiring the Respondent to distribute the notice to employees by handbill and e-mail. As to the former, such a remedy would be improper because the lawfulness of the communications policy was not at issue in this case. As to directing handbilling of the notice, the Board reserves special remedies for cases involving "numerous, pervasive, and outrageous" unfair labor practices. *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995), enfd. in relevant part 97 F.3d 65 (4th Cir. 1996). This is not such a case. Finally, as to the request to order e-mail distribution of the notice, although there is some limited evidence that the Respondent has begun posting some of its policies on its intranet, this evidence is insufficient to find that the Respondent customarily communicates with employees electronically. Thus, we deny the Charging Party's request. See, e.g., *Nordstrom, Inc.*, 347 NLRB 294, 294 (2006).

Members Liebman and Walsh are of the view that the language of the Board's standard notice-posting provision, which requires the posting of a remedial notice "in conspicuous places including all places where notices to employees are customarily posted," encompasses distribution of a remedial notice by e-mail if the respondent customarily disseminates notices to its employees electronically; whether it does so is an issue they would leave for compliance. Moreover, to the extent there is any uncertainty that the language of the current notice-posting provision encompasses electronic posting, they would revise that language to so state. See *International Business Machines Corp.*, 339 NLRB 966, 967–968 (2003) (Member Walsh, dissenting); *Nordstrom*, supra at 294 fn. 5 (Member Liebman, dissenting in part). In the absence of a Board majority for their position, however, they concur, for institutional reasons, in the denial of the Charging Party's request.

I. BACKGROUND

Employee Joan Wells, the Union's chief steward and executive vice president, was employed by the Respondent as a full-time registered nurse in the medical intensive care unit (MICU) of the Respondent's hospital (the Hospital). In 2006, the Respondent and the Union were negotiating a successor collective-bargaining agreement, and Wells served as a member of the Union's negotiating committee.[2] The negotiations concerned staffing levels, among other things.

In September, the Union held a press conference at which it publicized a report that ranked the performance of the Hospital and other local hospitals. On September 13, a local newspaper published an article entitled "*Hospital nurse-to-patient ratio rated*," which discussed the press conference and the parties' ongoing dispute over staffing levels. The article quoted Wells as saying that, as a result of a nursing shortage at the Hospital, "You don't get medications to patients on time. They could be lying in their own excrement for who knows how long. You can't even do the basic things you want to do."

On the same day, a story written by Wells appeared on a website maintained by the Union. As relevant here, Wells stated:

> The level of care for patients at Valley Hospital is a growing concern because management isn't giving us the staff we need. Here's an example: In the past, there were four Telemetry Technicians that would watch the heart rhythms for all of the patients in the hospital. Recently, the hospital has cut staff down to two people on most days.
>
> This means that one person is watching the heart rhythms for the twenty-five critically ill patients in the Medical ICU plus about 44 other hospital patients, and the other technician is watching the heart rhythms of all remaining patients in the hospital.
>
> What happens when the technician needs to take a break or go to the bathroom? It means that staff attending to critically ill patients must step away from their duties to help out—or that one person is responsible for monitoring the heart rhythms of every single patient in the hospital! Do you want to be one of one hundred sixty-nine people depending on one overworked Telemetry Technician?
>
> On medical-surgical floors, nurses may have eight or more patients. An irregular heartbeat can develop quickly, and fast action is needed. This means that without the help of the technicians watching patients' heart rhythms a patient could have a heart attack and possibly die.

[2] All dates contained herein are 2006, unless otherwise indicated.

> UHS, the for-profit company that owns Valley Hospital, makes more than enough money to pay for additional staff. Right now, they are choosing not to, and that's just not acceptable. As nurses and patient advocates, we're committed to fighting for safe and enforceable staffing ratios.

Subsequently, as part of a management investigation into Wells' statements, Risk Manager Antoinette Pretto interviewed Wells. Pretto asked Wells for specific dates, times, and names in connection with the incidents described in her statements. Wells told Pretto that her statements were "general statements" based on Wells' personal experience. Wells also told Pretto that Pretto could get some of the information she sought by reviewing medication administration records, in which nurses note delays in giving patients their medications. With respect to telemetry technician understaffing, Wells told Pretto that she had seen instances of only two telemetry technicians on duty at a time.

Typically, in the MICU, where Wells worked, no more than two patients were assigned to each nurse. Upon reporting for work on October 7, several MICU nurses, including Wells, found three patients listed next to their names on the assignment board; one nurse, Tracy Canty, had four patients listed next to her name. After initially refusing to work, the nurses filed written protests and performed their assigned work. Ultimately, only one nurse was assigned three patients, and no nurses were assigned four patients.

After this incident, Human Resource Administrator Dana Thorne interviewed Wells, who told Thorne that the assignment board had listed four patients assigned to Canty. Later, Thorne notified Wells that she was being suspended pending an investigation into the September 13 publications and the October 7 incident.

On October 13, the Union distributed a flyer at the Hospital, bearing the Union's logo and a photograph of Wells. The flyer quoted the following portion of a speech that Wells had given at a union rally: "I was suspended yesterday for standing up, with my co-workers, to management's doubling of the patient load in ICU. Expanding intensive care patient loads to 3 and even 4 patients is simply unsafe, unacceptable and needlessly endangers patients. Now more than ever, we have to stand together for our patients."

After conducting its investigation, management decided that Wells' September 13 statements were false and disparaging to the Respondent and that terminating Wells was appropriate. On October 20, Thorne again met with Wells. At that meeting, Wells acknowledged making the statements contained in the October 13 flyer. When asked what the basis was for her statements, Wells told Thorne that Canty initially had been assigned four patients on October 7. Wells acknowledged that Canty ultimately was not assigned four patients that day. Thorne concluded that Wells' October 13 statements were false, added those statements to the grounds for termination, and terminated Wells.[3]

II. JUDGE'S DECISION

Stating that she was applying *Wright Line*,[4] the judge concluded that the Respondent violated Section 8(a)(3) and (1) of the Act in discharging Wells. In reaching this conclusion, the judge determined that Wells' statements were protected because, viewed in context, they were an extension of an ongoing labor dispute over staffing levels. The judge also found that the statements did not cause Wells to lose the protection of the Act, as the Respondent had not shown that the statements were disloyal or maliciously false, i.e., knowingly false or made with reckless disregard for their truth or falsity. In the latter regard, the judge found that Wells had based her statements on her own observations and what other employees had told her. In addition, the judge noted that Wells' statement regarding patients lying in excrement was phrased in the conditional, i.e., that staffing shortages "could" result in such a situation.

III. RESPONDENT'S EXCEPTIONS

The Respondent argues that Wells' statements were not protected because they raised only patient-care issues and did not mention a labor dispute or attempt to elicit public support for the Union in connection with such a dispute. The Respondent notes, in this connection, that the Union does not represent the telemetry technicians about whom Wells wrote on the Union's website. In addition, even assuming Wells' statements were protected as an initial matter, the Respondent claims that Wells lost the Act's protection by making statements that were maliciously false and disloyal. The Respondent also notes that Wells failed to report the harmful consequences of allegedly inadequate staffing levels internally, as required by the Respondent's employee communications policy and health care peer review report procedures.[5]

[3] According to the Respondent, no employee, including Wells, was disciplined for the October 7 incident.

