UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

WOMEN AND INFANTS HOSPITAL,

Respondent

and **Cases 01-CA-312111**
01-CA-312613

NEW ENGLAND HEALTH CARE EMPLOYEES UNION, DISTRICT 1199 – SEIU,

Charging Party

Charlotte S. Davis and *Miriam Hasbun, Esq.,*
for the General Counsel.
Kevin Creane, Esq.
for the Charging Party.
Matthew Parker and Joseph Whelan, Esqs.,
for the Respondent.

DECISION[1]

STATEMENT OF THE CASE

RENÉE D. MCKINNEY, Administrative Law Judge. This case was tried[2] in Hartford, Connecticut, on July 30, 2024. New England Health Care Employees Union, District 1199 – SEIU filed the charge in Case 01-CA-312111 on February 14, 2023; the charge in Case 01-CA-312613 on February 12, 2023; and the amended charge in Case 01-CA-312613 on March 27,

[1] I use the following abbreviations in this decision: "Tr." for transcript; "GC X" for General Counsel exhibit; "RX" for Respondent exhibit; "JX" for joint exhibits; "GC Br." for the General Counsel's brief; and "R. Br." for Respondent's brief. Although I have included citations to the record to highlight particular testimony or evidence, my findings and conclusions are based not solely on the evidence specifically cited but rather are based on my review and consideration of the entire record, which may include the demeanor of the witnesses. I have also considered the relevant factors in making my credibility findings which includes: "the weight of the respective evidence, established or admitted facts, inherent probabilities, and 'reasonable inferences that may be drawn from the record as a whole.'" *Daikichi Corp*., 335 NLRB 622, 623 (2001) (quoting *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996), enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003)).

[2] During my review of the record, I identified transcript corrections that are warranted. Those corrections are set forth in Appendix A to this Decision and Recommended Order.

2023. The General Counsel issued an order[3] consolidating cases, consolidated complaint, and notice of hearing on March 29, 2024. Respondent Women and Infants Hospital filed a timely answer to the complaint on April 12, 2024; an amended answer on July 8, 2024; and a second amended answer[4] on August 1, 2024.

The amended consolidated complaint, as further amended at hearing, alleges that, on October 20, 2022, Respondent violated Section 8(a)(1) of the Act by issuing employee Josue Diaz ("Diaz") a written warning for leading a walk-in[5] while he was on union leave and by, on February 21, 2023, issuing employee Kelli Price ("Price") a no-trespass order for leading a walk-in while she was on union leave. The amended consolidated complaint further alleges that, also in violation of Section 8(a)(1) of the Act, on February 21, Respondent threatened to suspend employees for engaging in protected concerted activities, and, on February 21 and March 3, informed employees that Price's no-trespass order was issued because of her protected concerted activities. Respondent substantially denied these allegations. All parties were afforded the right to call and examine witnesses, present any relevant documentary evidence, and argue their respective legal positions. After the conclusion of the trial, Respondent and the General Counsel filed briefs, which I have carefully considered.

Thus, based on the entire record, including my credibility determinations, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with an office and place of business located in Providence, Rhode Island. Respondent operates a hospital providing medical and health care services. In conducting its operations during the calendar year ending December 31, 2023, Respondent derived gross revenues in excess of $250,000 and purchased and received at its Providence facility goods valued in excess of $5,000 directly from points outside the State of Rhode Island. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Further, Respondent admits, and I find, that New England Health Care Employees Union, District 1199 – SEIU ("Union") is a labor organization within the meaning of Section 2(5) of the Act.

[3] On the first day of hearing, I granted counsel for the General Counsel's unopposed oral motion to withdraw consolidated complaint allegations 15-20 and 22 pursuant to the informal Board settlement of Cases 01-CA-311812, 01-CA-314901, and 01-CA-314907. (Tr. 9.) I granted counsel for the General Counsel's unopposed oral motion to sever those three cases from the instant proceeding on August 1, 2024. (Tr. 228-229.)

