Flagstaff Medical Center, Inc. *and* Communications Workers of America, Local Union 7019, AFL–CIO *and* National Nurses Organizing Committee/California Nurses Association (NNOC/CNA)

Flagstaff Medical Center, Inc., and Sodexho America, LLC, as Joint Employer *and* Communications Workers of America, Local Union 7019, AFL–CIO. Cases 28–CA–021509, 28–CA–021548, 28–CA–021637, 28–CA–021664, 28–CA–021704, and 28–CA–021728

August 26, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE AND HAYES

On May 20, 2009, Administrative Law Judge Gerald A. Wacknov issued the attached decision. Respondent Flagstaff Medical Center, Inc. (FMC) filed exceptions and a supporting brief, the General Counsel filed an answering brief, and Respondent FMC filed a reply brief. The General Counsel filed exceptions and a supporting brief, which were adopted by Charging Party National Nurses Organizing Committee/California Nurses Association (CNA). Respondents FMC and Sodexho America, LLC (Sodexho) filed an answering brief, and the General Counsel 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[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified below, to modify his remedy,[3] and to adopt the recommended Order as modified and set forth in full below.[4]

I. OVERVIEW

Respondent FMC operates a hospital in Flagstaff, Arizona, and Respondent Sodexho provides managers who oversee the day-to-day operations of the hospital's housekeeping department. As set forth in the judge's decision, this case arises from a campaign by the Communications Workers of America, Local Union 7019, AFL–CIO (the Union) in 2006 and 2007[5] to organize a group of workers employed by Respondent FMC in the ancillary services departments of the hospital. The complaint alleges, and the judge found, that Respondent FMC committed numerous unfair labor practices in the wake of the organizing drive.

Specifically, the judge found, and we agree for the reasons set forth in his decision, that Respondent FMC violated Section 8(a)(1) of the Act by: (1) interrogating employee Lydia Sandoval about what a union could do for employees that FMC was not already doing; (2) interrogating Sandoval, on a separate occasion, about whether it was necessary to bring a union into the hospital; (3) implicitly threatening employee Mattie Martinez with a layoff if the Union was elected; and (4) interrogating Martinez about whether anyone had talked to her about the Union.[6]

Additionally, for the reasons given by the judge and as further explained below, we adopt the judge's dismissals of allegations that Respondent FMC and/or Respondent Sodexho violated Section 8(a)(3) and/or (1) of the Act by: (1) subcontracting the hospital's patient-transport

[1] No exceptions were filed to the judge's findings that Respondent FMC violated Sec. 8(a)(1) of the Act by: (1) prohibiting employees from discussing their wages; (2) surveilling and restricting employees' union activity in the emergency department break room; (3) creating the impression of surveillance by statements made to employee Barbara Mesa; and (4) threatening employees Melissa Demmer and Mesa with unspecified reprisals. No exceptions were filed to the judge's dismissals of allegations that Respondent FMC violated the Act by: (1) interrogating employee Laverne Gorney; (2) interrogating employees Ana Nez and Laverne Gorney; (3) surveilling Mesa's union activities on an unspecified date; (4) warning employee Lydia Sandoval not to engage in union solicitation; (5) warning off-duty employee Paula Souers against engaging in union solicitation of on-duty employees; (6) installing a surveillance camera to monitor employees' union activity; (7) surveilling and interrogating Mesa in January 2008; and (8) warning and suspending employee Heskielena Begay. Additionally, we find it unnecessary to pass on allegations that Respondent FMC violated Sec. 8(a)(1) of the Act by interrogating Souers on February 23, 2007, and by surveilling Mesa's union activity in March 2007, as any such findings would be cumulative of other violations found and would not materially affect the remedy.

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

[3] In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB 6 (2010), we modify the judge's recommended remedy by requiring that backpay and other monetary awards shall be paid with interest compounded on a daily basis.

[4] We shall modify the judge's recommended Order to conform to our findings and the Board's standard remedial language as well as to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice. We shall also substitute a new notice to conform to the Order as modified.

[5] All dates are in 2007, unless noted otherwise.

[6] Chairman Liebman and Member Pearce form the majority to adopt the judge's findings that Respondent FMC twice unlawfully interrogated Sandoval. Member Hayes finds it unnecessary to pass on those allegations as any such violations would be cumulative of another violation found and would not affect the remedy. The panel unanimously adopts the judge's findings that Respondent FMC unlawfully threatened and interrogated Martinez.

work because of the union activities of employees in the ancillary services departments; (2) changing employee Dale Mackey's scheduled lunchbreak; (3) changing employee Barbara Mesa's work schedule and denying her request for a vacation; (4) changing employee Lydia Sandoval's work shift; (5) giving employee Paula Souers a negative performance appraisal because of her union activities; (6) placing an overbroad restriction on union activity in Souers' evaluation; (7) excluding Mesa from the kitchen; (8) creating the impression of surveillance and disparaging the Union, through statements of Supervisor Frances Otero; and (9) prohibiting employees from taking photographs of hospital patients or property.[7]

For the reasons set forth below, we find, contrary to the judge, that Respondent FMC violated Section 8(a)(1) of the Act by: (1) threatening employees that unionization would be futile; and (2) threatening employees that it would eliminate their scheduling flexibility if they unionized, and violated Section 8(a)(3) and (1) of the Act by: (1) discharging employee Michael Conant because of his union activities; and (2) changing employee Laverne Gorney's schedule because of her union activities.[8] Finally, we affirm the judge's dismissal of the complaint allegation that Respondent FMC and Respondent Sodexo constitute joint employers of the housekeeping employees.[9]

II. DISCUSSION

A. Subcontracting of the Patient-Transport Function

In October 2006, the Communications Workers of America (the Union or CWA) began to organize employees in FMC's ancillary services departments, which included, among others, the housekeeping and dietary departments.[10] The Union began openly campaigning in FMC's cafeteria sometime in March 2007.[11]

The General Counsel excepts to the judge's dismissal of the allegation that Respondent FMC subcontracted its patient-transport function to chill the Union's organizing efforts, in violation of Section 8(a)(3) and (1). We agree with the judge, as explained below.

In operating the hospital, FMC was required to transport patients throughout the facility. FMC accomplished this task in two ways. First, four ancillary services employees, who were employed directly by FMC, transported patients to and from the radiology department. In addition, other FMC employees, mostly nurses and patient care technicians, transported patients to and from areas other than radiology. FMC did not have a centralized and dedicated patient-transport department or a computer-tracking system. As found by the judge, this operation was inconvenient for patients (who had to wait for transport assistance), and reduced the amount of time that nurses could devote to patient care.

On August 3, FMC subcontracted the patient-transport work to Sodexho. FMC had started exploring solutions to the transport problem as early as 2004. In fall 2004, Douglas Umlah, the executive director of strategic projects for FMC's parent corporation, and Ruth Eckert, FMC's director of nursing services, visited two hospitals with patient-transport systems operated by Sodexho. Based on their favorable impressions of those operations, Umlah recommended that FMC contact Sodexho for patient transport services. After William Bradel became FMC's president in April 2006, he contacted three other hospitals, inquired about their patient-transport models, and in particular inquired about the efficacy of contracting out the entire patient-transport function, including managers and employees. Based on those discussions, Bradel became convinced that having the managers and employees under one umbrella fostered maximum performance and safety. In September 2006 (prior to the commencement of the Union's organizing campaign), Bradel decided to implement the full-patient transport model by contracting out the entire operation, including the employee component. On February 13,[12] FMC's

[7] Chairman Liebman and Member Hayes form the majority to adopt the judge's dismissals of the allegations that Respondent FMC violated the Act by changing Sandoval's work shift, issuing a negative appraisal to Souers, and prohibiting employees from photographing hospital patients or property. Member Pearce dissents as to those allegations for the reasons set forth in his separate opinion. The panel is unanimous in adopting the remaining dismissals described in the paragraph above.

[8] Chairman Liebman and Member Pearce form the majority to reverse the judge and find that Respondent FMC violated the Act by threatening employees that unionization would be futile and by discriminating against Conant and Gorney. Member Hayes dissents on those issues for the reasons set forth in his separate opinion. The panel unanimously finds that Respondent FMC unlawfully threatened employees with loss of scheduling flexibility.

[9] Chairman Liebman and Member Hayes form the majority to adopt the judge's dismissal of the joint-employer allegation. Member Pearce dissents for the reasons set forth in his separate opinion.

[10] The judge found no record evidence showing that the Union was attempting to organize four dedicated patient-transport employees whose work was subcontracted. The General Counsel excepts, citing a May 2007 union flyer inviting "Transport" employees, among other classifications, to attend an organizing meeting. However, the relevant events with respect to the subcontracting of patient transport operations occurred prior to May 2007.

[11] An earlier organizing effort was conducted by the National Nurses Organizing Committee/California Nurses Association (CNA), which sought to represent a unit of FMC's nurses. In June 2006, the Board conducted an election, which CNA lost. Thereafter, the Board sustained one of CNA's objections, and a second election was scheduled. The second election was later blocked by the charges at issue in this case.

All dates are in 2007, unless noted otherwise.

[12] The judge inadvertently stated February 13, 2006. The record shows that this meeting occurred on February 13, 2007.

executive board decided to award the contract to Sodexho, with the understanding that the managers and employees would be employed by Sodexho rather than FMC. The subcontract was executed on May 7, and Sodexho's performance started in August.[13]

Sodexho immediately hired FMC's four dedicated patient-transport employees, and they began wearing Sodexho uniforms. Sodexho hired approximately six additional patient-transport employees during August and September.

As stated above, we agree with the judge that the subcontracting did not violate Section 8(a)(3) and (1) of the Act. Initially, the General Counsel and Respondent FMC dispute whether this allegation is governed by *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), or *Darlington Mfg. Co.*, 165 NLRB 1074 (1967) (on remand from 380 U.S. 263 (1965), enfd. 397 F.2d 760 (4th Cir. 1968), cert. denied 393 U.S. 1023 (1969)). Board precedent establishes that discriminatory subcontracting allegations are properly analyzed under *Wright Line*'s burden-shifting framework. See *Lear Siegler, Inc.*, 295 NLRB 857, 859–860 (1989); *National Family Opinion, Inc.*, 246 NLRB 521, 529 (1979); *Harper Truck Service,* 196 NLRB 262, 262 fn. 2 (1972).

Under *Wright Line*, the General Counsel has the initial burden to prove that an employee's union activity was a motivating factor in an adverse action. The elements commonly required to support the initial showing are union activity by employees, employer knowledge of that activity, and union animus on the part of the employer. See, e.g., *Approved Electric Corp.*, 356 NLRB 238, 238 (2010). If the General Counsel makes the required initial showing, the burden shifts to the employer to prove by a preponderance of the evidence that it would have taken the same action even in the absence of the union activity. Id.

We assume arguendo that the General Counsel satisfied his initial burden of proving that employees' union activities were a motivating factor in FMC's decision to subcontract. We agree with the judge, however, that Respondent FMC demonstrated that it would have subcontracted patient-transport work even absent the employees' union activities. As explained above, Respondent FMC took major steps toward subcontracting the patient-transport work well before the Union began its campaign with offsite meetings in October 2006 and its first open campaigning in March 2007. FMC began considering subcontracting in 2004 and continued to investigate that option for the following 2 years. In September 2006, before any union activity, Bradel decided to subcontract, though it remained to be decided which company would receive the subcontract. In February, the executive committee met to approve awarding the contract to Sodexho, and reconfirmed that decision 2 months later.

Those major steps, coupled with evidence that Sodexho's automated system would substantially improve the hospital's patient-transport operation persuade us that FMC would have subcontracted even absent the employees' union activities. It is clear that FMC's prior system of transporting patients was inefficient, costly, and inconvenient for patients. In contrast, the subcontracted system was efficient insofar as it was fully automated and used dedicated patient-transport employees. Additionally, the system had been tried and tested at other hospitals. Accordingly, we find that FMC satisfied its *Wright Line* rebuttal burden, and we shall dismiss this complaint allegation.

B. Change to Employee Sandoval's Work Shift

We agree with the judge that Respondent FMC did not violate Section 8(a)(3) and (1) of the Act by changing employee Lydia Sandoval's work shift because of her union activity. The relevant facts, set forth in more detail in the judge's decision, are as follows. Sandoval worked in the hospital's cafeteria, preparing and serving food. In early March, during a conversation with Director of the Dietary Department Jeanine Drake, Sandoval expressed support for the Union and her view that the Union would be better for everyone.[14] Approximately 2 weeks later, FMC transferred Sandoval from the day shift to the afternoon shift and simultaneously transferred a "presentation cook" from the afternoon shift, where he had been underutilized, to the day shift.

As found by the judge, a grill cook frequently complained to management that Sandoval would be missing from her workstation for periods of a half-hour or longer, causing the kitchen's performance to suffer. Customers likewise complained about poor service, and Supervisor Auggie Robledo repeatedly admonished Sandoval not to disappear from her workstation. At the same time, the presentation cook, whose job was to prepare food in front of customers during the lunch and dinner period, was not being kept busy with food orders during the dinner hours. Robledo testified that, by switching the shifts of Sandoval and the presentation cook, FMC could better utilize the presentation chef and thereby increase its revenue.

[13] The record shows that, between February 13 and May 7, FMC and Sodexho were negotiating the terms of the subcontract.

[14] Sandoval separately expressed her union support to Supervisor Auggie Robledo, but the record does not show that she did so before her shift transfer.

FMC offered to let Sandoval remain on the day shift as a dishwasher, but Sandoval declined.

Assuming arguendo that the General Counsel satisfied his initial burden of proving that Sandoval's union activity was a motivating factor in the decision to change her shift, we find, as did the judge, that Respondent FMC satisfied its *Wright Line* rebuttal burden of proving that it would have changed Sandoval's shift even absent her union activity. The credited evidence demonstrates that FMC managers changed Sandoval's shift due to her numerous disappearances from her workstation, coupled with the opportunity to improve revenue and efficiency by transferring the presentation chef to the day shift. And while our dissenting colleague argues that FMC never formally disciplined Sandoval for her absences, Supervisor Robledo repeatedly admonished her not to leave her workstation. Further, FMC's offer to permit Sandoval to remain on the day shift if she become a dishwasher indicates its willingness to accommodate her preference for daytime hours. Accordingly, we shall dismiss this allegation.

C. Employee Paula Souers' Performance Evaluation

We find, contrary to our dissenting colleague, that the judge correctly dismissed the allegation that Respondent FMC violated Section 8(a)(3) and (1) of the Act by giving employee Paula Souers a negative performance evaluation because of her union activities. Souers worked as a nutrition assistant in ancillary services and was an active union supporter, sometimes openly engaging in union solicitation in the hospital's cafeteria.

In late July, Souers, who was off-duty, entered the kitchen and spoke with three on-duty kitchen employees for approximately 30 minutes. Supervisor Frances Otero sporadically observed those conversations and eventually approached Souers and told her that she should not disrupt working employees.[15] Souers immediately left the kitchen. Otero testified that he does not allow off-duty employees to talk to working employees for more than 5 minutes and that he had not approached Souers sooner because, at the time, he had believed that her conversations would be brief.

On August 10, Director Drake gave Souers her annual performance evaluation, which evaluated her in seven core competencies. In each core competency, an employee receives a rating from 1 to 5 denoting, respectively, Unsatisfactory, Needs Improvement, Meets Standards, Exceeds Standards, and Exceptional. Overall, Souers' evaluation was positive, and she was recommended for a 4-percent wage increase. She was rated "Exceeds Standards" in four core competencies, and "Meets Standards" in two others. In the remaining core competency, "Legal Issues," Souers was rated "Needs Improvement." In related commentary, the appraisal states that Souers had violated a policy against recording a staff meeting without the consent of all participants. The commentary further states, "You need to conduct off work business in public areas and not interfere with employee [sic] during their shifts." Drake testified that this comment was a reference to the late July incident in which Souers had interfered with the work of on-duty employees.

The judge found that Souers' negative rating in the single core competency was due to her disregard for well-established and lawful work rules that limited kitchen conversation between on-duty and off-duty kitchen employees to relatively brief exchanges. We agree. Director Jeanine Drake testified without contradiction that the relatively low rating and commentary stemmed from the incident described above. Further, the record indicates that Souers' extended, 30-minute interference with the on-duty employees' work was unprecedented, and directly contrary to the policy that such conversations be limited to a few minutes. Accordingly, we shall dismiss this complaint allegation.

Unlike our dissenting colleague, we do not find that FMC's rebuttal case is undermined by the fact that FMC considered the July incident under the "Legal Issues" core competency. Nothing in its description precludes such consideration, and we will not second guess FMC's choice of evaluation factors here. Additionally, we disagree with our dissenting colleague that Supervisor Otero's on-and-off observation of Souers' discussions with the on-duty employees undermines FMC's rebuttal case. After Otero determined that Souers' interference with their work had extended much longer than brief conversations tolerated by FMC, he intervened and instructed Souers to leave.

D. Rule Against Photographing Hospital Patients, Property, or Facilities

In April, after a hospital visitor photographed a patient, other visitors, and hospital employees using a cell phone camera, FMC began reviewing its policies regarding patient privacy. In July, FMC issued an updated portable electronic equipment policy, which prohibited the use of electronic equipment during worktime and which further provided that "[t]he use of cameras for recording images of patients and/or hospital equipment, property, or facilities is prohibited." The General Counsel contends that this policy violated the Act. We agree with the judge that it does not.

[15] No exception was filed to the judge's dismissal of an allegation that this warning violated Sec. 8(a)(1) of the Act.

An employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). In determining whether a work rule is unlawful, the Board must, however, "give the rule a reasonable reading." *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). "It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." Id. Under *Lutheran Heritage Village-Livonia*, a work rule is unlawful if it *expressly* restricts Section 7 activity. Even if the rule does not expressly restrict Section 7 activity, the work rule will be found unlawful upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to Section 7 activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. Id. at 647.

We agree with the judge that FMC's rule restricting photography of hospital property is not unlawfully overbroad as it does not have a reasonable tendency to interfere with Section 7 activities. *Lutheran Heritage Village-Livonia*, supra. First, FMC's rule against photographing hospital property does not expressly restrict Section 7 activity. Further, like the judge, and contrary to our dissenting colleague, we find that employees would not reasonably interpret the rule as restricting Section 7 activity. The privacy interests of hospital patients are weighty, and FMC has a significant interest in preventing the wrongful disclosure of individually identifiable health information, including by unauthorized photography. See, e.g., 42 U.S.C. § 1320d-6 (prohibiting wrongful disclosure of individually identifiable health information). Employees would reasonably interpret FMC's rule as a legitimate means of protecting the privacy of patients and their hospital surroundings, not as a prohibition of protected activity. Finally, there is no evidence that FMC promulgated the rule in response to Section 7 activity or that FMC actually applied the rule to prohibit Section 7 activity. The General Counsel does not argue, much less establish, that any photography that predated the rule's promulgation was protected by Section 7. Accordingly, we shall dismiss this allegation.

E. Threat that Unionization Would be Futile

On June 29, FMC's president, Bradel, and its vice president for ancillary services, Roger Schuler, conducted a meeting with 25 to 30 employees in FMC's dietary department. During the meeting, Bradel asked employees whether they had any issues or problems, and several employees raised employment-related concerns about various subjects.[16] Bradel then told employees that he appreciated this direct contact with them and that it was valuable in building their relationship. Bradel stated that he knew about the union campaign, and added that it would be difficult to have such direct communication if the employees elected a union. When an employee responded that the employees needed representation, Bradel replied that, if there was a union, "I would not be negotiating with the union" or "you won't be negotiating with me."