[4] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[5] The Respondent also argues that, in applying *Wright Line*, the judge erred in finding antiunion animus based on statements made by two lower-level supervisors. We find it unnecessary to address this argument because the judge's application of *Wright Line* was itself in error. *Wright Line* applies where the motive for a challenged employment action is in dispute. See, e.g., *CGLM, Inc.*, 350 NLRB 974, 974 fn. 2 (2007). Here, there is no dispute that Wells was discharged for

IV. ANALYSIS

Section 7 of the Act provides, in pertinent part, that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." The protection afforded by Section 7 extends to employee efforts to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Thus, Section 7 protects employee communications to the public that are part of and related to an ongoing labor dispute. See, e.g., *Allied Aviation Service Co. of New Jersey, Inc.*, 248 NLRB 229, 231 (1980), enfd. mem. 636 F.2d 1210 (3d Cir. 1980). This includes communications about labor disputes to newspaper reporters. See, e.g., *Hacienda de Salud-Espanola*, 317 NLRB 962, 966 (1995).

In the health care field, patient welfare and working conditions are often inextricably intertwined. See id. In this connection, employees' statements regarding patient care and/or staffing levels have been found protected where it was clear from the context of the statements that they related to a labor dispute and/or employees' terms and conditions of employment. See, e.g., *Brockton Hospital*, 333 NLRB 1367, 1374–1375 (2001) (distribution to nurse employees of articles addressing adverse effect on patients of downsizing and restructuring nursing staff, and of using nonprofessional employees to perform nursing duties, protected), enfd. in relevant part 294 F.3d 100 (D.C. Cir. 2002), cert. denied 537 U.S. 1105 (2003); *Misericordia Hospital Medical Center*, 246 NLRB 351, 356 (1979) (participation in preparing report concerning staffing levels at hospital and number of patients to be cared for by staff, protected), enfd. 623 F.2d 808 (2d Cir. 1980).[6] Even where employees' communications are "primarily concerned with the effect of . . . staffing on patient care, that is not inconsistent with finding that" the communications also related to a "labor dispute." *Holy Rosary Hospital*, supra at 1210.

But finding that employees' communications are related to a labor dispute or terms and conditions of employment does not end the inquiry. Otherwise protected communications with third parties may be "so disloyal, reckless, or maliciously untrue [as] to lose the Act's protection." *Emarco, Inc.*, 284 NLRB 832, 833 (1987); accord *Mountain Shadows Golf Resort*, 330 NLRB 1238, 1240 (2000).

Statements have been found to be unprotected as disloyal where they are made "at a critical time in the initiation of the company's" business and where they constitute "a sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income." *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464, 472 (1953); accord: *Endicott Interconnect Technologies, Inc. v. NLRB*, 453 F.3d 532, 537 (D.C. Cir. 2006), denying enforcement of 345 NLRB 448 (2005).[7] The Board is careful, however, "to distinguish between disparagement of an employer's product and the airing of what may be highly sensitive issues." *Professional Porter & Window Cleaning Co.*, supra at 139. To lose the Act's protection as an act of disloyalty, an employee's public criticism of an employer must evidence "a malicious motive." *Richboro Community Mental Health Council*, 242 NLRB 1267, 1268 (1979).

Statements are also unprotected if they are maliciously untrue, i.e., if they are made with knowledge of their falsity or with reckless disregard for their truth or falsity. See, e.g., *TNT Logistics North America, Inc.*, 347 NLRB 568, 569 (2006). The mere fact that statements are false, misleading or inaccurate is insufficient to demonstrate that they are maliciously untrue. See, e.g., *Sprint/United Management Co.*, 339 NLRB 1012, 1018 (2003). Where

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making the statements outlined above. Thus, the sole issue here is whether, in making those statements, Wells enjoyed the Act's protection. See, e.g., *Felix Industries*, 331 NLRB 144, 146 (2000), enf. denied on other grounds 251 F.3d 1051 (D.C. Cir. 2001).

[6] See also, e.g., *Holy Rosary Hospital*, 264 NLRB 1205, 1205 (1982) (nurses hiring attorney to pursue their concern about the number of nurses on duty in emergency room, protected); *Community Hospital of Roanoke Valley*, 220 NLRB 217, 222–223 (1975) (nurse's statement during television interview regarding instances of inadequate RN staffing, protected, where story related the statement to salary and benefits at the hospital), enfd. 538 F.2d 607 (4th Cir. 1976).

[7] By contrast, where the purpose of communications is to encourage the employer to remedy problems in working conditions, and not to disparage its product or undermine its reputation, the communications are protected. See *Professional Porter & Window Cleaning Co.*, 263 NLRB 136, 139 (1982), affd. mem. 742 F.2d 1438 (2d Cir. 1983); see also *Great Lakes Steel*, 236 NLRB 1033, 1036 (1978), enfd. 625 F.2d 131 (6th Cir. 1980) (pamphlets using "rhetorical hyperbole[,]" specifically "GLS POLICY MEANS—LET THEM DIE WAITING[,]" protected, where plain objective was to bring about improvement in medical and ambulance practices to avoid possibility of needless future deaths). For example, the Board has found statements attacking a hospital's "safety levels and administration"—including a statement that "only very minimal patient care is given and safety standards are stretched to the limit and beyond"—were protected because they were closely tied to nurses' working conditions, and it was clear from the tenor of the article that its intention was not to harass, disparage, or harm the employer, but simply to force the administration to take heed of its employees' complaints about wages and working conditions at the hospital. *Mount Desert Island Hospital*, 259 NLRB 589, 593 (1981), enfd. in relevant part 695 F.2d 634 (1st Cir. 1982).

an employee relays in good faith what he or she has been told by another employee, reasonably believing the report to be true, the fact that the report may have been inaccurate does not remove the relayed remark from the protection of the Act. See *KBO, Inc.*, 315 NLRB 570, 571 (1994), enfd. mem. 96 F.3d 1448 (6th Cir. 1996). In addition, in the context of an identified, emotional labor dispute, the fact that an employee's statements are hyperbolic or reflect bias does not render such statements unprotected. See *Emarco*, above at 834.

We now apply these standards to Wells' statements.

A. September 13 Newspaper Statements

Wells' statements were made at a union press conference that occurred while the parties were in the process of negotiating over staffing levels. Wells expressly tied her comments to the effect of nurse-to-patient ratios on nurses' ability to do their jobs, stating that as a result of understaffing, "[y]ou don't get medications to patients on time. They could be lying in their own excrement for who knows how long. You can't even do the basic things you want to do." The fact that these comments expressed concern over patient care does not mean that they were unrelated to the ongoing labor dispute over staffing ratios. See *Holy Rosary Hospital*, 264 NLRB at 1210. As noted above, staffing levels significantly affect nurses' working conditions. See *Brockton Hospital*, 333 NLRB at 1375. In addition, the newspaper article that quoted Wells made clear that the parties were in contract negotiations, and the article quoted union officials as saying that their "primary disagreement" in negotiations with the Respondent was over staffing ratios. We find that Wells' statements related to an ongoing labor dispute over staffing levels.