[4] On August 1, 2024, I granted Respondent's unopposed oral motion to file its second amended answer and received the document as GCX 1(v). (Tr. 505.)

[5] A walk-in, which Respondent calls "storming", is a practice wherein bargaining unit employees make an unannounced group visit to orally present their grievance(s) or petition to a supervisor or manager. (Tr. 32, 544, 592.)

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

1. The Relevant Collective-Bargaining Agreement Provision

Respondent and the Union were parties to four collective-bargaining agreements, each of which was effective December 1, 2020, through November 30, 2024, that covered registered nurses and licensed practical nurses (JX 1.); service and maintenance employees and nurses' aides (JX 2.); technical employees (JX 3.); and clerical employees. (JX 4.) Besides the recognition language, which is not in contention here, pertinent to the instant matter and contained in each of the collective-bargaining agreements is the following provision:

…

ARTICLE XVII
UNPAID LEAVE

Full Time and Regular Part Time Employees shall be eligible for unpaid leave in accordance with the following:

> Union business. A leave of absence of up to one (1) year shall be granted to Employees with one (1) or more years of bargaining unit seniority in order to accept a full-time position with the Union, provided such leaves will not interfere with the operation of the institution. No more than one (1) member of the bargaining unit may be on such leave at any time.

2. The Relevant Provisions of the Workplace Violence Prevention Policy

Respondent[6] maintains a workplace violence prevention policy, which was in effect at the time of the underlying incidents in this case. (RX 2.) In pertinent parts, that policy provides as follows:

> I. **Purpose.** The purpose of this…[policy] is to reduce the potential for any act or threat of physical violence, harassment, intimidation, or other threatening disruptive behavior that occurs at the work site and/or in the performance of work….
>
> II. **Scope.** This policy applies to…patients, visitors and workforce of Care New England…hospitals…health care entities, and each other…direct or indirect subsidiary…

[6] Care New England is Respondent's parent company. (Tr. 95; R. Br. 5.)

III. **Definitions.**

A. **"Harassment"** means behavior or communication through any medium…designed or intended to intimidate, menace, or frighten another person. […]

C. **"Physical attack"** means any unwanted or hostile contact including but not limited to hitting kicking, fighting, pushing, shoving, spitting, scratching, biting, or the throwing of an object towards any individual.

E. **"Threat"** means the expression of a present or future intent to cause physical or mental harm without regard to whether the party communicating it has the present ability to do harm, and without regard to whether the expression is contingent, conditional or future. […]

F. **"Visitor"** means an individual on…premises…who is not a patient or workforce member…

G. **"Workforce"** means an employee…whose conduct, in the performance of work…is under the direct control of Care New England and/or [affiliates], whether or not such person is paid by Care New England or [an affiliate].

H. **"Workplace Violence"** means any act or threat of physical violence, harassment, intimidation, other threatening disruptive behavior…directed at towards person s at the work site or in the performance of work. Workplace violence is categorized into the following types:

…

Type II – Patient/Visitor/Other to Workforce: means workplace violence directed by patients, clients, visitors…

Type III – Workforce to Workforce: means workplace violence directed at workforce by a present or former member, supervisor, or manager.

B. Josue Diaz's Union Leave and the July 19, 2022, Incident with Michelle Rosa Martins

From February 2022 to approximately the end of September 2022, pursuant to Article XVII.2 of the collective-bargaining agreement, patient services coordinator Diaz was on unpaid union leave in the role of organizer. (Tr. 172, 176.) In this role, Diaz worked at least 40 hours a week, and the Union paid Diaz the same salary as he received from the hospital. (Tr. 176-178). While Diaz was an organizer, he reported to Patrick J. Quinn,[7] and later, Jesse Martin ("Martin"),

[7] I take administrative notice that references to "Patrick Queen" in the transcript (Tr. 176, 177.) refer to Patrick J. Quinn, who stepped aside as the Union's Executive Vice-President in July 2022. <https://6park.news/rhodeisland/ri-

the Union's current executive vice president. (Tr. 176, 381.) Diaz performed get-out-the-vote work contacting members, which work was associated with the Rhode Island political cycle; lobbied the state legislature; and provided traditional representation services to unit members located at Respondent's 38 work sites. Diaz's meetings from the Union's office located at the hospital and at the Union Hall usually occurred through Zoom. (Tr. 178, 385-387.)