The judge dismissed the allegation that this statement threatened employees that unionization would be futile, finding that employees would reasonably understand it to mean that Bradel himself would not attend bargaining sessions if the Union were elected. We disagree. "The test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction." *Double D Construction Group, Inc.*, 339 NLRB 303, 303–304 (2003), cited with approval in *Joseph Chevrolet, Inc.*, 343 NLRB 7, 8 (2004), enfd. 162 Fed. Appx. 541 (6th Cir. 2006). In context, employees could have reasonably construed Bradel's statement as indicating that FMC would not bargain with the Union. Bradel is the Respondent's highest-ranking official, and his declaration that he would not negotiate with a union was made in direct response to an employee's assertion that employees needed union representation. Given that context, employees could reasonably interpret Bradel to mean that FMC did not intend to bargain with the Union. Cf. *Redwing Carriers, Inc.*, 165 NLRB 60, 83 (1967) (employer violated Sec. 8(a)(1) when company president told employees that "he would not 'sit down at a table and negotiate with the Teamsters'").

We disagree with our dissenting colleague's assertion that the *only* reasonable interpretation of Bradel's remark is that Bradel personally would not attend negotiations and that others would represent FMC at the bargaining table. Bradel's remark was not made in the midst of a discussion of who, amongst FMC's officials, would be sitting at the bargaining table. Rather, as stated above, Bradel uttered his declaration immediately after an employee stated that he felt employees needed representation. As construed by the dissent, Bradel's remark is a non sequitur. Employees would more naturally interpret it as a comment on the futility of the union representation that the employee had just stated was needed. Accordingly, we reverse the judge and find that Respondent

[16] As stated above, we adopt the judge's dismissal of the complaint's allegation that FMC unlawfully solicited employees' grievances and implicitly promised to remedy them during this June 29 meeting.

FMC conveyed an implicit threat that unionization would be futile.

F. Threat to Eliminate Scheduling Flexibility

FMC has a practice of permitting employees to trade shifts, and employees regularly availed themselves of this practice. In June, several employees conversed in the diet office in the presence of their supervisor, Lisa Dominguez. Nutrition assistant Heather Craig raised the subject of the Union, stating that she thought union representation would benefit the employees. In response, Supervisor Dominguez stated that she had just returned from a meeting with the director of the dietary department, Jeanine Drake, who told her that "if [the employees] got the Union in that [they] would no longer be able to switch shifts and that [their] schedules would be set." Craig asked Dominguez whether she was serious, and Dominguez reiterated that Director Drake had indeed made the comment.

The judge dismissed this allegation, finding that employees could have reasonably understood that Dominguez' statement conveyed Drake's assessment of working conditions under a union contract, rather than a threat that FMC would retaliate against employees if they unionized. However, the comment was not couched in terms of what the Union might try to achieve in bargaining or what terms and conditions might result from good-faith negotiations. Rather, Dominguez relayed to employees Director Drake's definitive statement that, if the Union came in, employees' scheduling flexibility would be lost. Such a comment has a reasonable tendency to interfere with employees' union activities, and violates Section 8(a)(1). *North Star Steel Co.*, 347 NLRB 1364, 1365–1366 (2006) (employer unlawfully threatened that, if the union got in, the employer would no longer have the flexibility to reduce hours during an economic downturn and would have to lay off employees); *St. Joseph Ambulance Service*, 346 NLRB 1311, 1314 (2006) (employer violated the Act by stating that "if we voted for a union . . . he wouldn't be able to be as flexible [regarding schedules] with students like us"); cf. *Exelon Generation Co.*, 347 NLRB 815, 826 (2006) (employer engaged in objectionable conduct by informing employees that "management flexibility would be lost and supervisors would no longer be able to let an employee leave work early or come in late").

G. Discharge of Michael Conant

Michael Conant was employed by FMC as a housekeeper until his discharge on August 1, purportedly for excessive absences. At all relevant times, FMC maintained a written attendance policy that provides, "More than three (3) occurrences of unscheduled absences within a six (6) month time period *may* result in counseling and departmental follow-up." (Emphasis added.) The written attendance policy contains a table, reproduced below, setting forth potential disciplinary action for a given number of unscheduled absences in a rolling 6-month or 12-month period. FMC acknowledged that, prior to mid-June, it did not strictly impose the disciplinary action set forth in the chart.

Occurrences	Action
4 occurrences in any rolling 6 month period, or 7 in any 12 month period.	Verbal warning. Discussion of extenuating circumstances or medical problems employee may be experiencing.
5 occurrences in any rolling 6 month period, or 8 in any 12 month period.	Written warning. Discussion of absenteeism; recommend EAP if appropriate.
6 occurrences in any rolling 6 month period, or 9 in any 12 month period.	Final Warning. Discussion of possible extenuating circumstances with employee and Human Resources: possible 3 day suspension without pay.
7 occurrences in any rolling 6 month period, or 10 in any 12 month period.	Termination.

Conant received several corrective actions, including a verbal warning, a written warning, and a suspension, for absences that predated any of his union activity. In July 2006, Conant received a verbal warning because of four unscheduled absences in a 6-month period. In November 2006, Conant received a written warning because of nine unscheduled absences in a 6-month period. Conant had an unscheduled absence in mid-January, but FMC did not discipline him. Conant had another unscheduled absence in February 2007, and he received a final written warning and 3-day suspension for having seven unscheduled absences within a 6-month period. Conant had unscheduled absences on May 18, June 13 and 14, and July 3—putting him at 11 absences in 12 months—but Conant was not disciplined for any of those absences.

Starting in early July, Conant began wearing a union button to work every day. On July 27, Conant had his 12th unscheduled absence in a rolling year, and FMC discharged him on August 1, citing those absences.

We analyze this discriminatory discharge allegation under *Wright Line*, supra at 1083. Here, Conant engaged in union activity when he openly wore a union button in the workplace throughout July, and it is undisputed that FMC had knowledge of that open union activity.

Respondent FMC's union animus is established through its numerous violations of Section 8(a)(1). FMC

does not except to the judge's findings that it unlawfully created the impression in April that its employees' union activities were under surveillance, threatened employees in July with unspecified reprisals if they supported the Union, surveilled and restricted employees' union activity in a break room in August, and, on repeated occasions, instructed employees during their performance evaluations not to discuss their wages with others. We have also found that FMC further violated the Act when it threatened in June that unionization would be futile, threatened in June to eliminate scheduling flexibility, interrogated employees about union activity in March and August, and threatened an employee with layoff in August. Those numerous and varied violations of the Act, which occurred relatively close in time to Conant's discharge, fully support a finding of antiunion animus. See, e.g., *Lee Builders, Inc.*, 345 NLRB 348, 349 (2005) (inferring animus motivated discharge in part from unlawful interrogation); *BRC Injected Rubber Products,* 311 NLRB 66, 72 (1993) (inferring animus motivated refusal to hire in part from repeated acts of interrogation and surveillance). In addition, the timing of Conant's discharge suggests unlawful motivation. Thus, FMC claims that its written attendance policy compelled Conant's discharge and that it began strictly applying that policy after Joe Brown replaced Vivian Kasey as director of the environmental services department in mid-June. This is belied by the facts. Conant himself was not discharged for his 11th absence on July 3. Additionally, 3 weeks after FMC discharged Conant, it imposed only a 3-day suspension on housekeeper Monika Thompson for having nine absences within a 6-month period, even though the written policy called for discharge.[17] Finally, after Brown replaced Kasey, FMC continued to impose lesser discipline on other employees than that called for by the written policy.[18] In light of this record, FMC's claim of strict adherence to the written policy is baseless and supports a finding of unlawful motivation.[19]

In support of its argument that it satisfied its *Wright Line* rebuttal burden of proving that it would have discharged Conant even absent his union activity, Respondent FMC cites its written attendance policy and claims that it merely strictly applied that policy, which mandated Conant's discharge. As explained above, the record is replete with evidence that FMC did not strictly adhere to its written attendance policy both before and after Conant was discharged. Cf. *Hialeah Hospital*, 343 NLRB 391, 392 (2004) (employer failed to satisfy *Wright Line* rebuttal burden by pointing to written policy that had gone unenforced). Our dissenting colleague claims that FMC's record of lax enforcement does not undermine its rebuttal case because there is no evidence that FMC failed to discharge any employee who, like Conant, had received a final written warning and had amassed unscheduled absences 20-percent above the threshold for discharge. However, the burden is not on the General Counsel to prove that a similarly situated employee received lesser discipline than Conant. Rather, the burden is on FMC to prove that it would have discharged Conant even absent his union activity. Given FMC's lax enforcement of its written policy—especially its failure to discharge Conant for his 10th and 11th unscheduled absences before he engaged in open union activity—we are unable to find that FMC met its rebuttal burden. Accordingly, we reverse the judge and find that Conant's discharge violated Section 8(a)(3) and (1) of the Act.

H. Change to Laverne Gorney's Work Schedule

We find merit in the General Counsel's exception to the judge's dismissal of the allegation that the Respondent changed employee Laverne Gorney's work schedule by increasing her weekend shifts in violation of Section 8(a)(3) and (1). Gorney worked for FMC for 10 years, serving most recently in the cafeteria as a dishwasher. During 2007, Gorney customarily worked Monday through Friday, but occasionally worked a weekend shift. For example, in May, FMC did not schedule Gorney to

[17] Director Brown testified that he did not discharge Thompson because she had not previously been issued a final warning or 3-day suspension, but the written policy does not require such a warning, and Brown testified that he *could have* discharged her under the policy. The point is that FMC did not strictly apply its written policy.

[18] In the following instances, FMC issued lesser discipline than that set forth in the chart. On September 26, FMC issued Theressa Willis a written warning for seven absences in a 6-month period. On July 12, FMC issued Veda Kim a written warning for six absences within a 6-month period. On September 26 and October 26, FMC issued verbal warnings to Melissa Demers and Joseph Gonzales, respectively, for five absences in a 6-month period. On December 12, FMC issued a verbal warning to Joshua Johnson for six absences within a 6-month period.

[19] The judge credited Director Joe Brown's testimony that he was not influenced by any of Conant's union activity when he decided to discharge Conant. However, "the question of motivation where an alleged unlawful discharge is involved is not one to be answered by crediting or discrediting a respondent's professed reason for the discharge, and thus we cannot accept every credibility finding by a trier of fact as dispositive of that issue." *Charles Batchelder Co.*, 250 NLRB 89, 89–90 (1980). Rather, that question is one to be resolved based on consideration and weighing of all the relevant evidence. Id.; see also *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1960) ("self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved"). We note that Brown was not the only decisionmaker or even the final authority regarding the decision to discharge Conant. Brown recommended to VP Schuler that Conant be discharged, and Schuler reviewed and approved that recommendation. Given these facts, and the ample record of FMC's union animus, we cannot find that Brown's testimony establishes that Conant's union activity played no role in his discharge.

work any weekend shifts. In late May, Gorney appeared in a prounion advertisement in the Arizona Daily Sun, and FMC was aware of it. Beginning in early June, FMC started assigning Gorney three or four weekend shifts per month, which, as the judge found, was "very unusual" for Gorney.[20] On the weekend shifts, Gorney had to perform some unspecified tasks in addition to her normal duty of washing pots and pans. Around this time, FMC also made unspecified changes to the schedules of certain unidentified employees.

The judge found no probative evidence that the change in Gorney's schedule and/or job duties was motivated by unlawful considerations. We disagree.

The General Counsel satisfied his initial burden of demonstrating that Gorney's union activity was a motivating factor in the schedule change. *Wright Line*, supra at 1083. Gorney engaged in union activity in late May, when she appeared in the prounion newspaper advertisement, and the Respondent learned about it shortly thereafter. As explained above, FMC's union animus is evidenced by its numerous violations of the Act. Additionally, we find probative the timing of Gorney's very unusual schedule change, coming as it did on the heels of her appearance in the pro-union advertisement. See, e.g., *Detroit Paneling Systems,* 330 NLRB 1170, 1170 (2000) (relying on suspicious timing in finding that union activity was motivating factor in discharge).[21]

We reject FMC's claim that it changed Gorney's schedule based on the need to have Gorney train other employees. The testimony cited by FMC in support of that assertion related not to the unusual weekend shifts that began in June, but rather to an increase in Gorney's hours that occurred in late July or August. And although Gorney had worked some weekend shifts in the past, and FMC routinely changed employees' schedules, that does not explain FMC's decision in early June to assign Gorney a "very unusual" amount of weekend shifts per month, just days after she expressed her union support in a newspaper ad. Unlike our dissenting colleague, we cannot find that Respondent FMC satisfied its *Wright Line* rebuttal burden by showing that, around the time that it changed Gorney's schedule, it made unspecified changes to the schedules of other unidentified employees. FMC's evidence is too vague to meet its burden of proving that it would have changed Gorney's schedule in the manner it did, when it did, absent her union activity. Accordingly, we find that FMC violated Section 8(a)(3) and (1) of the Act by assigning Gorney the additional weekend shifts.

I. Joint Employer

The complaint alleges that Respondent FMC and Respondent Sodexho are joint employers of the housekeeping employees in FMC's environmental services department and are jointly and severally liable for several of the alleged unfair labor practices.[22] We agree with the judge that the General Counsel failed to prove a joint-employer relationship.

The test for joint-employer status is whether two entities "share or codetermine those matters governing the essential terms and conditions of employment." *Laerco Transportation*, 269 NLRB 324, 325 (1984). To establish a joint-employer relationship, the General Counsel must prove that one employer "meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction of the other employer's employees." Id; see also *Hobbs & Oberg Mining Co.*, 297 NLRB 575, 586 (1990), enfd. mem. 940 F.2d 1538 (10th Cir. 1991).

Here, the judge found that Sodexho's managers "play no role in formulating policy as it relates to hiring criteria, terms and conditions of employment, rates of pay, performance appraisal criteria and raises, and discharge and disciplinary criteria," finding instead that those matters were dictated to Sodexho's managers through FMC's policy manual. Additionally, the judge found that "FMC requires strict conformity by Sodexho with all FMC policies and guidelines pertaining to the employer-employee relationship, and Sodexho has no independent authority to modify or deviate from the parameters established by FMC."

On exception, the General Counsel cites some additional testimony by FMC's vice president, Schuler, to the effect that Sodexho's managers and supervisors attended FMC meetings and participated in the discussion and setting of policies. However, the General Counsel did not elicit any specific information regarding such participation, and, as stated above, Schuler also testified that Sodexho's managers played *no role* in formulating or deciding policy as it relates to terms and conditions of

[20] The Respondent does not except to the judge's finding that the additional weekend assignments were "very unusual" for Gorney.

[21] We reject Respondent FMC's argument that Gorney's schedule change did not amount to an adverse employment action cognizable under the Act. Which days of the week an employee works certainly constitute a term or condition of employment. Cf. *Willamette Industries,* 341 NLRB 560, 562 (2004) (change from two shifts to three rotating shifts "constituted a discriminatorily motivated adverse change in employment conditions").

[22] Those alleged unfair labor practices include discrimination against Michael Conant and Barbara Mesa, surveillance of Mesa's union activity in March, creation of an impression it was surveilling employees' union activity, and disparaging the Union. We have dismissed or found it unnecessary to pass on all of those allegations, except that we have found that Conant was unlawfully discharged.

employment. That record does not provide a sufficient basis for finding joint-employer status.

Likewise, the evidence regarding Sodexho's role in hiring, discharging, disciplining, supervising, and evaluating housekeepers does not establish that Sodexho shared or codetermined essential terms and conditions of employment. Contrary to our dissenting colleague's assertion, joint-employer status is not established merely because Sodexho's managers interviewed candidates and made recommendations to FMC about whom to hire and fire. *Lee Hospital*, 300 NLRB 947, 949 fn. 13, 950 (1990) (company's role in recommending applicants for hire insufficient to establish joint employer relationship); *AM Property Holding Corp.*, 350 NLRB 998, 1002 (2007) (same), order modified 352 NLRB 279 (2008), supplemented 355 NLRB 735 (2010), enfd. in relevant part 2011 WL 3252308 (2d Cir. 2011); *Martiki Coal Corp.*, 315 NLRB 476, 478 (1994) (same).[23] FMC retained final authority over hiring decisions, and there is no evidence that any Sodexho official hired or discharged an employee without FMC's approval. Indeed, as our dissenting colleague acknowledges, FMC did not approve all of Sodexho's hiring recommendations. Sodexho's limited authority to make recommendations to FMC officials, consistent with FMC's policies and subject to FMC's final approval, is insufficient to prove joint-employer status.

We further find that the General Counsel has failed to establish that Sodexho's daily supervision of the housekeeping employees' work gave rise to a joint-employer relationship. "The Board has held that evidence of supervision that is 'limited and routine' in nature does not support a joint employer finding." *AM Property Holding Corp.*, supra at 1001 (quoting *G. Wes Ltd. Co.*, 309 NLRB 225, 226 (1992)). Supervision is found "limited and routine" where the supervisor's instructions consist primarily of telling employees what work to perform, or where and when to perform the work, but not how to perform it. Id. The General Counsel and our dissenting colleague fail to point to evidence that Sodexho's supervision extended beyond the limited and routine.

The reliance of the General Counsel and our dissenting colleague on Sodexho's role in employee evaluations is likewise unavailing. Although Sodexho's supervisors evaluate the housekeepers, it is undisputed that they do so based on criteria established by FMC. In addition, FMC, not Sodexho, determines the amount of annual wage increases. Sodexho has no authority to depart from FMC's evaluation criteria or adjust the amount of the annual increases decided upon by FMC. Regarding disciplinary matters, there is no evidence that Sodexho, without input and approval from FMC, has suspended or discharged a housekeeper or codetermined disciplinary standards. Cf. *Lee Hospital*, 300 NLRB at 949–950 (company's limited disciplinary authority to give oral and written reprimands insufficient to establish joint-employer status).

Our dissenting colleague relies heavily on the management agreement between FMC and Sodexho, which requires FMC to "hire, discharge, or discipline supervised employees upon Sodexho's reasonable request if such action is in accordance with FMC's employment policies and procedures." However, "[i]n assessing whether a joint-employer relationship exists, the Board does not rely merely on the existence of such contractual provisions, but rather looks to the actual practice of the parties." *AM Property Holding Corp.*, supra at 1000. As explained above, the actual practice of the parties did not involve Sodexho codetermining essential terms and conditions of employment of the housekeeping employees. Moreover, even the terms of the management agreement themselves undermine the General Counsel's claim of joint-employer status. Under the provision, Sodexho's request must be reasonable and consistent with FMC's policies—which, as explained above, Sodexho had no role in formulating. Finally, the inclusion of an indemnification clause in the management agreement between FMC and Sodexho simply does not establish that Sodexho and FMC shared or codetermined essential terms and conditions of employment. For these reasons, we affirm the judge's finding that joint-employer status has not been established here.[24]

III. AMENDED REMEDY

Having found that Respondent FMC has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(3) and (1) by discharging Michael Conant, we shall order Respondent FMC to offer him full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his senior-

[23] *Computer Associates International*, 332 NLRB 1166 (2000), enf. denied 282 F.3d 849 (D.C. Cir. 2002), relied upon by the General Counsel, is distinguishable. In that case, Computer Associates "directly hired" engineers who were employed by Cushman. Id. at 1168. In adopting the judge's finding of joint-employer status, the Board "placed particular reliance" on Computer Associates' role in hiring Cushman's engineers as well as its "ongoing, close, and substantial supervision" of them. Id. at 1166 fn. 2.