We further find that the statements were not disloyal, and therefore unprotected, under *Jefferson Standard*. There is no evidence that they were made "at a critical time in the initiation of" the hospital's business. *Jefferson Standard*, 346 U.S. at 472. Further, although the statements were critical of the employer's product – patient care—they were not made "in a manner reasonably calculated to harm the [Respondent's] reputation and reduce its income." Id. Taken in context, it was apparent that Wells' intent was not to disparage or harm the Respondent but to pressure the Respondent to increase staffing and thereby improve nurses' working conditions. See *Mount Desert Island Hospital*, 259 NLRB at 593.

Neither were Wells' statements maliciously false. The judge found that Wells based these statements on her own experiences and the experiences of other nurses as related to Wells. With respect to the "excrement" comment, the judge found that this was stated in the conditional, not in the affirmative. In sum, there is no basis for finding that Wells' statements reported in the September 13 newspaper article were knowingly false or made with reckless disregard for their truth or falsity.

B. September 13 Website Statements

Much of Wells' September 13 website article focused on patient care and on telemetry technicians, who concededly are not part of the nurses' bargaining unit. Critically, however, her comments expressly discussed the impact of telemetry technician staffing levels on nurses' terms and conditions of employment. For example, she stated that, as a result of cuts in telemetry technician staffing, when a technician "needs to take a break or go to the bathroom," nurses "*attending to critically ill patients must step away from their duties to help out* . . ." (emphasis added). She also stated: "On medical-surgical floors, nurses may have eight or more patients. An irregular heartbeat can develop quickly, and fast action is needed. This means that without the help of the technicians watching patients' heart rhythms a patient could have a heart attack and possibly die." In other words, too few telemetry technicians affect the nurses' ability to perform *their* jobs. In addition, Wells directly referred to the dispute with management over staffing levels: "UHS, the for-profit company that owns Valley Hospital, makes more than enough money to pay for additional staff. Right now, they are choosing not to, and that's just not acceptable. As nurses and patient advocates, we're committed to fighting for safe and enforceable staffing ratios." These statements were made on a union website, one day after a union rally that addressed staffing levels. Thus, again, Wells' statements clearly were related to the ongoing labor dispute over staffing.

We also find that the statements were neither disloyal nor maliciously false. Like Wells' statements in the newspaper article, these statements were intended not to disparage or harm the Respondent but to pressure the Respondent to increase staffing and thereby improve nurses' working conditions. And Wells based her assertions of staffing cuts on her own observations as well as on conversations with the telemetry technicians and the person who was in charge of scheduling them.

C. Wells' October 13 Statements

In the October 13 flyer, Wells was quoted as stating that she had been suspended for "standing up, with my co-workers, to management's doubling of the patient load in ICU[,]" which referred to the MICU nurses' concerted protest over being assigned three and (in one case) four patients. The flyer displayed the Union's logo and additionally stated that in a "negotiating session, management proposed contract language gutting the restrictions on floating that we had in our contract, and giving

management absolute power to float." The flyer then encouraged employees to "Join Us at the Rally for Quality Patient Care" later that day. Wells' statements plainly were related to a labor dispute.

We also find that the statements were not disloyal. Again, Wells' statements were intended not to injure the Respondent's business, but to pressure the Respondent to improve nurses' working conditions by providing sufficient staffing to enable the nurses to carry out their duties effectively.

We further find that the statements were not maliciously false. The judge found that, at least temporarily, four patients were assigned to nurse Canty on October 7. Arguably, Wells' statements regarding "doubling of the patient load in ICU" and "[e]xpanding intensive care patient loads to 3 and even 4 patients" were hyperbolic insofar as they did not reflect the temporary nature of the situation, as only one nurse ended up with three patients that day and none ended up with four. However, as discussed previously, the mere fact that statements made in the context of an emotional labor dispute are hyperbolic does not remove them from the protection of the Act. See *Emarco*, 284 NLRB at 834.[8]

The Respondent argues that, rather than making her statements publicly, Wells should have complained to the Respondent internally regarding the negative effects that staffing levels were having on patient care. However, so long as protected concerted activity is not unlawful, violent, in breach of contract, or disloyal, employees engaged in such activity generally do not lose the protection of the Act simply because their activity contravenes an employer's rule or policies. See *Communication Workers Local 9509*, 303 NLRB 264, 272 (1991). Specifically, an employer may not interfere with an employee's right to engage in Section 7 activity by requiring that the employee take all work-related concerns through a specific internal process. See *Kinder-Care Learning Centers*, 299 NLRB 1171, 1171–1172 (1990); *Easter Seals Connecticut, Inc.*, 345 NLRB 836, 838 (2005). Accordingly, the Respondent's argument provides no basis for finding that Wells was appropriately discharged.

For the foregoing reasons, we find that all of the statements that undisputedly motivated Wells' discharge were protected under the Act. Accordingly, we affirm the judge's conclusion that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Wells.

[8] With respect to the heading of the flyer—"UHS' New ICU Standard: 4 Patients for Every Nurse"—the judge found that Wells did not compose that heading. The Respondent argues that Wells' position with the Union demonstrates that she necessarily was responsible for the heading. The Board has held, however, that an individual's membership on a union executive committee is insufficient without more to find the individual responsible for handbill activity. See *Patterson-Sargent Co.*, 115 NLRB 1627, 1630–1631 (1956). Thus, the Respondent's argument is misplaced.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Valley Hospital Medical Center, Inc., Las Vegas, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(c).

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

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge any of our employees because they engage in union or other protected concerted activities.

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

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

WE WILL make Joan Wells whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, less any net interim earnings, plus interest.

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

VALLEY HOSPITAL MEDICAL CENTER, INC.

Joel Schochet, Esq., for the General Counsel.
Raymond J. Carey, Esq. (Foley & Lardner LLP), of Detroit, Michigan, for the Respondent.
Glen Rothner, Esq. (Rothner, Segall & Greenstone), of Los Angeles, California, for the Charging Party.
Daniel Bush, Esq., of Los Angeles, California, for the Charging Party.

DECISION

I. STATEMENT OF THE CASE

LANA H. PARKE, Administrative Law Judge. This matter was tried in Las Vegas, Nevada, on March 27 through 28, 2007,[1] upon order consolidating cases, consolidated complaint and notice of hearing (the complaint) issued January 31, 2007, by the Regional Director for Region 28 of the National Labor Relations Board (the Board) based upon charges filed by Nevada Service Employees Union, Local 1107, affiliated with Service Employees International Union (the Union or the Charging Party), alleging that Valley Hospital Medical Center, Inc. (Respondent) violated Sections 8(a)(1) and (3) of the National Labor Relations Act (the Act). On March 27, 2007, the Regional Director approved the withdrawal of all charges except for allegations relating to the discharge of Joan Wells, as addressed in the unfair labor practice charge Case 28–CA–21047.[2] The Respondent essentially denied all allegations of unlawful conduct.

II. ISSUE

Did the Respondent violate Section 8(a)(1) and (3) of the Act by discharging employee Joan Wells on October 20, 2006?