On July 19, 2022, unit employee Yokasta Perez[8], an interpreter, approached Diaz in the Union's hospital office complaining that she was being denied a locker for her exclusive use at work. Perez told Diaz that admitted 2(13) agent director of patient experience and family centered care Michelle Rosa Martins ("Rosa Martins"), after providing her with a locker key, had taken the key back and was requiring her to share a locker with other employees. Tr. 179-80, 181, 474, 468.

After confirming with Perez that Rosa Martins was in her office, Diaz, consistent with his usual practice when dealing with he considered an informational discussion, walked to Rosa Martins' office with Perez for an impromptu meeting. (Tr. 182, 183.) When they arrived, Perez knocked on Rosa Martins' office door and asked if she had time to talk to them. (Tr. 184.) Rosa Martins was sitting at her desk and granted them permission to enter. (Tr. 184.) Rosa Martins' office was small and consisted of one entrance, a desk with a computer, a chair for the desk, and, as Diaz recalled it, a couch.[9] (Tr. 185, RX 17, 18.) Diaz sat on the couch, less than a foot away from Rosa Martins in her desk chair and introduced himself; Perez remained standing. (Tr. 185, 477.) Diaz and Rosa Martins had not met before this conversation; Rosa Martins was new to Respondent's employ. Diaz testified that his usual speaking volume was "loud", estimating it as a 4 or 5 on a 1 to 10 scale. (Tr. 186.) Although he was wearing a face mask during that conversation, he spoke to Rosa Martins at his usual volume. (Tr. 186.)

Diaz explained the reason for his visit; Rosa Martins acknowledged that Perez was being required to share a locker because Respondent did not have keys for the other lockers. (Tr. 187.) Diaz suggested a way to resolve the issue, which solution Rosa Martins explained she had already tried. (Tr. 187.) Then, Diaz told Rosa Martins that she could also put in a ticket to the engineering department, which could open the lockers, change the locks, and provide a new key. (Tr. 188.) Diaz's speaking volume in such close proximity and, what Rosa Martins interpreted as his strident and overbearing manner, offended Rosa Martins. (Tr. 188, 481.) Further, Diaz was mistaken in who had told Perez the prior week that she would have to give back her locker key and share with the other interpreters; it was a different supervisor. (Tr. 475.) Yet, when Rosa Martins tried to clarify this point (because she was on vacation the prior week), Diaz contradicted her, insisted that it had been Rosa Martins who spoke to Perez, and also again demanded a locker for Perez and that Rosa Martins resolve the issue. (Tr. 475-476.)

In response, Rosa Martins told Diaz that he was yelling, she was not even there when the incident occurred, and she did not know what Diaz was talking about. (Tr. 475.) Yet, as she did

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healthcare-workers-union-leader-steps-aside.html> (last accessed February 27, 2025).

[8] The transcript refers to both Yokasta Suero Perez (Tr. 179.) and Yokasta Flores Perez (Tr. 23.). Based on the testimony as a whole, I surmise that this is the same individual. Perez did not testify at hearing.

[9] Rosa Martins testified that, at the time of Diaz's visit, there were actually two guest chairs in her office—not a couch. (Tr. 471.) I find that this is an immaterial difference in the witnesses' testimony that does not reflect on credibility.

so, Rosa Martins leaned in towards Diaz, further closing the already small space between them. (Tr. 188, 491.) According to Diaz, she also "swung" her finger in front of his face and told him that she did not like his tone of voice and the way that she was talking to him. (Tr. 188.) However, according to Rosa Martins, Diaz was pointing at *her* first, and she responded by addressing him with shoulders shrugged, hands in her lap, and her palms facing up and fingers spread in response in an effort to appeal to Diaz to cease. (Tr. 476, 480, 492, 493.) Even as they agreed that Perez needed her own locker, Rosa Martins refused to continue their conversation because she perceived that Diaz was yelling at her and that his behavior was intended to intimidate her. (Tr. 476.)