[24] Chairman Liebman joins the majority opinion on this issue, consistent with the Board's current joint-employer doctrine. While she has questioned that doctrine, see, e.g., *AM Property Holding Corp.*, 350 NLRB at 1011–1012, she believes that the result reached here is correct under existing law.

ity or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, Respondent FMC shall be required to remove from its files any references to Conant's unlawful discharge, and to notify him in writing that this has been done and that the discharge will not be used against him in any way.

Having found that Respondent FMC unlawfully changed employee Laverne Gorney's work schedule, we shall order it to rescind the shift change, to remove from its files any references to her unlawful schedule change, and to notify her in writing that this has been done and that the schedule change will not be used against her in any way.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Flagstaff Medical Center, Inc., Flagstaff, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their union membership, activities, sympathies, and/or support.

(b) Placing employees under surveillance while they engage in union or other protected concerted activities.

(c) Warning employees that they should be careful about associating with union advocates.

(d) Directing employees not to discuss their wages with other employees.

(e) Threatening employees that if the Union negotiates a raise for employees, budgetary considerations would cause the layoff of recently hired employees.

(f) Threatening employees that selecting a union representative would be futile.

(g) Threatening to eliminate employees' scheduling flexibility if employees select a union representative.

(h) Prohibiting employees from engaging in union activity in the emergency department break room.

(i) Discharging, changing the work shift, or otherwise discriminating against employees for supporting the Union or any other labor organization.

(j) 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 Michael Conant full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Michael Conant whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Rescind the unlawful change to Laverne Gorney's work schedule.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and unlawful schedule change, and within 3 days thereafter, notify Conant and Gorney in writing that this has been done and that the discharge and shift change will not be used against them in any way.

(e) Within 14 days after service by the Region, post at its Flagstaff, Arizona facility copies of the attached notice marked "Appendix."[25] 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 and maintained for 60 days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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 facilities 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 in since March 31, 2007.

(f) Within 21 days after service by the Regional Office, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that FMC has taken to comply.

[25] 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."

MEMBER PEARCE, dissenting in part.

When its employees engaged in protected organizational activities, Flagstaff Medical Center, Inc. (Respondent FMC) responded with a series of unlawful actions that interfered with their Section 7 rights. I concur in the majority's findings that FMC unlawfully interrogated employees about union activities; prohibited them from discussing their wages; surveilled and restricted their union activity; created the impression of surveillance; and threatened employees on numerous occasions. Additionally, I join the majority's findings that FMC unlawfully discriminated against Michael Conant and Laverne Gorney because of their union activities.

Contrary to my colleagues, I would additionally find that Respondent FMC violated Section 8(a)(3) and (1) of the Act by changing employee Lydia Sandoval's work shift and by issuing a negative performance appraisal to employee Paula Souers because of their union activities, and violated Section 8(a)(1) of the Act by promulgating and maintaining a rule banning all photography in the workplace. I also dissent from the majority's finding that Respondent FMC and Respondent Sodexho are not joint employers of the housekeepers in the environmental services department.[1]

A. Change to Lydia Sandoval's Work Shift

Respondent FMC transferred employee Lydia Sandoval from the day shift to the afternoon shift a mere 2 weeks after she expressed her union support to a manager in response to an interrogation my colleagues agree was unlawful. Contrary to my colleagues, I would also find that the shift change violated Section 8(a)(3) and (1) of the Act. The General Counsel satisfied his initial burden of proving that Sandoval's union support was a motivating factor in the shift change. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Sandoval's union activity and FMC's knowledge of it are indisputable. In March, under unlawful questioning, Sandoval revealed to FMC's director of the dietary department, Jeanine Drake, that she would support the Union and that she thought the Union would be better for everybody. FMC's union animus is established through its many and varied violations of Section 8(a)(1), including its unlawful threats, surveillance, interrogations, and restrictions on union activity. The suspicious timing of the shift change—a mere 2 weeks after Sandoval revealed her union support to Drake—also constitutes strong evidence that FMC was unlawfully motivated.[2]

The burden thus shifted to FMC to prove that it would have changed Sandoval's shift in March even absent her union support. *Wright Line*, supra at 1083. The Board has long held that "[a]n employer cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Key Food*, 336 NLRB 111, 112 (2001) (citations omitted). FMC claims to have changed Sandoval's shift in part because she had a history of being absent from her workstation for 30 minutes or more. However, FMC had received complaints about Sandoval's absences long before changing her shift and did not even mention that conduct when it informed her of the change. Nor did she receive any discipline for the alleged infractions. Importantly, FMC also fails to explain how a shift change would remedy the purported problem, especially in light of the fact that it did not inform her that it was a reason for the shift change. FMC further claims that it changed Sandoval's shift in part to improve efficiency and productivity, as it was simultaneously transferring a presentation chef from the afternoon shift to the day shift. However, FMC fails to explain why the change in the presentation chef's shift necessitated a shift change for a cook, much less that it would have selected Sandoval among the cooks absent her union activity. Finally, FMC claims to have partially relied on the fact that Sandoval had catering knowledge that she could use on the afternoon shift. But that explanation is undermined by the fact that FMC offered to let Sandoval remain on the morning shift if she would agree to become a dishwasher. Put simply, FMC's hodgepodge of proffered justifications amount to nothing more than pretext, with the true reason for her transfer being retaliation for union support.

B. Negative Appraisal Given to Paula Souers

Similarly, I would find that Respondent FMC violated Section 8(a)(3) and (1) of the Act by issuing a negative performance appraisal to nutrition assistant Paula Souers, who, as the judge found, was "one of the Union's most active proponents." While serving as a union "organizer," she gave union information to employees, handed out flyers, answered employees' questions, and went to union meetings. She sometimes wore a union button at work. Souers took leave from work during July and vis-

[1] I agree with the remainder of the majority decision.

[2] The judge dismissed the 8(a)(3) allegation after he credited Supervisor Auggie Robledo's testimony that union activity played no role in the shift change, stating "there is no contrary evidence." As explained in the majority opinion, the question of motivation here is not one to be answered by crediting a decisionmaker's testimony that union activity played no role in an adverse action. See *Charles Batchelder Co.*, 250 NLRB 89, 89–90 (1980). For the reasons I stated above, a proper application of *Wright Line* reveals that Sandoval's union activity was a motivating factor in the shift change.

ited the hospital's cafeteria, where she solicited employees to sign an election petition. Director Drake observed Souers soliciting signatures at least twice. In late July, Souers, who was off-duty, spoke with three on-duty kitchen employees for approximately 30 minutes. Supervisor Frances Otero observed Souers' interactions on-and-off during this period and eventually approached and instructed her not to disrupt working employees. Souers departed immediately.

On July 30, Director Drake sent an email to Vice President Roger Schuler and Patricia Crofford, the vice president of human resources for FMC's parent company, Northern Arizona Healthcare, reporting that she had observed Souers and a coworker in the dining room and patio area where "[i]t appeared they were trying to get employees to sign something." Less than 2 weeks later, on August 10, Director Drake gave Souers her annual performance evaluation. Drake rated Souers a "2," a negative rating indicating "needs improvement," in the "Legal Issues" element. The appraisal commentary stated, "You need to conduct off work business in public areas and not interfere with employee [sic] during their shifts."[3]

The General Counsel easily satisfied his initial *Wright Line* burden of proving that Souers' union activity was a motivating factor in her negative performance appraisal. It is undisputed that Souers engaged in extensive union activity and that FMC had knowledge of it. FMC's union animus is established through its many instances of unlawful threats, surveillance, interrogations, and restrictions on union activity. Additionally, Director Drake's July 30 email, reporting to upper management on Souers' solicitation of employee signatures, strongly suggests that the negative appraisal, given just 2 weeks later, was connected to Souers' union activity. FMC claims it issued the negative rating because of the late-July incident in which Souers interfered with the work of several on-duty employees. But that incident has no relevance to any of the evaluation factors encompassed by the "Legal Issues" element, which focuses on complying with Federal and State laws and safeguarding privacy and confidentiality. [4] Second, Director Drake admitted that FMC had encountered "this kind of problem . . . before, where employees were kind of socializing too much at work," and that she had not included negative comments in those employees' appraisals. Although Drake testified that Souers' incident was unique because her conversations lasted 30 minutes, Supervisor Otero observed and tolerated them for that period, when she could easily have stopped them sooner. Moreover, Souers departed immediately when asked. Not surprisingly, none of the on-duty employees who participated in those conversations received negative ratings because of the incident. On this record, I would find that the negative rating was retaliatory and violated the Act.

C. Ban on Photography

Under *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004), "an employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights." FMC maintained a work rule providing, "[t]he use of cameras for recording images of patients and/or hospital equipment, property, or facilities is prohibited." Employees would reasonably construe the rule as prohibiting all photography of hospital property, including photography performed in concert for mutual aid or protection. Photography—like solicitation, distribution, and audio recording—is protected by Section 7 if employees are acting in concert for their mutual aid or protection and no overriding employer interest is present. Cf. *Hawaii Tribune-Herald*, 356 NLRB 661, 661, 663 (2011) (employer promulgated and maintained an overly broad rule prohibiting employees from making secret audio recordings). For example, Section 7 would protect two employees who concertedly photographed an unsafe working condition, such as a smoking electrical outlet, to document it and press for its repair. FMC's ban, which is absolute, would reasonably tend to restrain such protected photography. Therefore, it violates Section 8(a)(1). The majority dismisses this allegation because the rule does not explicitly restrict conduct protected by the Act and because FMC has not yet applied the rule to prohibit photography that is protected by the Act. Clearly, however, the rule violates Section 8(a)(1) given that employees would reasonably construe the rule's language to prohibit Section 7 activity. *Lutheran Heritage Village-Livonia,* supra.[5]

[3] Drake testified without contradiction that this comment was a reference to the late July instance in which Otero warned Souers against interfering with the work of on-duty employees.

[4] The evaluation factors in the "Legal Issues" element are: (1) Maintains and respects confidentiality and ensures privacy in all matters pertaining to patients and their care, as well as matters related to employees and hospital business; (2) Ensures that appropriate consents for care and authorizations to obtain or release information are obtained; (3) Understands and supports current State and Federal rules, regulations, policies, and employment laws; (4) Performs all obligations required by the NAH Corporate compliance program including reporting violations of corporate compliance to supervisor or designee when indicated and assisting other departments/employees with compliance issues as may be applicable; and (5) Complies with Patient Rights (Hospital Policy # 190–02), if applicable.

[5] Respondent FMC could have avoided a violation by including a caveat that its rule does not apply to conduct protected by the Act. See *Lutheran Heritage Village*, 343 NLRB at 652 fn. 7 (then-Member

D. Joint Employer

Unlike my colleagues, I would find that the General Counsel demonstrated that Respondent FMC and Respondent Sodexho constituted joint employers of FMC's housekeeping employees. Consequently, I would find that the Respondents are jointly and severally liable for the unlawful discharge of Michael Conant. The record demonstrates that Sodexho's managers and supervisors codetermined essential terms and conditions of employment of FMC's housekeepers, including their hire, discharge, discipline, and performance appraisals. See *Laerco Transportation*, 269 NLRB 324, 325 (1984) ("evidence must show that one employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction of the other employer's employees"). Importantly, the management agreement expressly contemplates sharing of control over FMC employees' essential terms and conditions, *requiring* FMC to "hire, discharge, or discipline supervised employees upon Sodexho's reasonable request if such action is in accordance with FMC's employment policies and procedures." When considered along with the Respondents' actual practice of sharing control over employees' terms and conditions, this contractual provision fully supports a finding that FMC and Sodexho are joint employers.

In actual practice, Sodexho's managers played a major role in the hiring of FMC's housekeepers. A Sodexho manager, not an FMC manager, interviewed and evaluated applicants and recommended well-qualified candidates to FMC's human resources department for hire. Although FMC signed off on hiring decisions, the record indicates that Sodexho was the driving force behind them. Of the 15 applicants whom Sodexho Manager Joe Brown recommended for hire, FMC hired 14.[6] Sodexho's managers had authority to discipline FMC housekeepers, and they exercised that authority when, for example, Sodexho Directors Vivian Kasey and Joe Brown issued warnings to FMC employees for unscheduled absences. Sodexho likewise shared control over discharge decisions. Although Sodexho's managers did not have final authority to discharge FMC employees, Director Brown recommended two employees for discharge and FMC adopted his recommendations. Sodexho's control over employee tenure is further evidenced by Director Brown's testimony that, although he was to have discharged Theressa Willis for excessive absences under FMC's attendance policy, he decided, apparently without any input from FMC's officials, to merely issue a written warning. Regarding performance appraisals, Sodexho's managers and supervisors evaluated the performance of FMC's housekeepers, placing them in one of several performance categories. Sodexho's performance evaluations were particularly important because an FMC employee's merit wage increase depended upon the performance category in which he was placed. Finally, Sodexho's managers provided day-to-day supervision of the housekeepers' work and the Sodexho director established employees' work schedules.

Lee Hospital, 300 NLRB 947 (1990), heavily relied on by the judge and my colleagues, is distinguishable. Unlike here, the management agreement in that case did not *require* the direct employer to hire, discharge, or discipline its employees at the reasonable request of the putative joint employer. Thus, that case lacked a clear contractual arrangement between the two employers expressly providing for codetermination of the most essential of terms and conditions. Additionally, whereas the putative joint employer in *Lee Hospital,* supra, did not set the employees' work schedules, here, the housekeepers' schedules were made by Sodexho's managers. Finally, in finding that the putative joint employer's day-to-day supervision of the nurses did not compel a finding of joint-employer status in *Lee Hospital*, the Board emphasized that such supervision "related to the physician-nurse relationship and patient care issues." Id. at 950. Here, the employees at issues are housekeepers, not medical personnel, and the General Counsel has not shown that Sodexho's supervision is limited to patient-care issues.

Only by downplaying Sodexho's role in the sharing of control over essential terms and conditions and by ignoring the clear import of the management agreement does the majority erroneously conclude that the General Counsel failed to establish a joint-employer relationship here.

For the reasons above, I respectfully dissent in part.

MEMBER HAYES, dissenting in part.

Contrary to the majority, I would adopt the judge's dismissals of complaint allegations that the Respondent threatened employees that unionization would be futile in violation of Section 8(a)(1) of the Act and unlawfully discriminated against prounion employees Michael Co-

Liebman, dissenting) ("if the prohibited conduct is of a kind so general as to imply that protected activity may be encompassed, an employer can easily eliminate the ambiguity by adding a statement to its rule that the prohibition does not apply to conduct that is protected under the National Labor Relations Act").

[6] Additionally, the record suggests that FMC did not hire any housekeeper whom a Sodexho manager did not recommend for hire. Contrary to the assertion of my colleagues in the majority, the fact that FMC rejected a single hiring recommendation by Sodexho does not preclude a finding of joint-employer status.

nant and Laverne Gorney in violation of Section 8(a)(3) and (1) of the Act.[1]

A. Bradel's Alleged Threat

In my view, employees would not reasonably understand FMC President Bill Bradel's June 29 comments as a threat that unionization would be futile. As described more fully by the judge, Bradel and Roger Schuler, FMC's vice president for ancillary services, conducted a meeting with approximately 25 employees. The employees raised numerous workplace issues, and Schuler addressed several on the spot while deferring consideration of others. After the substantive discussions, Bradel told the employees that he "appreciated the direct contact" with them and that such direct communication would be difficult if they decided to unionize. Bradel added that he thought that unionization was not necessary for FMC. An employee then spoke up and said that he felt that employees needed representation. Bradel responded along the lines that, if there was a union, "I would not be negotiating with the union" or "you won't be negotiating with me." The General Counsel alleges that Bradel's latter statement(s) effectively threatened that unionization would be futile.

The judge correctly dismissed this allegation, reasoning that employees would reasonably understand Bradel to mean precisely what he said—that *he* personally would not be negotiating with the Union. My colleagues stretch Bradel's words beyond their reasonable meaning to infer a threat that *FMC,* as a corporate entity, would refuse to negotiate with the Union. Bradel referred to himself only—not to FMC more broadly. Moreover, the discussion leading up to his statement reinforces that Bradel was referring to himself only. Bradel had just finished telling employees that he appreciated having direct contact with them and that such contact would be difficult with a union representing them. The tenor of the discussion, focused as it was on direct contact between Bradel and the employees, was not changed by an employee's intervening remark that he felt that employees needed representation. In this context, employees would understand Bradel as communicating merely that he personally would not be present at the bargaining table and that others would represent FMC during negotiations.

B. Discharge of Michael Conant

In February 2007, employee Michael Conant received a final written warning and 3-day suspension for having seven unscheduled absences within a 6-month period. On July 27, 2007, he committed his 12th unscheduled absence in a rolling 12-month period, for which he was discharged on August 1, consistent with FMC's written attendance policy.

The judge credited the testimony of Joe Brown, director of the environmental services department, that Brown was not influenced by any of Conant's union activity when he decided to recommend that Conant be discharged for his excessive unexcused absences. Brown's recommendation was reviewed and approved by FMC's vice president, Roger Schuler. I am not persuaded that the general evidence of Respondent's animus against union activity outweighs Brown's credible testimony, and I would therefore find that the General Counsel did not meet his initial *Wright Line* burden of proving unlawful motivation.[2] However, even assuming arguendo that the General Counsel has met his burden of proving that Conant's union activity did play a role in his discharge, I would dismiss the complaint allegation because the Respondent demonstrated that it would have discharged Conant for excessive absences even absent his union activity. As the judge found and the General Counsel concedes, "Conant's absenteeism warranted his discharge in accordance with FMC's policy." As explained above, FMC's written attendance policy calls for an employee's discharge upon 10 unexcused absences in any rolling year. Conant's 12 unscheduled absences exceeds that termination threshold by 20 percent. In light of that record, and the judge's finding that Brown, from the beginning of his tenure as director of environmental services, "attempted to enforce FMC's policies with consistency because it was important that all employees be treated equally," leads inevitably to the conclusion that FMC would have discharged Conant had not engaged in any union activity.

My colleagues incorrectly conclude that FMC's rebuttal case is undermined by incidents of alleged lax enforcement of FMC's written attendance policy. However, none of the cited incidents involve anything close to Conant's egregious record of absenteeism. Unlike Co-

[1] I would find it unnecessary to pass on complaint allegations that Respondent FMC unlawfully interrogated employee Lydia Sandoval on two occasions. Any such findings of violations would be cumulative of other violations found and would not materially affect the remedy. I join the majority opinion as to the complaint's remaining allegations.

[2] *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.3d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Charles Batchelder Co., 250 NLRB 89 (1980), cited by the majority, states that the credited testimony of a respondent's witness as to the reason for a discharge is not dispositive of the ultimate question of motivation. That certainly does not preclude consideration of such testimony when weighing all of the relevant evidence on this question, or the possibility that other evidence does not outweigh the credited testimony.

nant, none of the cited individuals had received a *final written warning* for absenteeism followed by additional unexcused absences putting them 20 percent over the discharge threshold. For these reasons, I would dismiss this allegation.

C. Change of Laverne Gorney's Work Schedule

Assuming arguendo that the General Counsel proved that employee Laverne Gorney's union activities were a motivating factor in the decision to assign her four weekend shifts in June 2007, I also find that Respondent FMC proved that it would have assigned her those shifts even absent her union activities. Accordingly, I would adopt the judge's dismissal of this complaint allegation. *Wright Line*, supra.