III. JURISDICTION

The Respondent, a Nevada corporation, with an office and place of business in Las Vegas, Nevada (the hospital), has, at all relevant times, been engaged in the operation of a hospital providing inpatient and outpatient medical care. During the 12-month period ending October 24, the Respondent, in conducting its operations, derived gross revenues in excess of $250,000 and purchased and received goods valued in excess of $5000 directly from points outside the State of Nevada. The Respondent admits, and I find, it has at all relevant times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) and a health care institution within the meaning of Section 2(14) of the Act. The Union has been a labor organization within the meaning of Section 2(5) of the Act.[3]

IV. FINDINGS OF FACT

Since the Union's 1999 certification as the collective-bargaining representative of the Respondent's registered nurses (RNs), the Union and the Respondent have entered into successive collective-bargaining agreements. In 2006, the parties commenced negotiations (the negotiations) on the terms of a collective-bargaining agreement to succeed the agreement effective June 1, 2004, to May 31 (the agreement). During the period of negotiations, Joan Wells (Wells) was employed by the Respondent as an RN in the medical intensive care unit (MICU) and part time by the Union, serving as a chief steward, an executive vice president for the Respondent's RN unit, and a member of the negotiating committee.[4]

At all relevant times, the Respondent had in effect a Healthcare Peer Review (HPR) reporting procedure that provided a system for employees to report patient/visitor incidents inconsistent with the "routine care of a patient and/or the desired operations of the facility [and which] requires or could have required (near miss/potential) unexpected medical intervention, unexpected intensity of care, or causes or had the potential of cause an unexpected health care impairment." Each HPR report was reviewed by a risk manager for referral to appropriate hospital personnel.

The Respondent's code-of-conduct policy, in effect at all relevant times, stated, in pertinent part:

> II. PURPOSE
> To establish guidelines for employee communication that will portray a positive professional image of staff to clients and the community as well as promote a safe, efficient and harmonious work environment that is conducive to quality customer interactions.
>
> III. POLICY
> When acting on behalf of or representing VHS in any capacity, employees will conduct themselves in a manner which promotes a positive image to patients, visitors, physicians, and other staff members, which is in line with the VHS philosophy.

The Respondent's Standards of Conduct, in effect at all relevant times, cautioned: "Conduct that . . . brings discredit on the Hospital . . . will not be tolerated."

During 2006 in the exercise of her chief steward/executive vice president duties, Wells engaged in the following union-related activities: attended negotiating sessions that Dana Thorne (Thorne), HR administrator, also attended; accompanied another employee to a factfinding discussion with Thorne; and headed a group of RNs in a visit to the Respondent's human resources (HR) office to discuss nurse orientation issues.

[1] All dates herein are 2006, unless otherwise specified.

[2] The Regional Director's order approving withdrawal request and withdrawing complaint allegations states, apparently inadvertently, that the suspension of Joan Wells remains in issue. At the hearing, the parties agreed the suspension was not at issue. Accordingly, I consider the allegation of unlawful suspension also withdrawn.

[3] Unless otherwise explained, findings of fact herein are based on party admissions, stipulations, and uncontroverted testimony.

[4] Wells had served as chief steward since 2004 and was identified on the Union's website as the Union's executive vice president of the Respondent's RN unit.

Following the visit, by letter dated June 27, Thorne, wrote to Wells, in pertinent part:

> This letter is in response to your visit to Human Resources on Monday, June 26 regarding SEIU presentations during nurse orientation.
>
> The RNs representing the SEIU made a negative impression on everyone in the Human Resources office as they interrupted employees and visitors . . . .
>
> Finally, in response to your note regarding the monthly employee reports, both May and June reports have been sent to the SEIU. . . .[5]

On September 13, the Las Vegas Review Journal (LVRJ), a local newspaper, ran an article entitled "*Hospital nurse-to-patient ratio rated*," in which it was reported that the Union had assigned several Las Vegas-area hospitals, including the Respondent, failing grades for patient care. The news article stated that union officials cited staffing ratios as the primary collective-bargaining disagreement in the Union's negotiations with various area hospitals. The LVRJ article quoted Wells as saying that because of a shortage of nurses at the Respondent,

> You don't get medications to patients on time. They (patients) could be lying in their own excrement for who knows how long. You can't even do the basic things you want to do.

According to Wells, her criticism was based on the reports of other nurses made during 2006 negotiation caucuses and on her own experience. Wells testified that during one caucus a floor nurse, whose name she could not recall, said she was unable to get medications to patients on time because of staffing issues. At the hearing, Wells detailed her experiences as follows:

> When you have a [patient who keeps you very busy . . . you don't get back to your other patient in time sometime . . . to give meds that are timed—they are timed for specific times of the day. So you might be late giving them which is why you don't get them on time. . . . If . . . you have one patient that is taking all your time, you don't get to [give basic care, e.g., make sure patients are clean, dry, hydrated, turned, free from pain].[6]

On September 13, the same date the LVRJ article was published, a story (web story) by Wells appeared on the "Share Your Story" page of the "Quality Care Nevada" website maintained by the Union:

> The level of care for patients at Valley Hospital is a growing concern because management isn't giving us the staff we need. Here's an example: In the past, there were four Telemetry Technicians that would watch the heart rhythms for all of the patients in the hospital. Recently, the hospital has cut staff down to two people on most days.
>
> This means that one person is watching the heart rhythms for the twenty-five critically ill patients in the Medical ICU plus about 44 other hospital patients, and the other technician is watching the heart rhythms of all remaining patients in the hospital Do you want to be one of one hundred sixty-nine people depending on one overworked Telemetry Technician?
>
> On medical-surgical floors, nurses may have eight or more patients. An irregular heartbeat can develop quickly, and fast action is needed. This means that that without the help of technicians watching patients' heart rhythms a patient could have a heart attack and possibly die.
>
> UHS, the for-profit company that owns Valley Hospital, makes more than enough money to pay for additional staff. Right now, they are choosing not to, and that's just not acceptable. As nurses and patient advocates, we're committed to fighting for safe and inforceable staffing ratios.

Wells based her assertion of reduced telemetry technician staffing on conversations with Virginia Hinkle, a telemetry technician scheduler who expressed concern that only two telemetry technicians worked on many shifts, and on her having seen only two telemetry technicians at work rather than the customary four. Although Wells could not specify when she had observed reduced telemetry technician staffing, it "seemed quite often" to her: "one week it might happen once or twice and then maybe it wouldn't happen for another week."[7]

After publication of the LVRJ news article and the web story (the September 13 publications), Thorne and Michelle Nichols (Nichols), chief nurse officer, discussed their content and thereafter directed Antoinette Pretto (Pretto), risk manager,[8] to investigate Wells' allegations that patients could be lying in excrement, not getting medications on time, and insufficiently monitored by telemetry technicians. In early October, after some scheduling delays,[9] Pretto interviewed Wells with Cheryl Bunch (Bunch), union representative, also present. Pretto asked Wells for dates, times, and names underlying the content of the September 13 publications. Wells said her statements were "general statements" but that she had personal experience. When Pretto again asked for specific supporting information, Wells said, "No comment," as she feared discipline for herself and other nurses who, like her, had been unable to give medications on time. Wells testified that she also told Pretto she could look on medication administration records (MAR), where

[5] Thorne denied that she knew Wells was a steward of the Union at any time through Wells' termination date of October 20. Insofar as that testimony implies that Thorne did not know Wells had any official function within the Union, I cannot accept it. The June 27 letter refers to the nurses who visited HR on June 26 as representing the Union. Thorne wrote to no other nurse regarding the visit, and Thorne's directing the letter to Wells and giving her information about reports sent to the Union justify an inference that she understood Wells had a leadership position in the Union.