The interaction further escalated at that point. Rosa Martins insulted Diaz by saying that she had thought she was talking to a professional person (meaning Diaz) but saw that she was not. (Tr. 188.) Pointing, Rosa Martins instructed Diaz to leave her office. (Tr. 190, 477.) Addressing Perez, not Rosa Martins, Diaz asked for Rosa Martins' name and email address and stated that he would report her. (Tr. 189, 478.) Rosa Martins accused Diaz of barging into her office uninvited while she was on a call, which Diaz denied. (Tr. 189, 210, 473.) Diaz rose, still pointing and within a foot of the seated Rosa Martins, and the two continued to bicker; Rosa Martins also rose. (Tr. 205, 481, 482.) Diaz advised Rosa Martins that he would email her and made to leave the office.[10] (Tr. 205, 478.) Rosa Martins told Diaz that he could email her all he wanted but to get out of her office. (Tr. 478.) By the end of the interaction, Diaz's speaking volume was at 8 or 9 out of 10. (Tr. 478.)

Diaz reported the interaction to senior organizer Heather Kelley and Rosa Martins reported it to her supervisor. (Tr. 205, 481.) On August 9. 2022, Diaz documented the interaction with Rosa Martins at Union executive vice president Martin's request. (Tr. 206, 405; GCX 8.)

C. Diaz's Investigatory Interview and the October 20, 2022, Warning Notice

On October 7, 2022, admitted 2(13) agent senior HR business partner Tim Clifford ("Clifford") e-mailed Diaz, copying senior organizer Kelly and director of labor relations Rosemary Healy to arrange an investigatory interview with Diaz regarding the events in Rosa Martins' office on July 9. (JX 9.) Kelley replied to Clifford the same day, asking whether the investigation involved off-duty behavior or Diaz's behavior while "employed" by the Union. Kelley posited that Respondent lacked the authority to investigate or discipline the Union's employees and concluded that Diaz's conduct was between the Union and Diaz during his Union "employment." Clifford acknowledged the Union's viewpoint and concluded that if Diaz did not wish to be interviewed, he would reach his conclusions based on the information he already had. After some discussion of dates, it was determined that the interview would occur on October 19.

[10] Here, Rosa Martins and Diaz's accounts differ in that Diaz states he backed away from Rosa Martins, who had advanced towards him, and Rosa Martins states that Diaz took a step towards her. (Tr. 192, 481.) If they started out a foot apart when seated, as Rosa Martins testified, Diaz taking a step towards Rosa Martins would have put them nose to nose when Rosa Martins stood up. Yet, it is clear from the testimony on the whole that Rosa Martins was highly agitated by this time and had ended the meeting, and Diaz, also highly agitated, was trying to exit the office. Therefore, I credit Diaz.

Kelley, Diaz, and Clifford[11] attended the meeting. (Tr. 194.) At the meeting, Diaz, Clifford, and Kelley argued about whether Diaz was Respondent's employee or not during his union leave. (Tr. 195-98, 232.) After debating with Clifford whether off duty conduct could be subject to discipline, Kelley ended the meeting; Diaz did not submit to the interview by Clifford. (Tr. 197.)

On October 26, 2022, Respondent issued Diaz a warning notice (JX 8.) dated October 20, 2022:

> Josue entered Michelle Rosamartins' [sic] office with a coworker to complain about access to lockers. During this meeting, Josue began angrily to raise his voice to Michelle. Josue also stood up from a seated position and took a step toward her while yelling his objections. Josue was standing between Michelle and the door effectively blocking it.

A statement, apparently written by Rosa Martins, which generally conformed to her testimony at hearing, was attached to the warning notice. (JX 9.)