FMC maintains a policy that "employees may be required to work different hours, shifts, overtime, holidays, and weekends, as the workload necessitates [and] . . . [t]here can be no guarantee that an employee will remain on any of the three shifts or that the employee will have certain days off." As the judge found, and consistent with that policy, FMC unilaterally changed the work schedules of its employees, including Gorney, over the years. Indeed, while Gorney typically worked Monday through Friday, she was assigned weekend shifts "quite a few" times in the year prior to her union activity. Hence, the four weekend shifts in June (of the 20 total shifts she worked that month) were not unprecedented. Critically, Gorney herself acknowledged at the hearing that FMC changed the work schedules of other employees at the same time it gave her the additional weekend shifts in June, and there is *no allegation* that those other, contemporaneous schedule changes were unlawful. My colleagues give short shrift to these contemporaneous changes. I would rely on them to find that Gorney's schedule change was part of FMC's normal course of business. Consequently, I would adopt the judge's dismissal of this allegation.

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 coercively interrogate you about your own or other employees' union membership, activities, sympathies, or support.

WE WILL NOT engage in surveillance of your union or other protected concerted activities.

WE WILL NOT warn you that you should be careful about associating with union advocates.

WE WILL NOT direct you not to discuss your wages with other employees.

WE WILL NOT threaten you that if the Union negotiates a raise for employees, budgetary considerations would cause the layoff of recently hired employees.

WE WILL NOT threaten you that selecting a union representative would be futile.

WE WILL NOT threaten to eliminate your scheduling flexibility if you select a union representative.

WE WILL NOT prohibit you from engaging in union activity in the emergency department break room.

WE WILL NOT discharge you, change your work schedule, or otherwise discriminate against you for supporting the Union or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

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

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

WE WILL rescind the change to Laverne Gorney's work schedule.

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

FLAGSTAFF MEDICAL CENTER, INC.

Mara-Louise Anzalone, Esq., for the General Counsel.
Steven D. Wheeless and *Alan M. Bayless Feldman, Esqs. (Steptoe & Johnson LLP),* of Phoenix, Arizona, for the Respondents.
Stanley M. Gosch, Esq. (Richard Rosenblatt & Associates, L.L.C.), of Greenwood Village, Colorado, for Communications Workers of America.
Donald W. Nielsen, Esq., of Fresno, California, for California Nurses Association.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice a hearing in this matter was held before me in Flagstaff, on 16 days between the dates of May 6 and September 25, 2008. The captioned charges filed by Communication Workers of America, Local Union 7019, AFL–CIO (CWA), were filed between the dates of August 7, 2007, and January 14, 2008. The charge filed by National Nurses Organizing Committee/California Nurses Association (CNA) was filed on September 4, 2007. On February 29, 2008, the Regional Director for Region 28 of the National Labor Relations Board (the Board) issued a final complaint and notice of hearing, entitled "Third Consolidated Complaint and Notice of Hearing," alleging violations by Flagstaff Medical Center, Inc. (Respondent or FMC), and Sodexho America, LLC (Respondent or Sodexho) of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondents, in their answers to the complaint, duly filed, deny that they have violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel (the General Counsel), and counsel for the Respondents. Upon the entire record,[1] and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent FMC, an Arizona corporation, with an office and place of business located in Flagstaff, Arizona, is a hospital engaged in the business of providing acute medical care and medical services. In the course and conduct of its business operations the Respondent FMC annually derives gross revenues in excess of $250,000, and annually purchases and receives goods valued in excess of $50,000 directly from points outside the State of Arizona. It is admitted and I find that FMC is, and at all material times has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

The Respondent Sodexho, a Delaware limited liability company, with an office and place of business in Flagstaff, Arizona, is engaged in the business of providing hospital facility management services for hospitals in various locations throughout the United States. In the course and conduct of its Arizona business operations Sodexho annually derives gross revenues in excess of $250,000 and annually purchases and receives goods valued in excess of $50,000 directly from points outside the State of Arizona. It is admitted and I find that the Respondent Sodexho is, and at all times material has been, and employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

It is admitted, and I find, that the CWA and the CNA are, and at all times material herein have been, labor organizations within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

The principal issues in this proceeding are whether Respondent FMC and Respondent Sodexho are joint employers, and whether Respondent FMC and/or Respondent Sodexho, have violated and are violating Section 8(a)(1) and (3) of the Act.

B. Facts

1. Background

FMC is a hospital located in Flagstaff, Arizona. It employs approximately 2000 employees and is one of three hospitals in a health care system organized under a corporate parent, Northern Arizona Healthcare.

Sodexho provides hospital management services and other types of services for hospitals throughout the United States. FMC has contracted with Sodexho to provide two types of services. Sodexho managers oversee day-to-day operations in one department, environmental services, commonly referred to as the housekeeping department; however, the housekeeping employees are hired and employed directly by FMC. Further, during the CWA organizing campaign involved herein, FMC began contracting with Sodexho to provide both the manager and the employees for another hospital function, known as transport services. Transport service employees provide transport services for patients while they are in the hospital, transporting them to and from various departments for tests and other procedures, and to their vehicles upon being released from the hospital.[2]

Prior to the matters involved herein, the CNA conducted an organizing campaign among the nurses employed by FMC. An election was held in which the CNA did not prevail. The CNA filed election objections, and a second election has been directed. The CNA has taken the position that the rerun election should be postponed pending the resolution of the instant matter which concerns a separate organizing campaign by a different union, the CWA, among ancillary service employees.

[1] The General Counsel's unopposed motion to correct the transcript is granted.

[2] It is alleged that this subcontracting to Sodexho of patient transport work, formerly provided directly by FMC, was not motivated by lawful business considerations, but rather was designed to chill union activity among the ancillary services employees in violation of the Act, causing them to fear that their jobs, too, might be contracted out if they continued to seek union representation.

While there are approximately 400 ancillary service employees in seven departments, the employees involved in this proceeding primarily consist of employees in two of those departments: Employees in the environmental services (EVS) or housekeeping department provide cleaning and linen services throughout the hospital; there are approximately 64 employees in this department. Employees in the dietary department, also known as the nutrition services department, provide food services, including the operation of the kitchen and cafeteria; nutrition assistants and dieticians who provide patient food services are also dietary department employees. There are approximately 30 employees in this department.

At all times material herein, Janine Drake has been the director of the dietary department. Drake and all supervisors under her authority are FMC employees.

At times material herein,[3] Vivian Kasey was the director of EVS until her departure, at which time she was succeeded by Joe Brown. Two supervisors or managers also assisted Kasey and Brown in EVS, namely, Linda Keeler and Rosemary Yazzi. These four-named individuals have been employed directly by Sodexho; however, the housekeeping employees under their supervision are directly employed by FMC.

2. Joint employer allegation

It is alleged that Respondent FMC and Respondent Sodexho are joint employers. The Respondents rely upon *Lee Hospital*, 300 NLRB 947 (1990), in which case the Board found, under circumstances analogous to the facts herein, that AAI, an entity hired to run a hospital's anesthesiology department, was not a joint employer with the hospital. The Board, after reviewing the relationship between the hospital and AAI, finding that the hospital independently determines labor relations policy and sets the wages, salary, and fringe benefits for the anesthesiology nurses, concluded "we do not find that AAI shares or codetermines those matters governing the essential terms and conditions of employment to an extent that it may be found to be a joint employer."

The agreement between FMC and Sodexho requires FMC to "hire, discharge or discipline Supervised Employees upon Sodexho's reasonable request if such action is in accordance with FMC's employment policies and procedures."

Roger Schuler is FMC's vice president for ancillary services, which includes EVS. Schuler testified that FMC has contracted with Sodexho to provide leased managers and supervisors for the EVS department. These managers and supervisors, according to Schuler, play no role in formulating policy as it relates to hiring criteria, terms and conditions of employment, rates of pay, performance appraisal criteria and raises, and discharge and disciplinary criteria. All these matters are dictated to Sodexho's managers and supervisors through FMC's policy manual which Sodexho has no input in formulating. Further, upon the recommended discharge of an EVS employee by a Sodexho manager, Schuler, has final authority to determine whether the employee should be discharged, and exercises the same authority over Sodexho managers that he exercises over FMC managers. In summary, FMC requires strict conformity by Sodexho with all FMC policies and guidelines pertaining to the employer-employee relationship, and Sodexho has no independent authority to modify or deviate from the parameters established by FMC. There is no contrary record evidence that is inconsistent with Schuler's testimony.

Accordingly, on the authority of *Lee Hospital,* supra, I find that FMC and Sodexho are not joint employers as alleged, and I shall dismiss this allegation of the complaint.[4] See also *Richmond Convalescent Hospital, Inc.,* 313 NLRB 1247, 1260–1261 (1994).

3. Contracting out the patient transport function to Sodexho

The complaint alleges that on or about August 3, FMC subcontracted its patient transport work to Sodexho in violation of Section 8(a)(3) and (1) of the Act.

Prior to August, FMC had a decentralized and departmentalized system for handling inpatient transporting services. It employed four ancillary services employees who were assigned to the Radiology department; these employees, who ultimately transitioned over to Sodexho (infra), performed patient transport services exclusively for radiology patients, transporting them to and from their hospital rooms for various radiology tests and procedures. Other inpatients requiring similar transporting services, including assistance from their rooms to their vehicles upon dismissal from the hospital, were transported within the hospital by a variety of hospital personnel, particularly nurses. Because there was no centralized and dedicated patient transport department and because of the lack of a computerized teletracking transport system, nursing employees would be utilized on an ad-hoc basis for often time-consuming transport functions and would thereby be under utilized for their primary nursing functions. This was inefficient, costly to the hospital, inconvenient for the patients who would have to wait for transport assistance, and added to the work of the nurses who thereby had less time to devote to their patients.[5]

FMC had been exploring a solution to this problem since 2004, as extensively detailed in the record. In February, FMC's executive board made the final decision to contract with Sodexho to perform the patient transport functions with Sodexho employees rather than FMC employees; in May, the contract was entered into with Sodexho; and in August, Sodexho assumed the patient transport function, and installed and fine-tuned an automated computer system, including remote pager devices to summon and keep track of transport employees throughout the hospital so that they could be utilized in the most efficient manner. The four FMC transport employees

[3] All dates or time periods hereinafter are within 2007, unless otherwise indicated.

[4] The cases cited by the General Counsel are inapposite, generally, in they do not deal with employers who contract with management companies to manage all or a portion of the employer's business operations and supervise the work of the employer's employees: See *NLRB v. Browning-Ferris Industries,* 691 F.2d 1117 (3d Cir. 1982); *Paramus Ford, Inc.,* 351 NLRB 1019 (2007); *Riverdale Nursing Home*, 317 NLRB 881, 882 (1995).

[5] Record evidence shows that the nurses, who were involved in an organizing campaign by the CNA, were very much in favor of a centralized patient transport system as this would relieve them of additional work responsibilities.

became Sodexho employees and, in addition, Sodexho began directly hiring additional transport employees. All the employees were trained by Sodexho and began wearing Sodexho uniforms.[6] It was anticipated that transport employees who exclusively performed this type of work would acquire expertise in handling a variety of transport situations that would enhance patient safety.

The General Counsel does not maintain that the new transport system was unnecessary or not a marked improvement over the prior method of transporting patients, but maintains that FMC should have itself set up the system in-house, furnishing its own managers and hiring the necessary employees; or, at the least, contracting out to Sodexho only the managerial and computerized functions of the new department, while retaining and hiring FMC employees to transport patients. Contracting out the entire project, so that transport employees are Sodexho employees and no longer employees of FMC, it is argued, has a "chilling effect" upon the union activity of the dietary and housekeeping employees[7] because such contracting out would reasonably cause them to be fearful that their jobs, too, might be subcontracted to Sodexho or some other entity if they continued to engage in union activity.

Since 2004, Douglas Umlah has been executive director of strategic projects for Northern Arizona Healthcare, the parent corporation of FMC. Umlah testified that since the fall of 2004, he has been directly involved with the ongoing process that culminated in the subcontracting of FMC's patient transport function to Sodexho. The decision to do so was made on February 13, at FMC's weekly senior management team meeting, and the contract with Sodexho was signed on May 7. Umlah testified extensively regarding the evolution of this program, and the entirety of his testimony need not be recounted here. He visited two hospitals in Phoenix with Ruth Eckert, FMC's director of nursing services, and was impressed with their patient transport systems, operated by Sodexho. He then contacted Sodexho for pricing on Sodexho's teletracking products: basically an automated dispatch system to facilitate the dispatching of patient transporters. He realized from his onsite visits, "that FMC really . . . didn't have the expertise to set up and run a program like this."

Umlah recommended that FMC contract with Sodexho for similar services. Thus, as set forth above, FMC already had an ongoing relationship with Sodexho; further, Sodexho offered a complete program, including software it utilized for implementing the automated system, that was successfully in operation at other hospitals; and in addition, because of the ongoing relationship with Sodexho, FMC was offered a discount on the necessary software. While there was continuing discussion regarding whether FMC or Sodexho should be the employer of the patient transport employees, Umlah testified that it was generally understood that Sodexho would, at the least, be contracted to install and manage the system.

William Bradel became FMC's president in April, 2006. Bradel testified that Umlah brought him up to date regarding the patient transport project. Bradel endorsed the idea because he understood that FMC's "homegrown" departmentalized model was inefficient. As a result, in the late summer of 2006, Bradel contacted colleagues at three different hospitals. He inquired about their models of patient transport, and, in particular, regarding the efficacy of contracting out the entire operation, so that the contractor would be the employer of the transport employees, as contrasted with outsourcing only the management component. Bradel testified:

> [T]hese hospital administrators that I talked with said that it has to be a complete—for maximum performance and patient safety that they felt that their experience with having the management and the employees all under one umbrella was the most successful . . . this is a very important decision. It's a costly decision. It's—for FMC it's over a half a million dollars [apparently annually] of straight overhead to the hospital and we wanted to make sure that we did this right.

According to Bradel, beginning in September 2006 (prior to the commencement of the Union's organizing campaign), he decided to proceed with the project and to implement the full patient transport model by contracting out the entire operation, including the employee component. He directed Umlah to continue working on the project.

Joseph Fitzhenry is a Sodexho employee. He began working at FMC on July 23, as the manager of patient transportation, and worked in that position until June 23, 2008. He was hired to develop and conduct oversight of the program. He was mentored by another Sodexho manager who was an interim startup person at FMC prior to Fitzhenry's arrival. Sodexho began transporting patients on August 3, with five transport employees, the four former FMC transporters[8] and one additional employee who had been hired by Sodexho from the outside. Thereafter Sodexho hired additional employees. By the first week of September there were 10 transport employees. One of the tranporters at any given time was assigned as a dispatcher to dispatch the other employees throughout the hospital. Fitzhenry testified that:

> Sodexho was hired in as kind of a one-stop shop in order to be able to provide all of the training and oversight of its employees, taking care of all of its own HR issues, and then to pro-

[6] As originally planned, Sodexho would be hiring 20 such transport employees, but because of budgetary problems this number was reduced to 10, and the remainder of the transport work continued to be done by FMC nurses or other staff.

[7] There is no record evidence that the Union was attempting to organize the transport employees, and the General Counsel does not appear to contend that FMC contracted out the work to Sodexho in order to preclude the Union from organizing the four transport employees.

[8] Fitzhenry testified that these four employees were given a 1-day orientation and it was made clear to them that their terms and conditions of employment were not subject to FMC any longer; rather, they were employees of Sodexho and subject to a whole new set of rules. According to Fitzhenry, Sodexho employees are instructed to relate to FMC supervisors, "Only in the sense that, you know, we're going to all be, I guess, a team player. We're going to work together for the common benefit of the patient." In the event of a problem, FMC supervisors would contact Fitzhenry directly. This happened from time to time. In the event of an immediate patient safety issue, one of the FMC nurses could so advise and/or correct the Sodexho transport employee, depending upon the circumstances.

> vide safe and reliable patient transportation for the patients throughout the medical center.

Asked whether there was any advantage to this method of operation, Fitzhenry testified:

> Well, when you buy the whole package, what you're getting is you're getting a complete program. You're having something where that particular outfit is coming in. They're providing all of their recruiting, hiring, firing, disciplining, payroll, compensation, benefits, all of those sorts of factors. And it also increases the accountability of the staff to that manager.

The General Counsel argues that the timing of FMC's decision to implement the system is suspicious in that it coincides with and overlaps the Union's organizational campaign. Thus, although the record evidence shows that the decision was made on February 13, 2006, at the weekly senior management team meeting, there is a later reference to the matter in the April 24 minutes of the senior management team. The General Counsel points out that at the April 24 meeting, "Doug [Umlah] presented proposal in putting time line, service scope, financial information, pros and cons of outsourcing."[9] And the minutes also state, "Senior management team supports outsourcing."

The General Counsel asked Patricia Crofford about the meaning and significance of this language. Crofford, as director of human resources, regularly attended the senior management team meetings but was not a member of the senior management team. Crofford testified that the outsourcing decision had been made in February, prior to the time FMC had knowledge of any union activity, but there were "additional discussions ongoing between February and April, regarding the specifics of the decision," and Umlah "continued his reinforcement of his belief that . . . the patient transport subcontracting was best for Flagstaff Medical Center." The General Counsel did not ask Umlah about this even though Umlah testified after Crofford. Thus, the only testimony regarding this matter is that of Crofford.

The contract with Sodexho was signed on May 7, 2 weeks after the aforementioned April 24 meeting. Umlah had been negotiating that contract with Sodexho for quite some time. It is reasonable to assume, absent any contrary evidence, that up until the date the contract with Sodexho was executed, FMC could have changed its mind; and that the discussion at the April 24 meeting and the references in the minutes simply served as reinforcement and validation that FMC's earlier February decision was the correct one. Accordingly, I find without merit the General Counsel's argument that the decision to contract with Sodexho was not made until April 24, at a time when the Union's organizing campaign was well under way. Further, even assuming arguendo the decision to contract with Sodexho was not finalized until April 24, there is no evidence the decision was motivated by unlawful considerations.

The General Counsel, maintaining that FMC could have simply contracted out the management component to Sodexho, retaining the employee component to itself, goes on to argue that FMC must have decided to outsource the employee component for discriminatory reasons, namely, to cause its dietary and housekeeping employees to fear that their jobs, too, might be contracted out because of, or in retaliation for, their union activity.[10] While it is possible that FMC could have contracted out only the management component, or conceivably could have developed and implemented its own in-house patient transport system without contracting out any component, this is not what it decided to do. The Respondent's witnesses, whom I credit, are experienced hospital professionals with expertise in hospital administration, and Sodexho's patient transport system is a sophisticated system that had been tried and tested at other hospitals. After exhaustive consideration, they decided that contracting out the entire operation to Sodexho was in the best legitimate business interest of FMC. There is no contrary evidence.

The contention by the General Counsel that FMC had an ulterior, unlawful motive in contracting out the patient transport work and would not have done so in the absence of the Union's organizing drive, is contradicted by persuasive, substantial, and uncontroverted record evidence. Accordingly, I shall dismiss this allegation of the complaint.

4. The June 29 and July 6 meetings conducted by Bradel and/or Schuler

It is alleged that FMC's president, Bill Bradel, and FMC's vice president for ancillary services, Roger Schuler, during the course of a dietary department employee meeting held on June 29, unlawfully solicited grievances and made statements violative of the Act to a group of about 25 or 30 dietary employees; further, it is alleged that a followup meeting on July 6, FMC further violated the Act by favorably resolving some of the employees' concerns raised at the July 29 meeting.