[6] Although Wells testified that she had utilized the Respondent's procedures for reporting failures to provide patients with quality care, she also testified that she had no time to complete "Incident Reports." No such reports were introduced into evidence. I find that regardless of what Wells may have observed, she never reported improper patient care to the Respondent.

[7] Wells had no information from any source that Hinkle was instructed to cut telemetry technician staff from four to two on any day.

[8] The function of a risk manager is to minimize risk to patients.

[9] The Respondent contends that Wells was resistant to the investigation into her allegations; resolution of that question is not relevant to the issues.

nurses were required to enter medication delays.[10] Pretto asked for specific information relating to patients lying in excrement. Wells told Pretto that her comment in that regard had also been a "general statement."[11] With regard to telemetry technician understaffing, Wells gave Pretto no specifics beyond saying that she had seen instances of only two telemetry technicians working.[12]

On October 4, Pretto provided Thorne with a summary of her interview with Wells, stating essentially that Wells had failed to provide specific examples or information regarding untimely administration of medication, patients lying in excrement, or reduction in telemetry staffing. The summary quoted Wells as saying she did not "keep notes everyday when [she] worked" and that her publicized comments were "general statements based on working in ICUs during [her] career." Pretto told Thorne that inasmuch as Wells could not substantiate her assertions, she believed the publicized statements were false.

Normally, the Respondent assigned only two MICU patients to an RN per shift.[13] On October 7, an RN scheduled for the 7:30 a.m. MICU shift called in sick. To cover for her absence, the MICU charge nurse revised the assignment schedule. At about 7 a.m. when scheduled RNs, including Wells, reported for their 7:30 a.m. shifts, the dry-erase assignment board showed more than two patients assigned to some of the RNs.[14] After discussion among the reporting nurses, all MICU day-shift nurses except one refused to accept assignments, i.e., "take report"[15] until more nursing coverage was obtained. By telephone Wells informed the shift supervisor and Karen Pels Jaminez (Jaminez), the appropriate union representative, that the MICU day-shift nurses would not take report until more staff was found. About 5 to 10 minutes later, Jaminez telephoned Wells and told her that if the nurses did not take report, they could be fired for insubordination, which caution Wells reported to the nurses. Thereafter, the Respondent having arranged for additional nursing coverage, the scheduled nurses filed individual assignment despite objection (ADO) forms[16] with the MICU charge nurse and took report. Only one RN took report on more than two patients for the full shift, accepting report for three.

On Saturday, October 7, following the refusal-to-take-report incident in MICU (the October 7 incident), Judith Eaton (Eaton), MICU day-shift charge nurse, told Canty that Wells was taking the union thing too far. Canty also heard Mark Trowbridge (Trowbridge), MICU night-shift charge nurse, say that Wells needed to be quiet. When Thorne and Nichols, shortly thereafter, commenced an investigation, both Trowbridge and Eaton informed Thorne they believed Wells was the ringleader of the nurses who declined to take report.[17] On the following Monday, Nichols told Canty that she had heard Wells had "corralled" the other RNs and "coached" their actions, which Canty denied.

On October 12, Thorne conducted a telephone fact-gathering interview with Wells in which Bunch participated. In the course of the interview, Wells told Thorne that on October 7, the assignment board in MICU had shown four patients assigned to Canty. Following the interview, Thorne notified Wells that she was suspended pending investigation of the September 13 publications and the October 7 incident.

At the end of the week following the October 7 incident,. Canty overheard Trowbridge gloating, "I got her; I got her; I got her." On another occasion, Canty overheard Eaton and Trowbridge discussing the possibility of a strike at the hospital and heard Trowbridge say, "I don't have to listen to her mouth no more." Canty assumed Trowbridge referred to Wells.

On October 13, the Union distributed a flier at the hospital bearing the Union's logo and a photograph of Wells (the October 13 flier). The heading read: "UHS' New ICU Standard: 4 Patients for Every Nurse"[18] and quoted a portion of Wells' speech given at a union rally:

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[10] Although Wells directed Pretto to MARs for substantiation, it is reasonable to infer that she did not expect the reports to provide supportive evidence; she testified that "if you don't have time to give the medication on time, you are not going to have time to stop and do all this paperwork" and that she did not have time to make notes on "every single instance" of medication delay.

[11] Wells admitted that she had never brought the issue of patients lying in excrement to management's attention.

[12] The Respondent's posthearing brief asserts that the number of technicians was reduced from four to three per shift after relocation created increased efficiency. The record does not reflect such evidence, and I disregard the assertion. Thorne testified that Wells' statement that the telemetry technician staff had been halved was untrue, but the Respondent provided no further staffing evidence.

[13] The Respondent utilized a "buddy" system in which one RN cared for her own and the patients of another (i.e., four patients) during regular and brief, unscheduled breaks. If patient acuity were low enough, the Respondent might assign three patients to one nurse, but such assignments were apparently unusual; in the nearly 3 years that Wells worked on MICU, she had only once been asked to care for more than two patients, which request she refused.

[14] Evidence of the assignment breakdown is neither entirely clear nor consistent. Wells testified that when she reported to work on October 7, she observed that two nurses named on the dry-erase board were assigned three patients each and that Tracy Canty was assigned four patients. When reported for work at about 7 a.m., several nurses laughingly told her she had been assigned four patients, but when she looked at the dry-erase board about 5 minutes later, she saw only three patients' names next to hers. On assignment despite objection forms completed on October 7, Wells and three other RNs noted, respectively, that three RNs were assigned three patients each. Judith Eaton, MICU day-shift charge nurse, denied she had assigned four patients to Canty but was equivocal as to whether four patients' names had at some point been listed next to Canty's name on the dry-erase board. She agreed that until the nurse shortage was worked out, at least two MICU day-shift RNs were assigned three patients

[15] Accepting patient assignments is commonly called "taking report," that is accepting the medically documented report of the patient's treatment from the nurse of the preceding shift

[16] Under the terms of the agreement, RNs who take issue with an assignment are expected to accept the assignment but may complete an ADO.

[17] It is unknown on what factors the two supervisors based their belief. Eaton initially testified that Wells filled out all of the ADO forms completed on October 7, but later admitted that each form had different handwriting and text and agreed that Wells had not completed ADO forms for other RNs. Trowbridge did not testify, and of the RNs involved in the October 7 incident, only Wells and Canty testified.

[18] Wells did not compose the heading, the wording of which was presumably provided by the Union.

> I was suspended yesterday for standing up, with my co-workers, to management's doubling of the patient load in ICU. Expanding intensive care patient loads to 3 and even 4 patients is simply unsafe, unacceptable and needlessly endangers patients. Now more than ever, we have to stand together for our patients.