D. Kelli Price's Union Leave and the February 9, 2023, Incident in the Environmental Services Department Office

From about November 2022 to about May 2023, registered nurse Price went on union leave to work as an organizer for the Union; she primarily reported to senior organizer Kelley. (Tr. 92.) Price worked about 40 hours a week during this time. (Tr. 31.) During her leave, prior to receiving the no-trespass order, on rare occasions, she worked out of the Union Hall office, but Price worked mostly out of the Union's office in the Hospital or reserved another empty office at the Hospital to perform her work. (Tr. 94-95, 96.) As an organizer, Price participated in Union strategy and planning meetings and had meetings with management and employees to resolve employee issues. (Tr. 92, 93-94.)

1. The EVS Employees' Complaints about Renata Coombs and the Union's Efforts to Resolve the Complaints

Beginning about fall 2022, four to five employees in the environmental services department ("EVS") complained to Price, who was a Union delegate for years prior to her Union leave, about their treatment by patient experience manager for environmental services Renata Coombs ("Coombs"). (Tr. 28, 33-34). The EVS employees expressed to Price feeling mistreated and dehumanized by Coombs. (Tr. 34.)

In response to these concerns, with the complaints continuing, about December 2022 or January 2023, Price and Union executive vice president Martin requested a meeting with senior HR business partner Clifford and director of environmental services Peter S. Cote ("Cote"). (Tr. 35-36.) Yet, when Cote and Clifford arrived at the meeting, they discovered that Price and Martin had, without telling them, invited approximately 30 EVS employees, who were waiting in an adjacent auditorium. (Tr. 510.) Cote, after first objecting that the EVS employees were on the clock and should be working, relented and listened and responded to the EVS employees; he

[11] Clifford did not testify at hearing.

acknowledged that there was a communication problem and indicated a desire to come up with a plan to address employee concerns. (Tr. 394-396.)

Price and Martin attempted to schedule a follow-up meeting to continue the discussion with the participation of a "supermajority" of EVS unit members. (Tr. 36, 399; GCX 2.). Cote responded by offering February 7 between 9:00 a.m. - 10:00 a.m., or February 9 between 9:00 a.m. - 11:00 a.m. or 12:00 p.m. - 1:00 p.m. and requesting that Price "limit staff participation to 4 or 5 representative employees" to avoid disruption to the EVS employees' work. (Tr. 511-513; GCX 2.) Price rejected Cote's proposed meeting time because she sought to schedule the meeting during a shift change time, 3:00 p.m. – 4:00 p.m., when most EVS employees would be able to attend. (Tr. 399.) Cote responded that he was not available during Price's proposed hour, and, further, he wished to "limit the number of staff attending subsequent meeting as to not disrupt work flows." (GCX 2.) Martin, copied on the e-mail correspondence, expressed the view that there should be no disruption if the employees were off the clock. (GCX 2.)

Cote replied on February 9 that he was not generally available at 3:00 PM and offered additional dates and times: February 13 between Noon-1:00 p.m., February 14 between 9:00 a.m. -10:00 a.m., and February 15 between 10:00 a.m. - 11:00 a.m. He also stated

> At least 17 of the EVS staff members at the last meeting were on the clock and not in their assigned work area; I would call that quite disruptive.

Meanwhile, EVS employees reported to the Union that nothing had been done to address the concerns employees had raised to Cote and Clifford. (Tr. 398.) The perceived disdain for the EVS employees by management had also escalated: Martin heard from EVS employees, many of whom are of Portuguese descent, that they were now being called the "Portuguese mafia" by management. (Tr. 398.) It is admitted that Cote did not do any follow up with his management team to address employees' concerns. (Tr. 546.) Rather, employees informed Price that when Coombs asked Cote what happened at the meeting with EVS employees, Cote told Coombs that she should just keep doing what she was doing. (Tr. 66.)