At the outset of the July 29 meeting, Schuler stated that he and Bradel were there to find out any issues, concerns, or problems that employees had. Several employees raised concerns. Schuler advised them that he would look into the matters they raised and would get back in touch with them, hopefully within 10 days.

Bradel, according to the testimony of employees Shawn White, Paula Souers, and Lydia Sandoval, all outspoken union advocates, told the assembled employees that he knew there was some union activity in their department, mentioned that he was aware of their union organizer "friend" who conspicuously spent time at a table in the cafeteria attempting to speak with employees, stated that he wanted them to think about unionizing because if they went union there would be no further meetings like this one, and further stated that they could solve the issues among themselves and did not need a third party brought in. During the meeting the union advocates disputed some of Bradel's remarks and defended the Union. White took issue with Bradel's "third-party" remark, saying that there would not

[9] The Tr. at p. 1472, L. 16, is amended as follows: "frozen kinds of outsourcing" is changed to "pros and cons of outsourcing."

[10] This theory is somewhat problematical. Thus, employees' fears that their jobs will be contracted out is customarily cause for concern because they fear they will lose their jobs. However, in the instant situation, the FMC employees who performed patient transport work did not lose their jobs, but rather continued to perform patient transport work at the same location for Sodexho rather than FMC.

be a third party because an employee committee would represent the employees during contract negotiations. According to White, this cause Bradel to remark, "[I]f you think you're going to sit down across the table from me and negotiate a contract, you're wrong."[11]

Bradel testified that this was the first opportunity he had had to meet with this particular group of employees. He and Schuler opened the meeting by soliciting feedback from the employees to learn what was working well and what improvements could be made. Initially, no employees spoke up and Bradel, in an effort to solicit their input, said:

> We really want to hear what you have to say. We've been conducting these meetings in other departments and we've got some really good feedback, so please speak up. . . .

Then employees began expressing their concerns. Some of their concerns were addressed by Schuler on the spot, and some were deferred until later. After this segment of the meeting, Bradel again said that he appreciated the direct contact with the employees and it was valuable to build that relationship. He said he knew there was some union activity in that department, and "that we appreciate the direct activity and that if we had a union that it would be difficult to have that same direct communication and I didn't think that, that would be necessary for FMC." An employee then spoke up and said he felt the employees needed representation. This prompted Bradel, who believed that he would not be one of FMC's representatives at the negotiating table, to say something to the effect that if there was a union, "I would not be negotiating with the union," or, "you won't be negotiating with me." Bradel denies referring to the union organizer in the cafeteria as their union organizer "friend" or "little friend," as this simply is not a remark he would have made.[12]

According to Schuler, Bradel said "that he appreciated the interchanges with staff . . . expressed his view that direct interchange like this might not be possible if a third party was involved." Further, before the employees left the meeting, Schuler told them he would look into their issues and get back to them at a followup meeting. The followup meeting was held on July 6. Bradel was not present. Schuler addressed the issues that had been raised by the employees at the June 29 meeting.

Schuler testified that the June 29 meeting was a department staff meeting with dietary employees,[13] that in the 4-1/2 years he has been vice president of ancillary services he has attended and participated in approximately 10 such meetings with dietary employees, and has attended and participated in approximately 50 to 70 similar meetings among ancillary services employees. Department staff meetings are conducted monthly, and Schuler attempts to attend as many meetings as he can. The meetings follow essentially the same format: the director asks the employees whether there are any issues or concerns they want to raise, and Schuler invites similar inquiries. The same format was followed at the June 29 meeting, although the director of the department was not present. Schuler testified that these meetings provide management with an opportunity to find out from employees "what's on their mind, what are their relevant issues, concerns, opportunities we might have to follow up on those issues and concerns." Schuler testified, "If it's a question that can be answered, the question is answered at that time. If not, the response is that we'll follow up and get back to them." The process of following up on employee concerns, as was done at the July 6 followup meeting was no different than the process that was customarily followed.

About a month prior to the June 29 meeting, Schuler introduced Bradel to ancillary services employees at four other meetings: security and PBX employees, plant operations and facilities employees, therapy services employees, and housekeeping department employees. The housekeeping employees' meeting, similar to the aforementioned dietary department meeting, was held in McGee Auditorium.

Bradel, according to Schuler, has attended some 20 other open forum meetings, as distinguished from departmental meetings, where Bradel was introduced by someone other than Schuler; all employees are invited to these open forum meetings. Further, according to Schuler, Bradel has held some 12 departmental staff meetings with nurses.

Schuler testified:

> Bill [Bradel] was a very big advocate of rounding.[14] He spends a lot of time out in the department meeting with employees. He has, as I mentioned yesterday, meetings that he calls Bagels with Bill where he would invite certain departments to meet with him in the cafeteria in small groups. He has departmental meetings that he goes to meet the staff. He has open forums that are open to anybody in the hospital for—for them to get to know him better and for him to describe hospital issues.

In addition to the foregoing, Schuler promotes his own open door policy and receives visits from about 10 employees each week who come to his office with personal or departmental problems or concerns.

Schuler's testimony stands unrebutted, and there is no contrary evidence.

The General Counsel points out that the dietary department head, Janine Drake, was not at the June 29 meeting, but that Bradel was at the meeting. Drake's absence seems irrelevant, and the presence of Bradel and Schuler is consistent with their presence at many similar employee meetings. Accordingly, I find that the format of the June 29 meeting was no different that the format of the numerous meetings with staff, including ancil-

[11] Dale Mackey, another witness called by the General Counsel, testified that Bradel said, "[H]e wouldn't be there if there was anybody coming in and representing the union. He would not attend it. He made that very specific . . . He would not attend the meeting."

[12] According to Schuler, Bradel did not specifically refer to any union organizer in the cafeteria. Whether or not Bradel made such a remark is irrelevant, and therefore a credibility determination is unnecessary.

[13] Customarily, the director of the department conducts the meeting; however, Drake did not attend this particular meeting.

[14] "Rounding," according to Schuler, is a formal, proactive, systematic, ongoing process whereby management team members circulate throughout the various departments, and engage the employees in dialogue "to determine what's going well, what needs improvement . . . what issues and concerns do they have in their department . . . an opportunity to get feedback from the staff and respond to those issues."

lary services employees, which occurred well prior to the instant union activity. I shall dismiss this allegation of the complaint.

I further find that the follow-up process during the July 6 meeting was similarly consistent with FMC's practice of providing answers and resolutions to employees' concerns that could not be immediately addressed at the June 29 meeting. Therefore, as there is no evidence that the Respondent initiated the practice of soliciting and attempting to resolve employee concerns in response to its employees' union activity, the fact that it continued this past practice during the course of the union activity is not violative of the Act.[15] I shall also dismiss this allegation of the complaint. Cf. *Southern Maryland Hospital,* 276 NLRB 1349 (1985), cited by the General Counsel.

I credit the testimony of Bradel. However, even assuming arguendo the accuracy of the employees' recollection of Bradel's remarks at the meeting,[16] it is not unlawful to advise employees that if they went union there would be no further meetings during which employee concerns were solicited and/or resolved, or to suggest that FMC and the employees could resolve their own issues without the intervention of a third party. See *Sunrise Health Care Corp*., 334 NLRB 903, 906–907 (2001); *Tri-Cast, Inc*., 274 NLRB 377, 377 (1985); *Ben Venue Laboratories, Inc*., 317 NLRB 900, 900 (1995).[17]

Regarding the remark by Bradel that "he" would not be negotiating with the Union, the employees could have reasonably understood Bradel to mean what he intended, namely, that although he was personally available to meet with employees at such departmental meetings, he would not be one of FMC's representatives at the negotiating table. Bradel did not state at that meeting, nor insofar as the record shows did any representative of FMC ever state, that FMC would not negotiate with the CWA or the CNA if either union was selected as the employees' collective-bargaining representative. I shall dismiss this allegation of the complaint.

5. Additional alleged violations by FMC

A. The 8(a)(1) Allegations

Alleged interrogation of Paula Souers: The CWA union campaign started in October 2006. Paula Souers was at that time a nutrition assistant in the dietary department. Souers, as an "organizer" for the Union, testified that she "gave information to people, handed out flyers, and answered questions . . . and went to meetings." Further, she sometimes wore a CNA (California Nurses Association) button at work, as she also supported the CNA in its efforts to organize the Respondent's nurses. She is "sure" management was aware of her support for the Union, as she "was open about it" from the beginning; and in October 2006, on the day she found out about the first [CWA] union meeting, she invited her immediate supervisor, Lisa Dominguez, to attend the meeting with her.

The next time she discussed the union with a supervisor was some 4 months later, on February 23, during a periodic evaluation with Sarah Klein-Mark, nutrition services coordinator. Souers testified she believed Kline-Mark knew she was an open union supporter as of that date as she didn't hide the fact and readily promoted the Union to her coworkers.

The discussion took place in Klein-Mark's office. Kline-Mark, who was at this period in time having similar meetings with other nutritional assistants, described the purpose of the meeting with Souers as follows: "The purpose was to recognize her as a high level employee and to continue to provide her with encouragement and let her know how good of a job she was doing in her current position." It was a 15-minute conversation and each spoke about 50 percent of the time. Klein-Mark complemented Souers for being a "high performer" (the highest ranking), said that she was a good nutrition assistant, cared for her patients, and took her job seriously. She then asked Souers if she had any issues or concerns.

Kline-Mark testified there was general discussion about the work of the department, and Souers expressed some work-related concerns: that she wished there were more nutritional assistants so she would have more time to spend taking food orders from her patients; that she felt some of the kitchen dietary employees were not being trained properly; and that she thought Bill Bradel, the Respondent's president, didn't think very highly of the nutrition department or the environmental services department.[18] Regarding this latter comment, Souers elaborated by referring to some negative remarks she understood Bradel had made about certain employees being "from the wrong side of the tracks." Klein-Mark testified that she then, "in context," asked Souers, "[W]hat she thought a union could do as far as relationships between the nutrition staff and the nursing staff."[19] Souers replied she didn't feel comfortable talking about the Union. Klein-Mark said it was "okay to have an open dialogue about it."[20] Souers again said she didn't want to talk about it. After this response, Klein-Mark "let it go."

[15] Moreover, under the circumstances, it appears unnecessary to discuss particular matters that were resolved.

[16] Both Bradel and Schuler gave a more nuanced account of Bradel's remarks regarding this matter: Bradel testified he stated that "if we had a union it would be difficult to have that same direct communication," and Schuler similarly testified Bradel said, "[T]hat he appreciated the interchanges with staff . . . expressed his view that direct interchange like this might not be possible if a third party was involved."

[17] The General Counsel relies upon other cases: *Tipton Electric Co*., 242 NLRB 202, 205–206 (1979), enfd. 621 F.2d 890 (8th Cir. 1980); *Reidbord Bros. Co*., 189 NLRB 158, 162 (1971); *Graber Mfg. Co.,* 158 NLRB 244 (1966), enfd. 382 F.2d 990 (7th Cir. 1967). To the extent these cases are inconsistent with the foregoing cases, it appears they do not reflect current Board law. See discussion in Member Brown's dissenting opinion in *Ben Venue Laboratories*, supra.

[18] On p. 22 of her brief, the General Counsel seeks to amend the complaint by adding an additional allegation as a result of Souers' being cautioned to avoid spreading "malicious gossip" about Bradel. As this amendment was not proposed during the course of the hearing, and FMC has thereby been denied the opportunity to present evidence, the General Counsel's request to amend the complaint is denied.

[19] Klein-Mark felt that Souers was expressing her concerns and, knowing that Souers supported the nurses' efforts because she had worn a CNA button, was curious and "wanted to see what her opinion was about what the union could do to help with relationships between nutrition services and nursing staff and Bill Bradel."

[20] Klein-Mark testified that she had undergone labor relations training on about four occasions by a firm that had been hired by the Respondent to handle the union campaign, and understood that "it was

Souers testimony regarding this part of the conversations differs markedly from that of Kline-Mark. According to Souers,[21] after expressing her concerns, she "thinks" Klein-Mark asked, "[H]ow do you feel about the union." Souers said, "I don't think you can ask me that." Klein-Mark said, "[I]t was okay, that it was just my opinion." Souers "thinks" she said, "I don't feel comfortable talking about it." Then Klein-Mark said, "It's okay. It's just your opinion." Then Souers finally said, "I'm for it." Kline-Mark asked, "Okay, why?" Then Souers explained that she had worked with a union before years ago and liked it, that she thought it would be a good thing for Flagstaff Medical Center, and good for the patients, that the people in the kitchen and housekeeping departments have no voice or way they can contribute, and that the hospital hired individuals that they could exploit and take advantage of. Klein-Mark said she didn't agree.

Klein-Mark concluded the meeting by again telling Souers what a good employee she was, and how good of a job she was doing; and Souers, in turn, said she thought Kline-Mark was doing a good job as a supervisor as well. Then the two hugged, and the meeting ended. Asked about the hug, Kline-Mark explained that although she had five to seven similar meetings with other employees, none of the other meetings ended in a hug; that she had hired Souers a year earlier and felt close to Souers; and that Souers was "more than just an employee" as the two had considerable daily communications, and had talked about Souer's family and other nonwork-related matters, and had "connected." Thus, to Kline-Mark it was more than simply a compulsory work-related interview, and the hug was an expression of this relationship.[22]

As noted, the only discrepancy of significance concerns Klein-Mark's alleged interrogation of Souers about union matters. On this point I credit the testimony of Kline-Mark who appeared to be a forthright witness with a complete recollection of the entire conversation. This is in contrast to Souer's less comprehensive account of the meeting. It seems unlikely that Kline-Mark would point blank ask Souers, "[H]ow do you feel about the union," because Kline-Mark already knew the answer to that question as Souers was a staunch union advocate. Accordingly, the ensuing scenario described by Kline-Mark is the more probable. Asking Souers, a known union advocate, in the context of discussing work-related matters, what she believed a union could accomplish, does not constitute coercive interrogation; this is particularly true given Kline-Mark's simultaneous excellent evaluation of Souers and her expression of affection for Souers. I shall dismiss this allegation of the complaint. See *Aladdin Gaming, LLC*, 345 NLRB 585, 611 (2005); *Enloe Medical Center*, 345 NLRB 874, 876–877 (2005).

Alleged interrogation of Lydia Sandoval: Lydia Sandoval works in the dietary department. Sandoval testified that in early March, as she was cashiering in the café, she was also carrying on a running conversation, between customers, with Dietary Director Drake. At this point she had not worn any union button, nor had she otherwise indicated that she was a union advocate. During the intermittent, ongoing conversation, lasting off and on some 20 to 25 minutes, Drake, according to Sandoval, said the nurses' union (CNA) was "foolish" and "asked my opinion on what I thought the union [the CWA] could do for us that FMC couldn't or wasn't already doing." It is unclear whether Drake made the statement and asked the question at the same time or at different times during the running conversation. Sandoval replied that she would support the Union and the Union would be better for everybody. Sandoval testified she had a good working relationship with Drake and the two have always been cordial and friendly.

Drake, who acknowledged that in March she had no reason to believe Sandoval might be a union supporter, denies that this conversation occurred.

I credit Sandoval's testimony. In March, Drake had no reason to suppose that Sandoval was a union advocate, and it is reasonable for Sandoval to have presumed that Drake's inquiry was calculated to discern whether Sandoval supported the Union. In this regard, it is significant that FMC managers and supervisors, including Drake, were asked by FMC's management consulting firm to report whether or not employees under their supervision appeared to favor the Union. I find that Drake coercively interrogated Sandoval regarding her union activity. By such conduct, FMC has violated Section 8(a)(1) of the Act.

Lydia Sandoval also testified that in March or April, apparently following her conversation with Drake, supra, Sandoval went to Supervisor Auggie Robledo's office to ask him about a work-related matter. Sandoval testified that after discussing the work-related matter, Robledo said he wanted to ask her something. He said the conversation was just between the two of them. He said that he'd never worked with a union before and wanted to know what it was like to work with a union. He asked what the union did for us.[23] Sandoval told him that the telephone company union represented the employees, and pointed out a particular difficulty that she had had with a coworker at FMC, suggesting that if there had been a union at FMC it would have been there to support her. Then she and Robledo just talked "about the pros and cons of the union." Robledo asked, "[I]f I felt it was necessary to bring in a union to the hospital, if we had that many problems or whatever." Sandoval said, "Yes, definitely." The conversation lasted 10 or 15 minutes.

Sandoval has known Robledo for the 6 years she has worked at the hospital, and they worked together as coworkers prior to the time Robledo became a supervisor. They have a warm and friendly relationship and talk about nonwork-related matters. Sandoval sometimes refers to him affectionately in Spanish as "mi hijo," meaning my son. Robledo did not testify regarding this conversation, but did testify about his close relationship with Sandoval.

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okay to talk about facts about the union, people's experiences that they may have had and also opinion that they may have had."

[21] Souers testified that only one part of the interview "stuck out in her mind," namely the part about the Union, and that she did not "remember clearly" the other parts of the conversation.

[22] Souers characterized the hug differently: "I hugged her because I felt that she was trying to do her best in a tough situation."

[23] Sandoval, prior to her employment with FMC, worked for a CWA-unionized telephone company. Sandoval does not know how Robledo became aware of this fact.

I find that Robledo's initial interrogation of Sandoval about her prior experiences with a union while working for a former employer was not coercive; obviously Robledo knew about Sandoval's prior employment, and Robledo's inquiry was innocuous and clearly was not designed to elicit a response that would cause Sandoval to declare whether she was for or against union representation in general, or at FMC in particular. However, I find that Robledo coercively interrogated Sandoval later on during the same conversation when he directly asked her if she felt it was necessary to bring a union into the hospital. By such conduct FMC has violated section 8(a)(1) of the Act.

Alleged interrogation of Laverne Gorney: Laverne Gorney testified that sometime during the course of the union campaign (Gorney was unsure of the month), in the kitchen, Drake spoke to her about the Union and said to her, "There will be dues to be paid. And once you join the Union you can't come back to work here." And, according to Gorney, Drake also said, "You have to file paperwork with the National Labor Relations Board to come back to work here."

Drake denies having a personal conversation with Gorney about the Union, and denies making the statements attributed to her by Gorney. Gorney did not at all impress me as a credible witness. Her memory was faulty and her testimony was inconsistent. She did not know when the event happened, and first testified that she was alone in the kitchen with Drake, while later testifying that Supervisor Mike Martin was present and she had to ask him to explain what Drake was talking about. Moreover, the comments Gorney attributed to Drake do not make sense standing alone, and Gorney did not provide an explanation or context for them. I credit Drake. I shall dismiss this allegation of the complaint.

Alleged interrogation of Ana Nez and Laverne Gorney: Ana Nez worked in the dishwashing department. Nez testified that in March she and coworker Laverne Gorney had a brief conversation with Klein-Mark, a nutrition coordinator who had no supervisory authority over kitchen employees.[24] According to Nez, Kline-Mark approached them and said, "Why are you going to vote for the Union."[25] Nez replied, "I will tell you the truth. I am abused in this work environment. So I am going to vote for the Union." Then, not knowing who Klein-Mark was, Nez asked Klein-Mark whether she was going to vote for the union. Kline-Mark said no, that she could not vote because she was a manager. Kline-Mark handed them a piece of paper that apparently they did not read and threw in the trash. Gorney did not say anything.