Thorne considered Wells' October 13 statement to convey false information on two counts: (1) that the Respondent had doubled the patient load in MICU from two patients per nurse to four, and (2) that Wells' suspension was disciplinary rather than investigatory. Thorne, Nichols, and Greg Boyer, the Respondent's CEO, discussed Wells' September 13 publications and her statement in the October 13 flier, asking what the Respondent would do if Wells were a "regular" employee of the hospital.[19] Concluding that a regular employee would be terminated for making false and disparaging statements about the hospital, they decided that Wells' union activity should not protect her from the consequences of her conduct and that she should be terminated. The Respondent made no decision to discipline any RN for participation in the October 7 incident.[20] Thereafter, Thorne prepared a written employee counseling/corrective discipline notice (termination document) for Wells on which the September 13 publications were listed as offenses.

On October 20, Thorne met with Wells. Sue Lewark (Lewark), director of nursing operations, and Bunch were also present. Thorne intended to terminate Wells absent an ameliorative presentation by Wells and/or Bunch. In response to questioning by Thorne, Wells acknowledged that she had made the statement attributed to her in the October 13 flier. Thorne asked Wells which nurse had been assigned four patients, and Wells named Canty but admitted that Canty had not, in fact, cared for four patients. Thorne asked Wells and Bunch to step out of her office. Believing that Wells had admitted to making a false statement in the October 13 flier, Thorne added that offense to Wells' termination document, and she and Lewark signed it. When Wells and Bunch returned to Thorne's office, Thorne gave Wells the termination document, which cited Wells for policy violations including "Falsification," with the following explanation:

> Joan Wells made statements published in the newspaper, a web site, and a flyer which she has admitted she had no factual basis to support (see attached).[21] These statements discredited the hospital and were intended to harm the hospital and/or undermine patient confidence in the hospital.

Upon receiving the termination document, Wells wrote, "All statements made were based on fact, therefore true" in the Employee Statement section and signed it. No further discussion occurred.

V. DISCUSSION

A. Positions of the Parties

The General Counsel contends that the Respondent discharged Wells because of her activities on behalf of the Union. The General Counsel argues the Respondent had no justifiable basis for discharge, as the statements made by Wells in the September 13 publications and the October 13 flier appropriately and accurately publicized working conditions germane to contemporaneous collective-bargaining issues. Counsel for the General Counsel asserts that a *Wright Line*[22] analysis is unnecessary herein, as the Respondent admittedly discharged Wells for her statements in the September 13 publications and the October 13 flier, and since Wells' statements constitute union activity, the discharge violated Section 8(a)(3) of the Act. Even if unmotivated by antiunion animus, counsel argues, the Respondent's discharge of Wells would violate Section 8(a)(1) of the Act under the principles enunciated in *NLRB v. Burnup & Sims,* 379 U.S. 21 (1964). In counsel for the General Counsel's view, under either an 8(a)(3) or an 8(a)(1) analysis, the only issue is whether Wells' statements "were so opprobrious as to lose the protection of the Act." Counsel argues that they were not and that the Respondent's discharge of Wells for making protected statements violated the Act. Counsel further asserts, however, that the real reason the Respondent discharged Wells was to silence her as a union proponent. Although intertwined with counsel for the General Counsel's basic argument, this further contention alleges an unadmitted antiunion motive for the discharge that requires a *Wright Line* analysis.

For its part, the Respondent contends that it bore Wells no animus for either her position with or her protected activities on behalf of the Union, maintaining that its sole basis for discharge was Wells' publication of maliciously false, disparaging, and disloyal statements regarding the quality of patient care at the hospital. The Respondent argues that Wells' statements were unprotected and in clear violation of company policy, thereby providing legitimate basis for termination.

B. The Discharge of Wells

Counsel for the General Counsel argues that the Respondent had a disguised motive in terminating Wells, i.e., to silence a vocal union leader irrespective of the September 13 publications and the October 13 flier. Under the Board's analytical framework for deciding cases turning on employer motivation,[23] the General Counsel meets his evidentiary burden by showing that an employee's protected conduct was a motivating factor in the employer's decision to take adverse action against the employee. The elements of discriminatory motivation are union or protected activity by the employee, employer knowledge of the activity, and employer animus. *St. George Warehouse, Inc.,* 349 NLRB 870 fn. 28 (2007); *Willamette Industries,* 341 NLRB 560, 562 (2004); *Farmer Bros. Co.,* 303

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[19] Thorne explained that by "regular" employee, she meant an employee who was not a part of the negotiating committee and not involved in the union activity that was occurring at the hospital. In her view, Wells was "more active [in union matters] than a lot of other nurses."

[20] As of the hearing, no discipline had been administered to any participating RN.

[21] Copies of the September 13 LVRJ article in which Wells was quoted, Wells' September 13 web story, and the October 13 flier were attached.

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

[23] *Wright Line*, id.

NLRB 638, 649 (1991). If the General Counsel establishes each element, the burden of persuasion shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line,* supra at 1089; *Corrections Corp. of America,* 347 NLRB 632, 634 (2006); *State Plaza, Inc.,* 347 NLRB 755, 755 (2006). The burden shifts only if the General Counsel establishes that protected conduct was a "substantial or motivating factor in the employer's decision." *Budrovich Contracting Co.,* 331 NLRB 1333 (2000). Put another way, "the General Counsel must establish that the employees' protected conduct was, in fact, a motivating factor in the [employer's] decision." *Webco Industries,* 334 NLRB 608 fn. 3 (2001).

In determining whether the General Counsel has met his evidentiary burden, Wells' union or concerted activity must be considered in two parts: (1) her activity as a chief union steward/executive vice president separate from her statements and (2) her three commentaries relating to the Respondent: the September 13 publications and the October 13 flier.

As to Wells' involvement in union leadership activities, e.g., participating in grievance processing, addressing collective-bargaining concerns to management, and participating on the negotiating committee, her activities were indisputably protected.[24] Moreover, in spite of the Respondent's denial that its managers/supervisors knew of her specific positions with the Union, it is clear, as noted earlier, the Respondent was aware Wells was not a "regular" employee, that she held some union leadership position, and that she energetically supported the Union. Thus, the General Counsel has established the first two elements of his evidentiary burden: union activity by the alleged discriminatee and employer knowledge of it.

The General Counsel's proof as to the third element—employer animus—is less unambiguous. Counsel for the General Counsel and counsel for the Charging Party argue that the following facts demonstrate the Respondent's animus toward Wells' union activities: (1) following Wells' suspension, Trowbridge was overheard saying, "I got her" and (2) the Respondent unwarrantedly identified Wells as the "ringleader" of and treated her differently from all other RNs involved in the October 7 incident.[25]

Reasonable minds might suspect Trowbridge referred to Wells when he boasted he had "got her," but suspicion is no substitute for evidence, see *Caribe Ford,* 348 NLRB 1108 (2006). Moreover, no basis exists for concluding that union animus rather than personal antagonism prompted his satisfaction. The statement does not, therefore, demonstrate animus. However, the Respondent's identification of Wells as the ringleader of the October 7 incident does. From their respective contemporaneous statements to other employees that Wells needed to be quiet and that she was taking the union thing too far, it is apparent that Trowbridge and Eaton had Wells' union partisanship in mind when they singled her out as instigator. The Respondent presented no evidence to support the two supervisors' conclusions, and Eaton's purported substantiation, i.e. that Wells had filled out all of the October 7 ADOs, was demonstrably erroneous. The Respondent also presented no evidence that any participating RN named Wells as initiator or facilitator of the refusals to take report. Indeed, Canty specifically denied to Nichols, the Respondent's investigating manager, that Wells had "corralled" or "coached" the RNs. The Respondent considered the RNs' October 7 refusal to take report to be misconduct, and although unable to provide proof of a reasonable or good-faith belief that Wells had catalyzed the misconduct, the Respondent nonetheless blamed her for it.