Finally, on February 9, 2023, Price and Kelley encountered a distraught employee who complained of an interaction she had with Coombs. (Tr. 42; 326.) In fact, it was a different EVS manager who had upset the employee, not Coombs. (Tr. 555.) However, there is no evidence that Price, Kelley, or the EVS employees who participated in the walk-in knew this. The distraught employee was later sent to a different hospital with a cardiac issue. (Tr. 44.) Unable to find Coombs to talk to her directly, Kelley directed Price to do a walk-in. (Tr. 166-167; 326, 328.)

By lunchtime on February 9, about three hours before the walk-in occurred, Cote knew that employees were planning to come to his office to speak with him. (Tr. 547.) He went looking for employees to "have a conversation with them" but intending to require anyone congregating on work time back to work. (Tr. 548.) Cote did not locate any such employees, and he did not attempt to locate the EVS union delegate, Alcidia Mota (Mota"). (Tr. 548.)

2. The February 9, 2023, Walk-in[12]

About 3:20 p.m., Price stood by the timeclock for the EVS department to catch EVS employees as they clocked out for the day, explained the respect and dignity issues that prompted the planned walk-in to Cote's office, and asked them to join her. (Tr. 47-48; 241.) About 10-12 employees agreed to accompany Price. (Tr. 48, 241.)

The EVS department office consisted of one large room, with four cubicles and a small rolling table, and a smaller room, which was Cote's office. (Tr. 517.) The space with the cubicles was about 12 feet by 25 feet and Cote's office was separated from that larger room by a door. (Tr. 132.)

When Price and the other employees entered the EVS office, EVS operations manager Steve Duarte was there. (Tr. 246, 534-535.) EVS manager Denise Martin was sitting by her desk across from Cote's office. (Tr. 246, 270.) EVS managers Brandon King and Coombs were also in the EVS office at that time. (Tr. 431.) Duarte left the room and stood in the hallway as the employees arrived. (Tr. 246, 249-250.)

Price said hello to Cote, King, and Coombs, and told Cote that his staff wanted to meet with him to discuss employees' concerns about respect in the workplace. (Tr. 50-51, 286.) In the EVS office were employees Mota, Stephanie Garneau, Kathy Zamborano, and Oliveira. (Tr. 515-516, 533.) The other employees remained in the hallway outside the EVS office. (Tr. 244-245, 285, 456.) According to Mota and Oliveira, no employees stood in the doorway. (Tr. 253, 255.)

The record is mixed as to whether the employees, other than Price, were quiet as they approached the EVS office and during the walk-in. (Tr. 49, 271, 272, 432, 435, 437, 516, 531, 532, 550, 559; GCX 27.) Price's testimony establishes that there was a brief discussion of how to proceed as the employees approached the EVS office, where the employees designated Price to speak on their behalf. (Tr. 49.) On the whole, I find it improbable that group of 10-15 employees, in an emotionally charged situation such as this one, would remain silent once they arrived at the EVS office. Thus, I credit Price and Respondent's witnesses that at least some of the employees were talking on the way to the EVS office and I credit Respondent's witnesses that the employees were engaging in a typical-for-protests type of call and response described by these witnesses.[13] Yet, the preponderance of the evidence tends to show that the only employee to address management directly was Price. (Tr. 50, 286, 432, 559, 564.)

[12] Regarding the February 9, 2023, incident facts, counsel for the General Counsel called Price and employees Maria Olivera and Mota. Respondent called admitted 2(13) agents Cote, operations manager Brandon King, and Coombs. The main differences of legal significance in the witnesses' testimony are (1) whether Price intentionally blocked Coombs from leaving the EVS office during the walk-in and (2) whether Price pushed on the door in order to force her way into Cote's office as Cote tried to close it on the employees during the walk-in. There are also other differences in witness testimony, discussed at length by the parties in their briefs, that I find have no substantial bearing on whether Price's conduct was protected in the first instance or later lost the protection of the Act. Therefore, although I resolve the conflicts that I identified below, my discussion of these differences is limited.

[13] Referred to by Respondent's witnesses as "chanting".