Gorney, who also works in the dishwashing department, testified that she does not really know Kline-Mark. Gorney testified that Kline-Mark entered the kitchen, introduced herself as a nutrition coordinator, gave Gorney and Nez pieces of paper, and asked Nez, "Are you going to vote for the Union?" Nez said, "Yes." Kline-Mark replied, "Do you not appreciate your jobs? Why would you want to vote for the Union." Nez replied she had undergone abuse on the job, and then said, "I have some complaints filed on me. And I don't appreciate that." Kline-Mark said, "We should continue this conversation in private, such as my office." Nez declined, saying that she was busy at the time and wanted to leave right away after work.

Kline-Mark testified the incident occurred on February 9. She was instructed by Schuler to go to the kitchen and distribute and/or read from a letter from Hospital President Bradel regarding a rerun CNA election. She approached Nez and Gorney, who were not occupied with work at the time, and read the following sentences to them from the letter, dated February 9, in order to let them know what the letter was about:

> I'd like to give you an update on the situation with the new union election ordered this week by the National Labor Relations Board. At this time, we have received no communication from the NLRB regarding a date for the new election.
>
> . . . FMC [has] requested the election be carried out as quickly as possible so that nurses can once again express their opinion about union representation.

Kline-Mark then gave the employees copies of the letter. Nez asked Kline-Mark whether she was going to vote for the union. Kline-Mark said she could not vote because she was a supervisor. There was no further conversation.

I credit the testimony of Kline-Mark. Kline-Mark appeared to be a credible witness with a clear recollection of the incident, and the testimony of Nez and Gorney was inconsistent. Further, the letter Kline-Mark read to the employees did not deal with the CWA organizing campaign or an election among dietary employees. It is therefore unlikely that Kline-Mark would have asked these employees how they intended to vote, as no election in which they would have been eligible to vote was imminent or, insofar as the record shows, even petitioned for by the CWA. And it is also unlikely that Kline-Mark would have invited Nez to her office to discuss complaints against Nez, as testified to by Gorney but not by Nez, as Kline-Mark had no supervisory authority over Nez. I shall dismiss this allegation of the complaint.

Alleged prohibition against discussing wages: Heather Craig is a nutrition assistant. She takes patient orders and delivers food trays to patients. Craig testified that during a conversation with Kline-Mark, who at the time had stepped down from her supervisory position, Craig mentioned she had been talking with Marilyn, a coworker, who had told Craig that she was receiving a higher base wage which reflected the fact that she had past experience in food service. Craig then wondered why she, too, had not received a commensurate wage for her similar prior experience in food service. According to Craig, Kline-Mark replied, "[W]e weren't even supposed to be discussing what we earn."

Kline-Mark testified that Craig asked her why another nutrition assistant who had the same experience as she did was getting paid more. Kline-Mark said she would look into it with Drake. She asked Drake about the matter. Drake, in turn, said she would look into the pay discrepancy with human resources, adding, "employees shouldn't be talking about their wages with

[24] I do not credit Nez' testimony that she was wearing a union lanyard around her neck, as union buttons and lanyards were not distributed to union supporters until July 16; moreover, Gorney did not recall that Nez was wearing a union lanyard.

[25] Initially, Nez was testifying through a Navaho interpreter. Asked to do her best to testify in English, Nez said in English that Kline-Mark said, "What do you think about the Union. Are you going to vote for the Union."

each other." Kline-Mark then related this conversation to Craig, and "let her know that she shouldn't be talking about wages with other employees." I find that by this statement Craig was indirectly advised by Drake, through Kline-Mark, that it was impermissible for employees to discuss wages with other employees.

In *Lafayette Park Hotel*, 326 NLRB 824, 826 (1998), the Board states:

> . . . discussion of wages is part of organizational activity and employers may not prohibit employees from discussing their own wages or attempting to determine what other employees are paid. [Citations omitted.]

Accordingly, I find that by such conduct FMC has violated Section 8(a)(1) of the Act.

The complaint alleges that, similarly, Supervisor Auggie Robledo, production manager in the dietary department, instructed employees not to discuss their wages with other employees. In this regard, Robledo's affidavit states:

> I usually tell employees at the beginning of each [performance evaluation] meeting that their evaluations and their raises are confidential and should be kept to themselves and I remind them not to leave the evaluation around because it is confidential.

Robledo confirmed during his testimony that this is generally what he tells employees during their performance evaluations, but emphasized that what he means to relate to the employees is that their evaluations are "confidential for me" and that he is not going to divulge confidential information to other employees. While there is certainly a significant discrepancy between what he tells employees and what he means to relate to them, I shall rely upon his affirmation both in his affidavit and his testimony, and find that employees would reasonably understand they are prohibited from discussing their wages with coworkers.[26] I find that by such conduct FMC has violated Section 8(a)(1) of the Act.

Alleged surveillance of Barbara Mesa: Barbara Mesa, an outspoken union advocate, would conspicuously spend her 30-minute lunch period and two 15-minute breaks every day at a table in the cafeteria, socializing and engaging in union-related business with Union Organizer Scott Barnes and other employees who also congregated at that same cafeteria table on a regular basis; other employees would sometimes just briefly stop by to talk or pick up union flyers. Mesa testified she was sitting at the union table in the cafeteria, which she occupied daily as an open and active union adherent, when she observed Bradel pointing at or towards her, getting up from his chair, circling the Union's table at which Mesa was seated, and then returning to his seat.

Bradel, who often eats in the cafeteria, recalled no such incident. Bradel testified that on occasion he will acknowledge someone at the cafeteria entrance by pointing to the person, which might make it appear he is pointing at the Union's table, and will on occasion get up and walk behind the Union's table to speak with the individual; and further, he will sometimes get up from his table, go to the food line or elsewhere, and return to his table in a roundabout fashion which would make it appear that he was circling the Union's table. Bradel denies singling out Mesa as a union proponent in the cafeteria.

I shall dismiss this allegation. I credit Bradel's testimony. Whatever Mesa observed, it is too improbable that Bradel was attempting to single out Mesa as a union adherent and cause her discomfort in such a bizarre and immature fashion, namely, by pointing at her and then literally walking a circle around her table.

Alleged threat of loss of scheduling flexibility: The complaint alleges that Supervisor Lisa Dominguez threatened employees with loss of scheduling flexibility if the Union succeeded in its organizing campaign. Heather Craig, a nutrition assistant in the dietary department, testified that in June, she and several other nutrition assistants were working in the diet office. Their direct supervisor, Dominguez, was also present. As they were working, according to Craig, they were engaged in general nonwork-related conversation, as it was customary to talk about personal or nonwork subjects while working. Craig mentioned the Union, and said she thought it wold be beneficial for the Union to come in and represent the employees. Dominguez replied, "[T]hat she had just gotten out of a meeting with Jeanine [Drake] and that Jeanine had told her if we got the Union in that we would no longer be able to switch shifts and that our schedules would be set." Craig said, "Oh, my gosh. Are you serious?" Dominguez responded, "[T]hat's what Jeanine had told her." The other employees in the room also indicated their surprise. According to Craig, "We couldn't believe it." Craig was very emphatic that Dominguez said employees *would* not be able to switch shifts, rather than "may not be able to switch shifts."

Dominguez, contrary to the testimony of Craig, testified that during the aforementioned colloquy in the diet office Dominguez told the employees she had no problem with employees switching shifts, but that flexibility could change if the Union came in.

Craig appeared to have a very specific and comprehensive recollection of the conversation, and was emphatic that her version of the conversation was the correct one. I credit Craig. However, in agreement with FMC's analysis of this issue in its brief, I find that the employees could have reasonably understood that the statement, "if we got the Union in that we would no longer be able to switch shifts and that our schedule would be set," was intended to relate what the Union would do to scheduling flexibility, not what FMC would unilaterally do. The practice of employees switching shifts among themselves, which insofar as the record shows occurred on a regular basis, was obviously advantageous for both the employees, who could find a substitute when they needed time off, as well as for FMC, as the practice would minimize scheduling difficulties; clearly the employees recognized that FMC would be reluctant to unilaterally change a practice that benefited itself. I find that the employees could have reasonably understood that the statement did not imply that FMC "may or may not take action

[26] Further, this comports with Drake's direction to Kline-Mark; as noted, Drake, as director of the dietary department, is Robledo's superior.

solely on [its] own initiative,"[27] bur rather conveyed Drake's assessment of working conditions under a union contract. Accordingly, I find the statement did not constitute a threat to retaliate against employees if they brought in the Union,[28] and I shall dismiss this allegation of the complaint.

Alleged banning of phototaking: It is alleged that FMC banned the use of cameras at work for discriminatory reasons. Patsy Crofford, vice president of human resources for Northern Arizona Healthcare, FMC's parent organization, testified that in April, 3 months before an updated portable electronic equipment policy was issued, NAH personnel began a review of existing policy for FMC and another NAH hospital regarding patient privacy matters. This review was precipitated by an incident in one of the critical care units: a visitor had taken photos with a cell phone camera of a patient, other visitors in the patient's room, and some of the FMC staff. The prior policy did not address the use of cell phone cameras or certain unrelated concerns, namely, that certain other portable equipment could present safety issues if used by hospital staff during worktime. Regarding the use of cameras, Crofford testified that inpatients and outpatients move throughout the hospital campus, inside and outside of campus buildings, often wearing only street clothes, and it can not be determined whether a person is a patient, family member, or visitor. The updated policy, according to Crofford, that simply prohibits photography in general anywhere on hospital premises, was designed to assure that "we never had a picture taken that had a patient inadvertently or consciously walking by and included in that picture."

The updated policy, entitled "Telephone, Cell Phone and Other Portable Electronic Equipment," is as follows:

> The use of portable electronic equipment including, but not limited to CD players, iPods, MP3 players, or cameras during work time is not authorized. The use of cameras for recording images of patients and/or hospital equipment, property, or facilities is prohibited.

Contrary to the contention of the General Counsel, there is no evidence the old policy was revised because of Mesa's activities. Mesa's testimony that she took a photo of Bradel at a group meeting, or her uncertainty regarding whether or not she showed a photo of her locker to hospital security personnel[29] to document that someone had been rummaging through her locker, is insufficient to show FMC was aware that Mesa used her cell phone to take photos in or around the hospital. And assuming arguendo the Respondent was aware of Mesa's phototaking activities, and further, assuming arguendo that such phototaking constituted union or concerted activities,[30] the evidence does not show the revised policy was in response to such activities. Rather, I find, the revised policy was motivated by lawful business considerations designed to resolve the legitimate patient privacy concerns described by Crofford.

The General Counsel also maintains the policy is overly broad and limits employees' Section 7 rights. It does not appear that the policy, on its face, would likely have a chilling effect on employees' Section 7 rights, as the specific right to take photos in the workplace would not reasonably seem to come to mind as an inherent component of the more generalized fundamental rights of employees set forth in Section 7 of the Act. However, it is clear that FMC may not utilize this policy, specifically designed to protect patient privacy, for purposes inimical to the Act. Thus, FMC may not interpret the policy to prohibit employees from engaging in legitimate union-related activity such as, for example, taking photos of hospital bulletin boards, or unsafe working conditions, or a gathering of employees at the union table in the cafeteria, unless patient privacy is compromised. See *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 646–647 (2004); *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). I shall dismiss this allegation of the complaint.[31]

Alleged unlawful warning to Lydia Sandoval: The complaint alleges that Supervisor Frances Otero, a lead cook in the dietary department, unlawfully admonished Lydia Sandoval for engaging in union solicitation in the kitchen. Sandoval is a dietary employee. Sandoval testified that in late summer, after finishing her shift, she did not leave the premises but rather waited for another employee, Mary Karlovits, to come on shift in order to request that Karlovits sign a petition for the Union. Supervisor Otero, in the serving area in the kitchen, asked Sandoval why she was still there. Sandoval said that she had a gift for Karlovits, a candle that she had brought back for her from vacation. While this was true, Sandoval did not tell Otero about the petition. After Karlovits arrived, Sandoval engaged her in a conversation, and apparently took out the petition that she had hidden in a book, to present to Karlovits. While they were conversing, Otero approached and said, according to Sandoval, "I thought you were going to give her a present. If this is what you wanted, then leave . . . you can come back when Mary is on her break." Sandoval said she was off the clock. Otero replied that Karlovits was on the clock. Otero, according to Sandoval, said she was not going to report this incident, but that she would if it happened again. Sandoval then left the premises.

Otero testified that when Karlovits arrived at work Otero briefly spoke with her about work-related matters. Otero then began performing other duties, assuming that Sandoval would be on her way after only a brief exchange with Karlovits. About 15 minutes later she observed Sandoval and Karlovits talking in a kitchen working area. Otero did not see a candle, but she did see that Sandoval had some paperwork in her hand. Believing that the two had been talking for 15 minutes, she told Sandoval to leave, advising her she could come back and talk to

[27] *NLRB v. Gissel Packing Co.,* 395 U.S, 575, 618 (1969). As the court states, at p. 619, the focus is on "what did the speaker intend and the listener understand?"

[28] See *Maestro Café Associates, Ltd*., 270 NLRB 106, 108 (1984).

[29] Mesa testified she "may" have done so.

[30] FMC further argues in its brief that Mesa's foregoing use of her cell phone camera did not constitute union or protected concerted activity.

[31] The following cases cited by the General Counsel are inapposite: *Loft*, 277 NLRB 1444, 1461 (1986); *Automatic Screw Products Co.*, 306 NLRB 1072 (1992). These cases deal with rules that, on their face, prohibit employees from engaging in concerted activity, namely, discussing wages with coworkers; conversely, taking photos may or may not be concerted activity, depending on the circumstances.

Karlovits when Karlovits was on her break. Sandoval replied that she did not intend to come back, as Karlovits' break was not until much later. Then Sandoval left. Otero testified that she did not say anything about reporting Sandoval; that, although she knew Sandoval was a union supporter, there was no mention of the Union; and that she has never permitted an on-duty employee to stop working and talk to a nonworking employee for an extended period of time, such as 15 minutes, because employees need to be working.

I credit Otero's testimony. The restriction Otero placed on Sandoval was not imposed to discourage organizational activity. Rather, I find, by asking Sandoval to leave Otero acted for legitimate business reasons, namely, to put and end to the 15-minute disruption of Karlovit's work regardless of the nature of their discussion. I shall dismiss this allegation of the complaint. *Brigadier Industries*, 271 NLRB 656, 657 (1984). The case cited by the General Counsel, *Cast-Matic Corp.*, 350 NLRB 1347, 1354–1355 (2007), is inapposite.

Alleged unlawful warning to Paula Souers: The complaint alleges that Supervisor Frances Otero, a lead cook in the dietary department, unlawfully admonished Paula Souers for engaging in union solicitation in the kitchen. Otero testified that she observed Souers, an off-duty dietary department nutrition assistant, in the kitchen area, with papers in her hand, talking to several different employees "for a very extensive amount of time," estimated by Otero to be about 30 minutes. Otero had observed Souers in the kitchen area off and on over this period of time but, believing that the conversations would be brief, did not tell Souers to leave the kitchen because chatting for a minute or two is permitted.[32] Finally, Otero told Souers she should not be disrupting the employees while they are working, and Souers left the kitchen.

Souers admitted she was engaged in union solicitation on this occasion, and further testified on cross-examination as follows:

> Q. On at least one occasion in July of 2007, you were in the kitchen proper where food is prepared and you were talking to employees while off duty for approximately 30 minutes. Is that true or false.
> A. I don't remember.
> Q. It could have happened?
> A. It could have.

Drake testified as follows regarding the matter:

> In this instance, it was an extensive amount of time, and disrupted the kitchen where Frances [Otero] was having a hard time getting everybody to get their work done that day, and both Auggie [Robledo] and Frances had reported it or discussed it with me, after the incident.

I find that Souers was disrupting the work of the kitchen employees for an extended period of time and that Otero admonished her for doing so. I shall dismiss this allegation of the complaint.

Alleged unlawful banning of Barbara Mesa from the kitchen: The complaint alleges that Otero unlawfully banned Mesa from the kitchen and from speaking to kitchen employees during their working time. Otero, encountering Mesa, a housekeeping department employee, talking in the kitchen to an on-duty kitchen employee, told Mesa she could not be there as she had no business in the kitchen, and walked Mesa out of the department. Otero testified she has never permitted any nonkitchen employee to be in the kitchen, because, "I don't think that any non-kitchen employee has any business in the kitchen because they could be a distraction or disruption to the other employees if people are just coming in and out of the kitchen at freewill." Contrary to the testimony of Mesa, Otero testified she instructed Mesa to leave the kitchen because she should not be there, and did not say, "You are not allowed in here to talk to those employees." Shawn White, a union supporter, admitted that nonkitchen employees or employees who have no business in the kitchen are not allowed in the main kitchen area.

Regardless of the words Otero may have used in requesting Mesa to leave the kitchen, it is clear that nonkitchen employees are not permitted in the kitchen area for any reason. Employees are aware of this rule. Further, there is no evidence the rule was designed to exclude employees for other than legitimate business reasons, as it makes sense that to indiscrim-inately permit any of FMC's several thousand employees to enter the kitchen and converse with kitchen employees would not be conducive to the efficient operation of the kitchen. The General Counsel maintains that Otero has made exceptions to this rule in certain instances, for example, permitting Mesa to be in the kitchen to solicit for the United Way campaign, or permitting Robledo's girlfriend, a nurse, to visit with Robledo in the kitchen area. Regarding visits by Robledo's girlfriend, Otero testified she was not aware of such visits. Regarding Mesa's soliciting for the United Way campaign in the kitchen or elsewhere, the employer may permit such charitable solicitations on an ad hoc basis without negating an otherwise legitimate exclusionary rule. See *Hammary Mfg. Corp.*, 265 NLRB 57 (1982); *Zurn/N.E.P.C.O.*, 345 NLRB 12, 14 (2005). Accordingly, I shall dismiss this allegation of the complaint.

Alleged threats, surveillance and disparagement of the Union by Supervisor Otero: The complaint alleges that during a conversation in the cafeteria, Otero threatened employees, gave the impression she was engaging in surveillance of their union activities, and disparaged the Union. The evidence shows that while Otero was sitting at a table in the cafeteria with Souers, Mesa, and Heather Boardwell, three overtly active union adherents, Souers asked Otero why she had been told that she could not enter the kitchen or the cafeteria when she was off duty.[33] Otero, according to Souers, replied that Souers could not go into the kitchen because people had been complaining that "[w]e were pressuring them about the Union"; however Otero expressed surprise that Souers was not permitted to enter the cafeteria. Mesa's testimony differs from that of Souers. According to Mesa, Otero responded to Souers's question as follows: "Well, you must have done something wrong that they

[32] Current off-duty dietary employees, but not other employees, were permitted to come into the kitchen area to check their mail, pick up a paycheck, and briefly exchange pleasantries with on-duty employees.

[33] I have found above that Drake did not make such statements to Souers.

are not allowing you in there." Otero denied making either statement. Otero testified that in response to Souers question, she said she did not know why Souers could not go to the cafeteria or the kitchen, and did not know who told her that. At some point, according to the testimony of both Souers and Mesa, Otero said, "[E]verybody knows that you, Shawn (White), and Heather (Boardwell) are the [union] pushers." Otero denies making this statement. Then, later, toward the end of the conversation, Boardwell asked why management assumed everything the three employees were doing was union business, as they could in fact just be talking about the Arizona Diamondbacks. Otero testified she replied as follows to this question: "I think you are discussing things that you shouldn't be discussing, because every time I come around the corner you scatter like cockroaches." Then she added, "Don't get me wrong. I am not saying that you are like cockroaches," and she said to Heather, "I am not calling you cockroaches." Boardwell, according to Otero, acknowledged this disclaimer, saying, "I know." Boardwell did not testify, and neither Mesa nor Souers denied that Otero said she was not calling them cockroaches. Otero, during her testimony, said that she was merely using this phrase as a descriptive figure of speech, rather than as a personal reference, and her disclaimer to the employees supports her testimony.