Ascribing responsibility for misconduct in the absence of a reasonable belief that an employee has engaged in misconduct evidences animus. See *McKesson Drug Co.,* 337 NLRB 935, 936 fn. 7 (2002) (Respondent "must show that it had a reasonable belief that the employee[s] committed the offense, and that it acted on that belief when it discharged [them]."); *Midnight Rose Hotel & Casino, Inc.*, 343 NRB 1003, 1005 (2004) (employer must establish, at a minimum, that it had reasonable belief of employee misconduct); *GHR Energy,* 249 NLRB 1011, 1012–1013 (1989) (demonstrating reasonable, good-faith belief that employees had engaged in misconduct sufficient). Based on the evidence of record, the Respondent had no reasonable or good faith basis for concluding that Wells had led the October 7 refusals to take report except for her prominence in union activity. These circumstances support an inference that the Respondent bore animus toward Wells' for her union activities and that such animus was a motivating factor in the Respondent's decision to discharge her.[26] *Wright Line,* supra at 1089.

Having proven the three elements of discriminatory motivation, the General Counsel has met his initial burden. Such a finding does not mean that Wells' discharge was in fact "unlawfully motivated." Id. As the Board has noted, "The existence of protected activity, employer knowledge of the same, and animus . . . may not, standing alone, provide the causal nexus sufficient to conclude that the protected activity was a motivating factor for the adverse employment action." *Shearer's Foods, Inc.,* 340 NLRB 1093 fn. 4 (2003); see also *American Gardens Management Co.,* 338 NLRB 644, 645 (2002). The General Counsel's establishment of the *Wright Line* factors does, however, shift the burden to Respondent to establish persuasively by a preponderance[27] of the evidence that

[24] I do not include as protected activity Wells' conduct during the October 7 incident, which the Respondent argues constituted an illegal, partial strike or Wells' statements, the protected or unprotected status of which is at issue herein.

[25] Neither counsel for the General Counsel nor counsel for the Charging Party have argued that the Respondent demonstrated antiunion animus by Eaton's statement to another RN that Wells was "taking this union thing too far," or by Trowbridge's statement that Wells needed to be quiet, but the statements give context to the supervisors' identification of Wells as the ringleader of the October 7 incident.

[26] No evidence contradicts the Respondent's assertion that Wells' role in the October 7 incident formed no part of the decision to discharge her, and the General Counsel has not alleged Wells' suspension pending investigation of the incident as an unfair labor practice. The Respondent's lack of a good faith belief in Wells' October 7 instigatory role is relevant solely to the question of whether the Respondent had animus toward Wells for her protected union activities.

[27] A "preponderance" of evidence means that the proffered evidence must be sufficient to permit the conclusion that the proposed finding is more probable than not. *McCormick on Evidence*, at 676–677 (1st ed. 1954).

it would have (not just could have) discharged Wells even in the absence of her protected union activity. *Desert Toyota,* 346 NLRB 118, 119–120 (2005); *Webco Industries,* 334 NLRB 608 fn. 3 (2001); *Avondale Industries,* 329 NLRB 1064, 1066 (1999); *T&J Trucking Co.,* 316 NLRB 771 (1995).

The Respondent contends that irrespective of Wells' protected union activity, she would have been discharged for publicly disparaging the quality of the Respondent's patient care. In this regard, the threshold question to be resolved is whether Wells' statements at issue herein were protected under the Act.

Employees do not lose Section 7 protection by communications to third parties that are (1) related to an ongoing labor dispute, *NLRB v. Electrical Workers Local 1229 (Jefferson Standard),* 346 U.S. 464 (1953), and (2) not "so disloyal, reckless, or maliciously untrue to lose the Act's protection." *Emarco, Inc.,* 284 NLRB 832, 833 (1987), citing *Jefferson Standard*.[28] The Act protects employees seeking "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." *Five Star Transportation, Inc.,* 349 NLRB 42, 44 (2007), quoting *Eastex v. NLRB*, 437 U.S. 556, 565 (1978); *Endicott Interconnect Technologies,* 345 NLRB 448, 450 (2005), enfd. denied 453 F.3d 532 (D.C. Cir. 2006). However, employee disparagement of an employer's product as opposed to publicizing a labor dispute, is not protected. *Five Star Transportation, Inc.,* supra, citing *Jefferson Standard*.

The Respondent initially argues that Wells' statements, made through channels outside the immediate employee-employer relationship, were unprotected because they did not pertain to wages or working conditions. Respectively, Wells' September 13 statements were reported to a local newspaper and published as a web story on the publicly available union website; her October 13 statement was disseminated by flier to employees and union representatives.[29] All of Wells' statements related to the Respondent's RN and telemetry technician staffing levels. Staffing ratios were of significant interest to the RN bargaining unit and a primary topic of contemporaneous collective bargaining in which Wells was involved as a union officer. Wells' LVRJ statement was in the context of a news article about the collective-bargaining controversy between the Union and area hospitals while her web story and October 13 flier also touched on staffing issues of collective-bargaining concern. Viewed in their "entirety and in context," Wells' statements reveal a clear nexus to terms and conditions of employment,[30] as the statements related directly to, and were inextricably intertwined with, collective-bargaining issues. Well's failure to mention the labor dispute did not vitiate the protection of the Act where her remarks were a clear extension of a legitimate and ongoing labor dispute, defined under Section 2(9) of the Act as "any controversy concerning terms, tenure or conditions of employment." See *Emarco, Inc.*, supra at 833.

The Respondent next argues that Wells' statements were unprotected because they were false, defamatory, disloyal, and publicly discreditable to the hospital. In assessing whether employee communications have lost the Act's protection, the Board considers whether "the attitude of the employee is flagrantly disloyal, wholly incommensurate with any grievances which they might have, and manifested by public disparagement of the employer's product or undermining of its reputation . . . ."[31] or whether employee communications are maliciously false, i.e., statements made with knowledge of their falsity or with reckless disregard for their truth or falsity. *TNT Logistics North America, Inc.,* 347 NLRB 568, 569 (2006). Nonmalicious employee communications to third parties regarding terms and conditions of employment, albeit offensive to the employer, are protected: "great care must be taken to distinguish between disparagement and the airing of what may be highly sensitive issues . . . absent a malicious motive, an employee's right to appeal to the public is not dependent on the sensitivity of [his employer] to his choice of forum." *Allied Aviation Service Co. of New Jersey, Inc.,* 248 NLRB 229, 232 (1980). The burden of showing malice falls on the Respondent. See *Diamond Walnut Growers,* supra at 36, 47 (1995), citing *Springfield Library & Museum,* 238 NLRB 1673 (1979).