After returning Price's greeting, Cote looked away to continue his work. (Tr. 50.) After an awkward pause where Price continued to linger at his door as more employees entered, Cote looked a question at Price. (Tr. 51.) Price informed him that she was waiting for the rest of his staff to come in and Cote replied that they did not have a meeting scheduled. (Tr. 51, 247, 270.) Price acknowledged this and explained that the EVS staff wanted to discuss issues they had with Coombs. (Tr. 51, 247.) Cote repeated that he was not going to meet with Price, got up, and slammed the door. (Tr. 51, 516.)

According to Coombs, when Cote slammed the door, Price said, "I can't believe that he closed the [fucking] door in my face." (Tr. 564, 574.) No other witness recalled Price cursing. (Tr. 107, 447-448, 450, 532, 575.) Therefore, given the lack of corroboration on this point, I find that Price did not do so. However, Price, still addressing Cote, after the door slammed, announced that she could talk through a closed door and wanted to speak with Cote about Coombs and include Coombs in the discussion. (Tr. 56, 567.)

After Cote slammed his door, Price addressed Coombs—telling her something to the effect that she was not going to continue to disrespect employees. (Tr. 432, 577.) Coombs refused to speak to Price and she apparently decided at that point to leave the main EVS office. (Tr. 271.) According to King's statement taken during Respondent's investigation, Coombs attempted to walk out the door but was blocked in by EVS employees. (RX 13.) King reiterated this in his hearing testimony. (Tr. 457, 463.) Coombs testified that her exit through the EVS exit door was blocked by Price and Garneau. (Tr. 567.) Yet, according to Mota, Price was next to Cote's door by that time—and she saw Coombs get up and knock on Cote's door after Cote slammed the door. (Tr. 271.) At that point, Mota received a phone call from a member and stepped out of the EVS office into the hallway. (Tr. 271.) Price testified that she was between Coombs and Cote; she was three steps away from Cote's door. (Tr. 54.) Further, King testified that there were too many people in the office to leave without someone moving on their own or without Coombs asking someone to move; Coombs did not ask anyone to move out of the way. (Tr. 432, 450, 461, 463.)

The EVS office is, by all accounts, a small space—made even smaller by the four cubicles and rolling table inside. (Tr. 284-285.) And there were five extra people crowded into the small open space in the room during the walk-in. Taking all of the relevant record evidence into account, I find that no one purposely blocked the EVS exit door. Further, both Duarte and Mota were able to leave the room during the walk-in. I find that the room was simply crowded; and without an easy path out of the EVS office, Coombs attempted to enter Cote's office instead.

Coombs, who had stepped around Price, banged on Cote's door, and repeatedly said, "no" and "let me in" at the door. (Tr. 56, 271, 518, 569.) Coombs was then standing with her back to Price. (Tr. 569, 577.) Yet, Coombs testified that she was afraid and felt she was in physical danger at that time. (Tr. 248, 261-262.) She was visibly upset. (Tr. 155.)

Price continued speaking, saying that the group was there to address the dignity and respect issues with Coombs. (Tr. 57, 286.) She admitted that she spoke a little louder than she had been in the hallway on the way to the office; her voice was raised from a level two to a level four on a scale of one to 10. (Tr. 105.) Price referenced the earlier meeting with EVS employees

and that "nothing seemed to have come of the meeting." (Tr. 57.) She also spoke about treating employees with respect and said something along the lines of that each time Coombs acted in a degrading manner toward staff, the employees would come back to address it again. (Tr. 57, 569.) Price also said that this could not keep happening and that someone had to go to the hospital because of Coombs' treatment. (Tr. 57.)

Cote opened the door about 16 inches after about two minutes. (Tr. 57, 518, 520.) Coombs walked in, and Price stepped forward to follow but Cote slammed the door again, excluding Price. (Tr. 57-58, 433, 520-521.) Price, who was stepping forward in the process of entering the door because she believed she was being admitted to Cote's office, put her hand up to the door to protect herself and slow down the closing door. (Tr. 58, 136.) Cote testified that it did not take much force for him to close the door, yet he felt resistance as he did so. (Tr. 541.)