The testimony of Mesa and Souers differs, and I am unable to credit either account. I credit Otero and find she said she did not know why Souers could not enter either the kitchen or the cafeteria while off duty. Further, even if Mesa's account should be credited, Otero's response that Souers must have done something wrong to be prohibited from entering the kitchen while off duty is no more than speculation on Otero's part; thus, Otero, by the very nature of her alleged answer to Souers's question, made it clear that she was unaware of what Souers was talking about. Assuming arguendo that Otero, referring to the four-named employees, said everyone knew they were "the union pushers," I find this statement is not violative of the Act. The statement was unthreatening; abundant record evidence amply demonstrates that in fact the named employees openly identified themselves as union activists, campaigned in favor of the Union, and frequented the union table in the cafeteria; and indeed the named employees must have known, by the very nature of their conspicuous efforts on behalf of the Union, that it was common knowledge they were in fact the leading union proponents. Finally, I find that Otero, realizing her utterance about cockroaches could be deemed offensive, pointedly told the employees her reference to cockroaches was not personal or intended as an insult. I shall dismiss these allegations of the complaint.

Alleged threat and interrogation by Manager Drake: In August, Mattie Martinez, a recently hired employee, was going through an orientation process in the dietary department as a nutrition assistant. Martinez testified that Jeanine Drake, while showing her bulletin boards containing both union material and FMC material, told her there was information on both sides to read about, and that the Union would make a lot of claims that aren't true. Then, according to Martinez, Drake "asked me about if anyone had talked to me about the union at all there." Martinez said yes. Drake asked her who. Not wanting Drake to know she favored the Union and not wanting to reveal the name of a union supporter, Martinez instead named her friend, an employee she believed to be against the Union. According to Martinez, she did not believe this response would reflect unfavorably on her friend. Drake, according to Martinez, said she was surprised, as she knew the individual named by Martinez was antiunion. Drake continued, asking Martinez whether anyone else had talked to her about the Union. Martinez said no. Martinez further testified that either during the same conversation or the day before during lunch, Drake said, "That it is possible for a union to provide a raise to the people in the union that are also in the department, but because there's just a certain budget that they have that they were going to have to let people go if that was the case." Martinez, as the last person hired, understood Drake to be telling her she would be the first fired in this eventuality.

Drake testified that during the orientation process, as she was showing Martinez the union bulletin board, she asked Martinez whether she had heard about the Union, but did not ask her to identify anyone who may have spoken to her about the Union. Regarding the Union, Drake told her, "that there was postings [from the Union] . . . and that the hospital had informational bulletins and that she needs to get the facts about the union and make her own decision." Drake denies saying anything to Martinez regarding the possibility of job loss due to budgetary considerations as a result of unionization.

I credit the testimony of Martinez, who appeared to have a clear recollection of her conversation(s) with Drake. It is unlikely that Martinez would have fabricated a scenario that was as detailed, specific and plausible, even to the point of causing her consternation as she attempted to evade Drake's questions. Further, it appears that Martinez, during her testimony, was attempting to formulate accurate responses; thus, on direct examination, she volunteered that she was not sure on which occasion Drake cautioned her about layoffs. I find that FMC has violated Section 8(a)(1) of the Act by coercive interrogation, and by threatening that unionization, resulting in wage increases for some employees, would cause the layoff of newly hired employees as a result of budgetary considerations.[34]

Alleged unlawful monitoring and restricting employees from ED break room: The complaint alleges that on August 19, FMC supervisors and a security guard unlawfully prevented employees from engaging in union activity in the emergency department break room. FMC admits the underlying facts, namely that employees Ed Gorney and Shawn White, wearing FMC identification and also union buttons, were asked to leave the secure ED break room, where they had been admitted by emergency room employees. During shift change, emergency department employees regularly enter and exit the break room to get coffee, and pass through to adjacent locker rooms. Also, there is apparently a CNA union bulletin board in or near the

[34] I do not find Drake also created the impression of surveillance of employees' union activities by advising Martinez that Drake knew the employee named by Martinez did not favor the Union; such a statement, without more, does not necessarily imply that Drake acquired this knowledge as a result of surveillance of employees' union activities; in any event, this would not affect the remedy, as other instances of surveillance have been found herein.

break room.[35] I credit the testimony of White and Gorney and find that during the incident they were precluded from passing out union literature and/or a union petition to some five employees who had entered or exited the room.

FMC acknowledges that Gorney and White were mistakenly asked to leave the break room. However, that particular matter was rather quickly resolved. Several supervisors apologized to Gorney and White, and within an hour or so they were again back in the break room speaking to employees on behalf of the Union without further incident that day.

However, 2 days later another similar incident occurred. Shawn White and Paula Souers, both wearing FMC identification and union buttons, entered the ED break room about 6:30 a.m., around shift change, to inform employees about the Union and request them to sign an organizing petition. They were admitted to this area by emergency room employees. They set some union fliers out on the sofa and were approached by Ashley Peak, a clinical coordinator and supervisor in the ED. Peak asked what they were doing there, and they said they were there to distribute union fliers and inform people about the Union. Peak said they were not allowed in a locked break room. White explained what had happened 2 days before, and advised Peak that nonemergency department employees were authorized to engage in union activity in any nonpatient, nonwork area throughout the hospital, including the ED break room. Peak replied that ED employees' personal belongings were in or adjacent to the break room, that things had been stolen, that she did not feel comfortable with them remaining there by themselves, and she did not intend to leave them alone in the room. Peak remained in the room and worked on paperwork at a table about 10 feet away, and, according to White, "basically monitored Paula and I while we were in there." While Peak was sitting there, employees would come in and talk to her about things; and sometimes Peak would leave the room for a few minutes and then return. As a result, the recruitment efforts of White and Souers proved futile, as it was apparent that the presence of Peak made the employees uncomfortable.

After a while another clinical coordinator, Lindy Turley, also a supervisor, came by and, prior to observing White and Souers, removed a union notice from a hallway bulletin board, placing it on an adjacent union bulletin board that happened to be behind an open door, Turley said, "That's where it goes." This notice, worded "Sign a Petition Today," had been placed there earlier by White and Souers before they entered the break room that morning. Turley did not say anything to White or Souers, and both she and Peak remained in the break room at a table; on occasion one of the two would exit the room for a short time and then return and occupy the table. They did this over the course of approximately 40 minutes to an hour while White and Sauers remained there. Finally, White and Souers left, as it was apparent that no employees were willing to speak to them in front of Peak and Turley.

[35] Insofar as the record shows, only emergency department nurses use the break room, and apparently White and Souers were simply interested in getting nurses to support the separate organizing efforts of dietary, housekeeping, and other ancillary services employees.

The above evidence presented by the General Counsel stands unrebutted, as FMC proffered no witnesses regarding this matter. I find that even if Peak had a genuine concern about protecting employees' property, her continual presence in the break room, together with Turley, was unwarranted; thus, White and Souers, although unknown to Peak, were no more suspect than any other FMC employees who were authorized to use the break room, and there was no showing that the break room was continuously monitored during other shift changes. Further, White and Gorney were not similarly monitored 2 days earlier. Accordingly, while the August 19 incident was diligently resolved, FMC engaged in similar conduct just 2 days later. Therefore, contrary to FMC's position, I find there was no effective repudiation of the August 19 incident, as on both occasions employees were effectively precluded and/or inhibited from promoting the Union in the ED break room. On the basis of the foregoing, I find FMC has violated Section 8(a)(1) of the Act by prohibiting employees from engaging in union activity in the ED break room, and by monitoring and engaging in surveillance of the union activities of employees in the break room.[36]

Alleged unlawful installation of surveillance camera: The complaint alleges that FMC installed a surveillance camera in the cafeteria directly above the table occupied by Barns and other union supporters in order to monitor their union activities. Patsy Crofford, vice president of human resources for Northern Arizona Healthcare, testified that since at least March 2006, a year or so prior to the time the Union began its organizing campaign, there had been a surveillance camera at that particular location, as well as at other locations in the cafeteria. At some point the camera above the union table had malfunctioned, and it was replaced. There was no new installation of an additional camera in the cafeteria after the advent of the Union. There is no contrary evidence. I shall dismiss this allegation of the complaint.

b. Alleged 8(a)(3) violations

Alleged change to Lydia Sandoval's schedule and work assignment: The complaint alleges that FMC changed the work schedule and work assignment of Lydia Sandoval in retaliation for her union activity. Sandoval, a day-shift dietary employee, worked on the day shift (from 6 a.m. until 2:30 p.m.) in the kitchen and cafeteria area primarily preparing and serving food. In March, after Manager Drake and Robledo became aware of her support of the Union, she was transferred to a later shift (from 11 a.m. to 7:30 p.m.).

Robledo testified Sandoval was transferred for various reasons: The grill cook was complaining that Sandoval, who was supposed to be helping him serve the omelets he prepared while

[36] Contrary to the position of the General Counsel, I do not conclude the facts warrant a finding that Peak engaged in unlawful interrogation by asking what the employees were doing there, or that Peak disparaged the Union by stating she was uncomfortable leaving White and Souers in the room alone because of prior instances of theft. Nor do I find that Turley violated the Act by removing the notice posted by White and Souers and by repositioning it to the bulletin board designated for union messages; there is no complaint allegation that FMC had deliberately obscured the union bulletin board for unlawful purposes.

customers were waiting at the counter, could not rely on Sandoval to be at her station. Sometimes Sandoval would "disappear" for a half hour or even longer. This was a big problem for the grill cook, who frequently complained. And customers, who had only a limited amount of time before work, also complained they were having to wait too long. As a result, Robledo repeatedly admonished Sandoval for this, and reported the matter to Drake. Further, the "presentation cook," who was to prepare food in front of customers during the lunch and dinner period, began work at 11 a.m., but was not being kept busy with food orders particularly during the dinner hours, and was underutilized. Therefore, it was decided to transfer the presentation cook to the early shift so that he could assist the grill cook in preparing omelets and other food in front of the customers; this would keep the presentation cook busy as, apparently, he would also help serve the food he and the grill cook were preparing. It would also bring in more revenue, as the cafeteria could introduce specials, prepared by the presentation cook, in order to draw customers. And it was decided to change Sandoval's shift to a later time so that, in addition to food preparation, she would be able to assist with the catering, apparently setting up and/or bringing food to various groups in or around the cafeteria or hospital as, according to the uncontroverted testimony of Robledo, Sandoval was very knowledgeable about the catering end of the business.[37] Robledo testified that Sandoval's union activity played no part in the decision to transfer her to the later shift. I credit this testimony of Robledo. There is no contrary evidence.

There is no contention that Sandoval is dissatisfied with her work assignments on the later shift. However, she apparently maintains that as a result of vision problems she has difficulty driving at night, and, in addition, she simply prefers the earlier shift so that her nights are free. Regarding the matter of driving at night, the record shows that in the winter it is just as dark at 5 a.m., when Sandoval drives to work, as it is a 7:30 p.m., when she now gets off work.[38] Regarding the fact that she prefers to work the early shift, she was in fact given this option by Robledo, but, as she would no longer be assisting the grill cook, part of her new duties would be to wash dishes. Sandoval, not wanting to wash dishes, declined, and opted to remain on the later shift.

FMC presented cogent, persuasive evidence in support of its position that Sandoval's transfer to the later shift was motivated by legitimate business exigencies, rather than in retaliation for being prounion. I shall dismiss this allegation of the complaint.

Alleged modification of Laverne Gorney's work schedule: The complaint alleges that FMC modified Laverne Gorney's work schedule in retaliation for her union activity. Gorney, who has worked for FMC for over 10 years, testified that for the last 2 years she had been washing pots and pans in the dishwashing department. Although she worked weekend shifts (Saturday or Sunday) "quite a few" times during the year, she customarily worked only Monday through Friday with relatively few assigned weekend shifts. Beginning in June, however, at about the time her union activity on behalf of the CWA became generally known, she was assigned three or four Saturday and/or Sunday shifts per month. This was very unusual.

While Gorney's complaints about her schedule change are somewhat difficult to understand, it appears that her principal complaint is not that she was required to work more Saturday or Sunday shifts, but rather that Drake, manager of the dietary department, made the schedule changes without first consulting her. However, insofar as Gorney's testimony is understandable, Drake had always made such schedule changes without consulting the dietary employees, and this had always irritated Gorney well prior to her union activity. Thus, Gorney testified that she, as well as other dietary employees, were treated similarly: "Anything we say, she [Drake] doesn't listen to us. She didn't check with me. But she is the boss. And that is her way."

Gorney, acknowledging that Drake changed the schedules of other employees at the same time, testified the job duties of the others remained the same, whereas only her job duties changed. Attempting to explain this, Gorney testified she had been accustomed to performing only one job task during her Monday through Friday shifts (washing pots and pans), whereas the particular weekend shifts to which she was assigned required that she perform various job tasks, apparently because fewer employees worked during the weekend. Gorney testified that because she was unable to complete certain tasks before having to begin the next one (she was neither asked the nature of these tasks, nor was she asked why she was unable to complete them), she felt "confused" or perhaps frustrated. However, she later seemed to recant this testimony. Thus, on cross-examination, Gorney testified she did not feel confused about her job duties; rather she was simply irritated that she had not been consulted prior to the time her schedule and/or job duties were changed.

There is no evidence that Gorney's weekend job duties were more taxing or difficult than her weekday job duties, or that her alleged inability to complete the assigned weekend tasks was other than systemic and applicable to all employees who were assigned to that particular weekend shift, or that she was criticized or warned about any work-related deficiencies after being assigned weekend shifts. Further, only four of Gorney's 20 shifts per month were weekend shifts; thus, the great majority of Gorney's shifts continued to be weekday shifts.

The Respondent's work rules state: ". . . employees may be required to work different hours, shifts, overtime, holidays and weekends, as the workload necessitates. . . . There can be no guarantee that an employee will remain on any of the three shifts or that the employee will always have certain days off."

It appears that Drake has unilaterally changed Gorney's schedule over the years without first consulting Gorney. While the monthly scheduling records show that in fact Gorney was assigned more weekend shifts beginning in June, at a time when Gorney's union activity was known to Drake, there simply is no probative evidence showing that the change in Gor-

[37] Sandoval admits that the grill cook warned her about being away from her assigned workstation, and answered, "Yes" to the following question: "And you remember that Auggie [Robledo] also mentioned to you a couple or three times that you needed to be out serving the customers and that you were disappearing or weren't at your work station, and he counseled you about that, didn't he?"

[38] Further, the record shows that Sandoval does drive at night to play bingo or for other social purposes.

ney's schedule and/or job duties in June was motivated by unlawful considerations.[39] Accordingly, I shall dismiss this allegation of the complaint.

Alleged subjecting Dale Mackey to more onerous working conditions: The complaint alleges FMC subjected Dale Mackey to more onerous working conditions in reprisal for his union activity. Mackey has worked in the dietary department since about 2004. He is the only utility aide, a special job designation designed specifically for Mackey due to certain disabilities, including a stroke that has affected his short-term memory. He has multiple duties: while in the kitchen he removes trays, utensils, dishes and trash from the cafeteria conveyor belt, discards the trash, and washes the trays, dishes, and utensils, apparently by putting them in dishwashers. When working in the cafeteria he sweeps and mops the dining room floor, cleans tables, straightens and wipes down the chairs, and empties trash receptacles. And primarily during the summer months, when cafeteria customers use the outside patio tables, he similarly sweeps the patio, cleans the seven patio tables, and empties the two patio trash receptacles.

Mackey began wearing a CWA badge on a lanyard in June or July. Drake, according to Mackey, asked him whether he knew about the Union. He replied that he had once been in a union and liked it because the employees got better raises. Drake said she didn't like the union, and, according to Mackey, "looked sort of upset" and just dropped the subject. About a week later, Drake brought in a paper about union matters, and read something to him about management rights and Indian tribes.

The complaint alleges Mackey was subjected to more onerous working conditions in retaliation for his union activity. A composite of the testimony of Drake and Robledo shows the following: The lunch period in the cafeteria begins at 11 a.m. and continues until 2 p.m., at which time the cafeteria is closed to customers until it reopens at 2:30 p.m. The cafeteria becomes increasingly busy throughout the lunch period, and is apparently at its busiest during the hour or so before it closes. Mackey's half hour lunchbreak, from 1:30 to 2 p.m., coincided with the busiest time, and at 2 p.m., when he returned from his lunchbreak, he was overwhelmed with work because at that point he had two jobs to do in the short time before the cafeteria reopened: to finish clearing off the conveyor belt that was usually loaded with trays and dishes of customers who were leaving the cafeteria before it closed, and to sweep and mop the cafeteria floor so that it would be dry by 2:30 p.m. when the cafeteria reopened. Because Mackey had trouble completing both of the aforementioned duties in the time allotted, it was decided to change his lunchbreak to 11 a.m., when the cafeteria was least busy, so that he would be working during the busiest part of the lunch period when he was most needed; and to give him a 15-minute break at 1:30 p.m. (instead of a 30-minute lunchbreak), so that from 1:45 until shortly after 2 p.m. he could complete his job of clearing the conveyor belt and, as soon thereafter as possible, begin sweeping and mopping the cafeteria floor.

Drake and Robledo deny that the change to Mackey's schedule was motivated by his support for the Union. While acknowledging that Mackey is kept busy and has many varied duties to perform in and around the cafeteria, they maintain that changing Mackey's lunch schedule helps the efficiency of the cafeteria operation, gives Mackey fifteen additional minutes to clear the conveyor, and also lessens Mackey's anxiety about having sufficient time to sweep and mop the floor in a timely fashion.[40] And, consistent with the testimony of Drake and Robledo, Mackey also testified that the lunch break change has enabled him to keep up with the trays and dishes on the conveyor belt: ". . . when I have an early lunch, I can keep up with it, but when I had [lunch] before at 1:30 I couldn't."

I credit the testimony of Drake and Robledo. Both gave convincing accounts of the rationale for changing Mackey's lunchbreak. Further, although Mackey can not always complete all the jobs assigned to him, it is clear that he has not been warned or reprimanded or otherwise counseled for any work-related deficiencies; rather, he is simply advised to do the best he can. Also, it is noteworthy that no other employees have suffered adverse consequences because of their union activity, and it is unlikely that FMC would single out Mackey as the sole recipient of discriminatory treatment.[41] I shall dismiss this allegation of the complaint.

Alleged unlawful negative appraisal to Paula Souers: The complaint alleges that Drake issued Souers an unwarranted negative appraisal and restricted her from speaking to her coworkers. On August 10, approximately 10 days after Souers was asked to leave the kitchen by Supervisor Otero, supra, Drake presented Souers with her annual job performance evaluation. Also present during the meeting was Nutrition Services Director Sheila Walsh, who had been hired only 4 days earlier. Drake invited Walsh to the meeting so that she could observe how Drake performed annual evaluations. Drake, who described Souers as a good employee and wrote many complimentary comments about Souers in other sections of the evaluation, gave her a lower rating ("needs improvement") on one portion of the evaluation, stating under the commentary section:

> You understand patient confidentiality.[42] You recorded a staff meeting without permission from the personnel attending which is against HR. Policy 10-4: "No employee will tape record a meeting or any other conversation that occurs in the

[39] Indeed, in about August, Gorney and others volunteered to accept additional hours of work.