Wells' LVRJ statement asserted that because of a shortage of nurses at the hospital, RNs were unable to provide timely medications to patients or give them basic care with the result that patients "could be lying in their own excrement for who knows how long." Her website statements focused on the Respondent's alleged reduction of telemetry technicians, resulting in one technician "watching the heart rhythms [of] twenty-five critically ill patients in the Medical ICU plus about 44 other hospital patients [while] the other technician is watching the heart rhythms of all remaining patients in the hospital . . . [one hundred sixty-nine people]." Her October 13 flier statement, under the heading "UHS' New ICU Standard: 4 Patients for Every Nurse," accused the Respondent of suspending her because she protested doubling the RN-ICU patient loads to "3 and even 4 patients [which is] unsafe, unacceptable and needlessly endangers patients." While Wells' accusations were perhaps over generalized and certainly hyperbolic, the Respondent has not met its burden of showing they were maliciously false.[32]

Although the Respondent demonstrated that before making her September and October 13 statements, Wells had neither

[28] "A critical . . . determination is whether the conduct bears 'a sufficient relation to [employee] wage, hours, and conditions of employment,'" *Five Star Transportation, Inc.,* supra at 45, quoting *Veeder-Root Co.,* 237 NLRB 1175, 1177 (1978), but employees' failure to specifically reference the labor dispute does not remove their remarks from the protection of Sec. 7 of the Act. *Emarco, Inc.,* supra.

[29] While Wells must have intended her September 13 statements to be read by an audience outside her employee-employer relationship, it is not clear that the October 13 flier was addressed to any but those inside that relationship. Nevertheless, for expediency, I have considered Wells October 13 statements in the same posture as the September 13 publications.

[30] *Five Star Transportation, Inc*., supra at 45, quoting *Endicott Interconnect*, supra.

[31] *Veeder-Root Co*., supra at 1177.

[32] See *Cincinnati Suburban Press,* supra, (affirmative evidence of malice necessary).

investigated hospital staffing data nor documented specific examples of the problems she cited, the Respondent did not show that Wells knew her statements were false or recklessly disregarded their truth or falsity. Wells' September 13 statement that nurse shortages could result in delayed medication and neglected patients was based on her own observations and RN grousing during negotiations. While the underpinnings for her statement may not have been substantial or even persuasive, there is no evidence they were demonstrably false. Moreover, Wells posed the criticism in the conditional, i.e., that nurse shortage "could" result in "patients lying in their own excrement for who knows how long," rather than averring that such was actually taking place. Wells' statements certainly insinuated that nurse shortages at the hospital produced substandard patient care, and it was understandably offensive to the Respondent, but absent a malicious motive, which the Respondent has not proved, Wells' "right to appeal to the public is not dependent on the [Respondent's] sensitivity." *Allied Aviation Service Co. of New Jersey, Inc.,* supra at 232. As for Wells' September 13 web story regarding telemetry technicians, she based her assertions of staff cuts on conversations with the technician scheduler and her own observations. Wells may have been mistaken in the inferences she drew from her conversations and/or her observations, but the Respondent has not proven her statements were clearly erroneous, much less that they were maliciously false. Finally, Wells' October 13 comments, while hyperbolizing RN assignments made during the October 7 incident, were not clearly unfactual. The facts are that on October 7 the Respondent, at least momentarily, assigned four MICU patients to one RN and on that day as well as on others assigned three patients to one RN. Moreover, although the Respondent may have suspended Wells on October 12 for investigational expedience, Wells' belief that she was suspended for her October 7 conduct is not so unreasonable as to constitute malicious falsity.[33]

In sum, none of Well's statements at issue herein are "so misleading, inaccurate, or reckless, or otherwise outside the bounds of permissible speech," as to lose the protection of the Act. See *Beverly Health & Rehabilitation Services,* 346 NLRB 1319 (2006) (negative statements to a local newspaper reporter about the quality of patient care protected where related to labor dispute and no evidence of malicious intent or knowledge of falsity); *St. Luke's Episcopal Presbyterian Hospital,* 331 NLRB 761, 761–762 (2000), enfd. denied 268 F.3d 575 (8th Cir. 2001) (employee's television newscast criticism of patient care protected where statements neither "disloyal, recklessly made, nor maliciously false," *Titanium Metals Corp.,* 340 NLRB 766 fn. 3 (2003), vacated in part on other grounds, 392 F.3d 439 (D.C. Cir. 2004) (newsletters critical of working conditions that described employer's credibility as "in the toilet" and its leadership as "crap" protected); *Veeder-Root Co.,* supra (statements not deliberately or maliciously false or made with reckless disregard for the truth); *National Steel Corp.,* 236 NLRB 822, 824 (1982) (action protected whether or not employees reasonable or correct in their good-faith belief); *Cincinnati Suburban Press,* 289 NLRB 966, 967–968 (1988) (though allegedly inaccurate, employee's publication of "Dirty Tricks in the Newsroom" was not so disloyal, reckless, or maliciously untrue as to lose the Act's protection); *Emarco, Inc.,* supra (remarks in the context of a labor dispute that reflect bias or hyperbole will not be considered reckless or maliciously untrue so as to lose the protection of the Act); *Diamond Walnut Growers,* supra (employees' statements that scabs were packing "walnut with mold, dirt, oil, worms and debris" not maliciously false); but see also *Five-Star Transportation, Inc.,* supra at 46 (letters describing company as a "substandard company" that recklessly employed alcohol abusers, drug offenders, and child molesters unprotected); *Sprint/United Management Co.,* 339 NLRB 1012 (2003) (e-mail to employees stating anthrax had been confirmed at the employer's facility deliberately false and unprotected); *Jefferson Standard,* supra, (employees' public disparagement of the quality of the employer's broadcasting without discernible relationship to an ongoing labor dispute, unprotected); *American Golf Corp.,* 330 NLRB 1238 (2000) (public, disparaging attack on the employer's product and policies with an undisclosed purpose of pressuring the employer during negotiations unprotected); *TNT Logistics North America, Inc*., supra (employees' letter to employer's most important customer accusing employer of requesting employees to fraudulently record logbook times, unprotected as maliciously false).

Inasmuch as Wells' September 13 and October 13 statements are protected under Section 7 of the Act, the Respondent has failed to meet its *Wright Line* burden. Accordingly, the Respondent violated Sections 8(a)(1) and (3) of the Act by discharging Wells on October 20.[34]

CONCLUSION OF LAW

The Respondent violated Section 8(a)(3) and (1) of the Act by terminating Wells on October 20, 2006.

REMEDY

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

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[35]

[33] In the absence of supporting authority, I decline to consider the Respondent's contention that Wells' employment by the Union manifests malicious falsity.

[34] The conclusion that Wells' statements were protected resolves the General Counsel's remaining theories of the case. See *Five Star Transportation, Inc.,* supra at fn. 8.

[35] 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

ORDER

The Respondent, Valley Hospital Medical Center, Inc., Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating any employee for engaging in union or other concerted, protected activities.

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

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

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

(b) Make Joan Wells whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(c) Remove from its files any reference to Joan Wells' unlawful termination and thereafter notify her in writing that this has been done and that the termination will not be used against her in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Las Vegas, Nevada, copies of the attached notice marked "Appendix."[36] Copies of the notice, on forms provided by the Regional Director for Region 28 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. 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 October 20, 2006.

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

adopted by the Board and all objections to them shall be deemed waived for all purposes.

[36] f 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."