[40] Robledo testified that Mackey is slow in doing his work, and is so forgetful that Robledo must reminded him several times each day what he is supposed to do or what he has forgotten to do. Further, according to Robledo, Mackey always complains, or "nags" about the amount of work he is given and his inability to complete it. Indeed, Mackey admitted he has always had trouble getting things done in the afternoon ever since he started working for FMC; that he sometimes receives help from other employees or supervisors; and that when he complains to Robledo about his inability to do everything that is expected of him, Robledo does not give him warnings or reprimands, but simply tells him to do the best he can.

[41] Mackey complains that the change to his lunch schedule has lessened by 15 minutes the time he has to socialize with his friends at 1:30 p.m. While this may be correct, it simply is an incidental consequence of the more pressing considerations set forth above.

[42] This is a positive rather than negative evaluation.

> work place without the express written or verbal consent of all attendees of the meeting or participants in the conversation. Failure to do so will result in disciplinary action."[43]
>
> You need to conduct off work business in public areas and not interfere with employees during their shifts.

Souers testified that she asked Drake what she meant by the sentence, "You need to conduct off work business in public areas and not interfere with employees during their shifts." Drake replied, according to Souers, "[T]hat means you cannot come into the kitchen when you're not scheduled for work." Souers disagreed, saying she could be in the kitchen while off-duty so long as she had her employee badge and identification. Drake said no. And Drake further said, according to Souers, that Souers was not permitted in the café, apparently meaning the cafeteria, on her days off, and that Drake didn't want her talking to Shawn White, another union supporter, who works in the grill area of the cafeteria, or Richard, apparently another union supporter, who works in the sandwich area of the cafeteria.

Drake and Walsh testified that Drake did not make the forgoing remarks attributed to her by Souers. I credit their testimony. Both Drake and Walsh appeared to be forthright witnesses with clear recollections of the 30-minute meeting. Further, it is highly unlikely that Drake, who knew Souers to be one of the Union's most active proponents, would have formulated special exclusionary and no-talking rules, applicable only to Souers and no other employees, that are patently contrary to the established work rules for kitchen employees.

I find the negative appraisal issued by Drake to Souers was warranted as a result of Souers's disregard for well-established and lawful work rules that limited kitchen conversation between on-duty and off-duty kitchen employees to relatively brief exchanges. I do not find, as the General Counsel contends, that by counseling Souers to "conduct off work business in public places and not interfere with employees during their shifts," Drake was referring solely to union solicitation. Rather, I conclude that Drake was referring to the 30-minutes Souers spent in the kitchen during which time, regardless of the nature of Souers' "off work business," Souers was interfering with the work of kitchen employees. I further find that Drake did not impose other restrictions on Souers or tell her she could not speak to other employees who worked in the cafeteria. I shall dismiss these allegations of the complaint.

6. Additional alleged violations by FMC/Sodexho

a. Alleged 8(a)(1) violations

Alleged surveillance of Barbara Mesa and others: As noted above, Barbara Mesa, an outspoken union advocate, would conspicuously spend her 30-minute lunch period and two 15-minute breaks every day at a table in the cafeteria, socializing and engaging in union-related business with Union Organizer Scott Barnes and other employees. Mesa testified that one day while she was with Barnes at the Union's table in the cafeteria, she observed EVS Director Vivian Kasey, who was some 20 feet away from Mesa's table, standing with her arms crossed, looking at Mesa with an "I see you" expression on her face, apparently intended to indicate disapproval of Mesa's association with the Union. This unnerved Mesa to the point that Mesa moved to the other side of the table so that her back was turned toward Kasey and she "wouldn't feel her watching."

Kasey, a Sodexho employee who was no longer working at the hospital at the time of the hearing, was unable to testify in this proceeding because of medical problems. However, in her comprehensive Board affidavit[44] Kasey generally denies intentionally singling out or staring at Mesa in the cafeteria. Record evidence shows that the personal and/or working relationship between Kasey and Mesa, at least from Mesa's perspective, was strained. Indeed, Mesa had recently stepped down from the position of a supervisory lead housekeeper because of a disagreement with Kasey, who according to Mesa, waived her badge in Mesa's face and asserted her authority over Mesa, saying, "That is why I am the director and you are not."

I shall dismiss this allegation of the complaint. Although I credit Mesa's testimony, I am unable to conclude that Kasey's preoccupation with Mesa was, under the circumstances, union-related rather than work related.

Alleged surveillance and monitoring of Barbara Mesa: As noted, Mesa spent her lunch periods and all of her break periods in the cafeteria at the union table. It was not required that employees clock out or in for lunch or their breaks. Mesa testified that near the beginning of April, her day-shift lead, Bernice Valencia, a supervisory FMC employee, approached her 1 day after lunch and said, "Vivian [Kasey] told me to come and tell you that you are exceeding your breaks in the cafeteria, it was along the lines, with the Union people." Mesa said, "Yeah, right. I haven't been. I know there is [sic] [surveillance] cameras" in the cafeteria. Valencia, according to Mesa, agreed, saying, "I know you haven't been."

Valencia did not testify in this proceeding. Kasey's affidavit states that from time to time she would have Valencia relay messages to employees, and does recall personally warning a number of employees during the course of monthly staff meetings that they were exceeding their break and lunch periods; however, she does not recall sending Valencia to speak directly with Mesa regarding this matter.

I credit the testimony of Mesa. As both Mesa and her supervisor, Valencia, agreed that Mesa had not been exceeding her breaks, I find that the cautioning or reprimand was unwarranted and that Mesa could reasonably believe it was motivated by her activities on behalf of the Union. Also, I find that by implying Mesa's conduct was being monitored, whether or not this was the case, Kasey created the impression of engaging in surveillance of Mesa while she was engaged in union activities at the union table in the cafeteria. Therefore, I find that by such con-

[43] There is no complaint allegation regarding this incident, and no suggestion by the General Counsel that this criticism of Souers was unwarranted.

[44] Pursuant to Respondents' motion, and over the General Counsel's objection, I determined it abundantly clear, as documented by her physician, that Kasey was unable to testify as a result of a serious medical condition. Accordingly, I received Kasey's Board affidavit, dated December 21, 2007, in evidence, and made it a part of the record as substantive evidence in lieu of her testimony.

duct FMC, through Kasey as FMC's agent, has violated Section 8(a)(1) of the Act.

Alleged warning to Melissa Demmer and Barbara Mesa: Melissa Demmer, a housekeeper, testified that in mid-July, Kasey approached her as she was eating lunch in the cafeteria at the union table with Mesa and Union Representative Barnes. According to Demmer, Mesa was generally known as Barne's "sidekick." Demmer testified that Kasey came over, looked around, and then, while looking directly at Demmer said, "Be careful about who you hang around," adding, "Unions are corrupt."

Mesa testified regarding the same incident: Mesa waived to Kasey, and Kasey approached the union table. Prefacing her remarks with the explanation that she could say whatever she wanted as she only had three days left to work, Kasey then told Demmer "to be careful who she hung out with or which side she picked or something along those lines, because they could get you in trouble." Mesa replied in Demmer's defense that Demmer was an intelligent person and could make an informed decision. Kasey suggested that Demmer come and talk to her in her office.

Kasey's affidavit states:

> I do not recall any date near the time I was departing FMC in 7/2007, in which I approached the union table in the cafeteria and had some interaction or discussion with employees at that table. I did not warn people to be careful who they hang out with or suggest to any FMC worker that they could get in trouble for hanging around at the union table or for being seen with the union supporters.

I credit the testimony of Demmers and Mesa and find that Demmers could reasonably interpret Kasey's remarks to be a cautionary warning to Demmers that her association with union advocates could adversely affect her in an unspecified manner. Further, I find Kasey's statement also constitutes a similar, albeit indirect, admonition to Mesa. By such conduct, FMC, through Kasey as FMC's agent, has violated the Act as alleged.

Alleged unlawful surveillance and interrogation by Manager Linda Keeler: The complaint alleges that in January 2008, Linda Keeler, a Sodexho manager, engaged in surveillance of Mesa, and unlawfully interrogated Mesa regarding an incident in the break room. Mesa testified that another employee informed Mesa that Keeler "just took a picture of you guys in the break room." Later that day Mesa asked Keeler about this. Keeler, according to Mesa, explained that she had tried to take a picture but the camera didn't work, and asked who told Mesa that. Mesa said it didn't matter who told her that.

Keeler testified that six employees, not including Mesa, were in the breakroom when they should have been working. She told the six employees it was time to get back to work, and conspicuously pretended to take a picture of them with her cell phone camera as the photo would capture the clock on the wall and document that they were sitting in the break room at a time they should have been working. Mesa was not in the room. I credit Keeler's testimony. Moreover, as there was no union activity or protected-concerted activity involved in this scenario, Keeler's question to Mesa appears to be no more than an innocent, spontaneous query that could not reasonably be regarded as unlawful interrogation. I shall dismiss this allegation of the complaint.

b. Alleged 8(a)(3) violations

Alleged unlawful changing of Barbara Mesa's work schedule: The complaint alleges that FMC and Sodexho discriminated against Mesa by denying her vacation request and changing her work schedule. Thus, after her union activity was widely known, Mesa was required to work 40 hours per week, and in addition, to work every weekend. FMC and Sodexho maintain that denying Mesa's vacation request and changing her work schedule were in accordance with FMC's personnel policies that were applied in a similar manner to all employees.

On June 18, Joe Brown, a Sodexho employee, assumed Kasey's position and became interim director of housekeeping. At that point Brown became responsible for that department's 64 full-time employees. Alice Colorado continued to be the department secretary, and Linda Keeler continued to be a day shift supervisor. Kasey, who was leaving the position, oriented Brown into the day-to-day things he needed to know to successfully continue running the department.

Brown soon learned of Mesa's support for the Union. Prior to Brown's tenure Mesa had voluntarily stepped down as a supervisory lead housekeeper and had become the only relief housekeeper. Brown testified he believed Mesa to be a highly proficient and skilled employee, and sometime prior to July 4, asked Mesa if she would help out as a lead over the July 4 holiday period. Mesa declined, explaining she could not do so because she supported the Union.

As Brown became more familiar with problems in the department, it became apparent that more housekeepers needed to be hired. The current housekeepers were working considerable amounts of overtime, thereby increasing the department's expenditures, and the hospital was not being kept as clean as possible due to lack of personnel coupled with inefficient scheduling of the work force. In Brown's view, the scheduling of housekeeping employees seemed more to benefit the requests of the employees rather than the needs of the hospital. His end goal was to have people working to benefit the needs of the hospital, rather than vice versa.

Scheduling of employees, according to Brown, had to be fair, balanced, and consistent; and having the correct number of people working each day, so that all the areas of the hospital could be cleaned on a daily basis, would also make the hospital cleaner. When he started in June there were 15 positions open, and he hired as many employees as he could. From July 10 to August 28 he hired a minimum of 10 housekeepers, and when he left in October only one position remained open.

Mesa, as a supervisor under Kasey, had worked every other weekend. On the weekends she did not work she also had the following Monday off, thus in effect having a 3-day weekend every other week.[45] Further, apparently as an accommodation to her, Kasey permitted Mesa to work 32 rather than 40 hours per week. After Mesa stepped down as a supervisor, becoming the only relief housekeeper, she continued working the same

[45] The Respondents' brief acknowledges that Brown's testimony in this regard was incorrect, and that Brown erroneously testified Mesa had, in effect, a 4-day weekend off every other week.

schedule she had worked as a supervisor. Relief housekeepers or "floaters," are employees who do not have regularly assigned areas to clean.

After July 10, Brown hired at least four additional relief housekeepers. They were required to work each weekend in order to fill in for other nonrelief employees who had the weekend off and, insofar as the record shows, were required to work 40 hours per week. Similarly, Mesa, also a relief housekeeper, was assigned weekend shifts and a 40-hour workweek. Brown testified it would have been unfair to the other floaters to require them, but not Mesa, to work every weekend, and that Mesa's schedule was changed to benefit the hospital. Mesa complained about the change, and Brown offered her a position as regular housekeeper with an assigned area to clean; this position would permit Mesa to have every other weekend off. He also told her that if she wanted to remain a relief housekeeper, she would have to work every weekend, but could pick her successive 2 days off during the week. However, in either event, Mesa would have to work 40 hours per week. Mesa declined both offers. There is no showing that Brown has permitted any other housekeepers, whether regular or relief, to work less than 40 hours per week.

Brown testified that Mesa also complained to him in mid-July that her vacation request, submitted July 10 for a vacation extending from July 22 to 29 in order to attend her daughter's softball tournament in Phoenix, had been denied by her supervisor, Keeler. Mesa requested that Brown overrule Keeler's denial. Brown discussed the matter with Keeler and agreed with Keeler that Mesa's request should be denied as the hospital was shortstaffed by 12 employees during the period Mesa wanted off. In accordance with FMC's practice, Mesa was given the option of finding a substitute, in which case her request would be granted. She did not find a substitute. According to Brown, other employees' vacation requests were also denied during the same time for the same reason.

I credit Brown's testimony. Brown gave cogent, persuasive reasons for taking the action he did, and there is no showing that Brown harbored any animosity toward Mesa. Brown, not Kasey, changed Mesa's work schedule and affirmed the decision to deny Mesa's vacation request. Brown was determined, I find, as the new interim director of housekeeping, to treat all employees similarly, and to apply FMC's personnel policies equally and in accordance with the best interests of the hospital. He was unwilling to make exceptions or to give Mesa or any other employee preferential treatment. I shall dismiss these allegations of the complaint.

Alleged unlawful discharge of Michael Conant: The complaint alleges that FMC/Sodexho discharged Michael Conant, a housekeeping employee, because of his activity on behalf of the Union. Conant, who cleaned rooms after patients were discharged, worked for FMC for 2 years. Insofar as the record shows, the only union activity attributable to Conant is the fact that he wore a union button at work during July, the last month of his employment. He had had a poor attendance record prior to his wearing a union button, and had received several corrective actions under FMC's no-fault absenteeism policy, including a verbal warning, a written warning, and a 3-day suspension. Then, after a series of four unscheduled absences from May 18 to July 27, he was discharged by Brown on August 1. It appears unnecessary to discuss either Conant's absentee history or the parameters of FMC's absentee policy, as the General Counsel does not dispute the fact that Conant's absenteeism warranted his discharge in accordance with FMC's policy. However, the General Counsel maintains that, as demonstrated by an analysis of FMC's past practice, Kasey had not strictly adhered to FMC's absentee policy, and therefore Brown, too, should have been guided by Kasey's example.[46]

As noted above, Brown took over Kasey's role as director of housekeeping for Sodexho. Assuming arguendo that during Kasey's tenure there was a lack of uniformity in her interpretation or implementation of FMC's absentee policy, the record shows that Kasey played no role in Conant's termination. Rather, the matter was brought to Brown's attention by Colorado, his secretary. The recommendation to discharge Conant was made by Brown and, after review, was approved by Schuler. Brown testified he acted in accordance with FMC's explicit absentee policy, and was not influenced by any union activity in which Conant may have been engaged. The record shows that Brown, from the inception of his tenure with FMC, attempted to enforce FMC's policies with consistency because it was important that all employees be treated equally. There is no showing that Brown has granted leniency to any employee who has failed to comply with FMC's absenteeism policy. I credit Brown's testimony. I shall dismiss this allegation of the complaint.

Alleged unlawful written warning to Haskielena Begay: The complaint alleges that FMC/Sodexho unlawfully issued housekeeping employee Haskielena Begay a written warning for having two unscheduled no-fault absences on successive days,[47] and, in addition, a 3-day suspension for failure to call in during one of those 2 days she was absent. These occurrences were brought to Brown's attention. Brown testified that when Begay returned to work he summoned her to his office in order to investigate the matter. Brown asked her what had happened over the weekend. Begay said she was not able to come in. Brown said he understood that on one of those days she was a "no call/no show," and advised her that a violation of this nature was a "big deal." Begay said she just didn't have her cell phone. Begay did not deny this conversation. Thereafter, Brown instructed Begay's supervisor, Keeler, a Sodexho manager, to issue the warning and the suspension. There is no question that the warning and suspension complied with FMC's absentee policy.

On Begay's next workday, shortly after she arrived at work, Keeler gave her the written warning, which Keeler had signed. Begay testified that she began wearing a union lanyard or button that very day, and that Keeler observed it with a look of disapproval as the two were speaking. Keeler denies this, stating she did not observe Begay wearing any union identification

[46] The Respondents disagree with the accuracy of the General Counsel's analysis and the conclusions drawn therefrom, and further maintains there could be a variety of discrete reasons, including mere inadvertence or perhaps the press of more immediate departmental concerns requiring attention, underlying any inconsistencies in the enforcement of the policy.

[47] Begay had previously received a verbal warning for absences.

that day. Then, the record shows, it was not until several hours later, after Begay's union sympathies were allegedly known, that Keeler presented Begay with the second document, also signed by Keeler, advising Begay of her 3-day suspension. Begay asked Keeler why she did not receive the two documents at the same time, and Keeler replied, according to Begay, "Well, I didn't know how to suspend people."

The General Counsel, acknowledging the initial warning had been prepared prior to the time Begay arrived at work, takes the position that Keeler and/or Brown had intended to give Begay only the single written warning, but then, within 2 hours of learning Begay was a union proponent, added a 3-day suspension as retaliation for her union activity. The warning and suspension are certainly related, and the record does not show why both the warning document and the suspension document were not given to Begay at the same time. I nevertheless credit Brown's testimony that he did not know of Begay's union activity at the time he instructed Keeler to issue the two documents. Brown, during his meeting with Begay, several days prior to the time she allegedly exhibited her preference for the Union, pointedly advised her that, in particular, he considered her no-call/no-show to be a "big deal." Nothing in the initial warning issued by Keeler referenced this fact. It is reasonable to conclude that from the outset, and not because of her union activity, Brown intended to impress upon Begay the seriousness of her infraction.[48] The suspension document issued to Begay is a written restatement of his succinct verbal admonition. Thus, the document states, inter alia:

> Haskielena must properly notify the department before the start of her shift. The department counts on her presents (sic) as an employee to be here or to call so we could fill her position in her absents [sic].
>
> Haskielena absenteeism No Call No Show are considered very serious and may lead to termination if not Corrected. Haskielena should take this warning very seriously.

I find that the second document presented to Begay, incorporating her 3-day suspension, was consistent with Brown's earlier admonition, and was not, as the General Counsel contends, an afterthought designed to punish Begay for supporting the Union. I shall dismiss this allegation of the complaint.

CONCLUSIONS OF LAW AND RECOMMENDATIONS

1. FMC and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.
2. Sodexho is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
3. The Unions are labor organizations within the meaning of Section 2(5) of the Act.
4. FMC has violated Section 8(a)(1) of the Act as found herein.

THE REMEDY

Having found the Respondent, Flagstaff Medical Center, Inc., has violated and is violating Section 8(a)(1) of the Act, I recommend that it be required to cease and desist therefrom and from in any other like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. I shall also recommend the posting of an appropriate notice, attached hereto as "Appendix."

[Recommended Order omitted from publication.]

[48] I credit Brown's testimony that he regarded Begay highly, and wanted to impress upon her the serious implications of her actions, as he did not want to lose her as an employee. Begay continued working in the housekeeping department until January 2008, when she voluntarily accepted a position with FMA in another department as a patient care technician.