I credit Cote that he felt resistance when trying to close the door after admitting Coombs to his office. (Tr. 449, 521, 541.) Yet, I also credit Price that she put her hand in front of her to stop the door from hitting her because she had started to advance into the doorway when Cote closed the door. (Tr. 64, 107, 552.) King saw Price put her hand on the door. (Tr. 433.) Cote admitted that Price was inches from the door as he closed it. (Tr. 439-440.) Yet, he was behind the door as he closed it, and, I find, therefore not in a position to see how far Price had moved forward after Coombs was admitted. Finally, I received into evidence a file note as a business record[14] attributed to a statement given to management by Duarte, who did not testify at hearing, which stated "Kelli Price placed her hand on the door, but Steve pushed it closed once Renata got i[n]." (RX 13.) Duarte's statement conforms with the accounts of Price, King, and Cote on this point.

After Cote closed his door the second time, Price announced that if the employees needed to come back every day, they would do so until the issue was addressed. (Tr. 59.) Price and the other employees left two or three minutes later. (Tr. 59, 522.)

The hearing testimony as to Price's demeanor, tone of voice, and speaking volume during the walk-in was mixed. Price herself testified that she was very relaxed because she was confident that she was doing the right thing. (Tr. 60.) Mota testified that Price was calm and collected: she was talking as normal, and her body language was not like she was mad. (Tr. 273.) Olivero testified that Price's tone was conversational, her voice was not raised, and she did not say anything threatening or intimidating. (Tr. 252-253.) Coombs testified that Price was "very disrespectful" and her voice "aggressive." (Tr. 577.) King testified that Price was "overbearing." (Tr. 435.) Finally, in testimony that was led by counsel, Cote agreed that Price's demeanor was not relaxed. (Tr. 517.)

At hearing, Price did not attempt to paint herself in a positive light. She freely admitted how her own frustration with the state of the relationship between the EVS employees and management affected her conduct during the walk-in. Based on my observations of Price's behavior on the witness stand, as well as the pattern of behavior reflected in Price's work history,[15] I credit Price, Mota, and Olivero as to how Price behaved and spoke during the walk-

[14] Fed.R.Evid. 803(B).

[15] Price's performance reviews remark upon her even composure and advanced oral communication skills, which I

in. At the same time, I note that the testimony of Coombs and King reflects how they interpreted Price's conduct—and not the objective signs that would lead to such conclusions. Cote's testimony on this point was led, and I find it of little persuasiveness.

The walk-in lasted between five and 10 minutes. (Tr. 60, 250, 273, 550.)

E. Respondent's Investigation of the February 9, 2023, Walk-in

Following the February 9 walk-in, labor relations director and admitted 2(13) agent Rosemary Healey telephoned Kelley and told her that "this can't keep happening." (Tr. 328-329.) Healey characterized the walk-in as violent and said that Coombs had to be escorted out by security. (Tr. 329.) Healey said that Respondent was going to discipline Price, but Kelley stated that it was as inappropriate to discipline Price as it had been to discipline Diaz because both had been working for the Union. (Tr. 329.) Healey also said that it was wrong that employees had gone to the EVS office when Cote had offered times to meet. (Tr. 329.) Kelley replied that Cote wanted to limit the number of employees to only a few, to which Healy responded that the Union did not need to have a group of employees there. (Tr. 330.)

Apparently during the week of February 17, 2023, Price called Healey to explain her version of the walk-in events, including that she had "touched" the door to protect herself, not to force her way into Cote's office. (Tr. 64.) Price explained why the EVS employees felt the need to do a walk-in despite Cote's participation in the earlier meeting and facial willingness to meet again. Namely, that Price had heard from employees that Cote had told Coombs to keep doing what she was doing. (Tr. 66.) Healey accused Price of being "out of control" at the walk-in, to which Price appealed to Healy's knowledge of Price's character and history. (Tr. 66.) Price also told Healey that even if she was not a union delegate, liaison, or organizer, she would still encourage the employees to talk with Cote and Coombs directly since this was a "human" issue. (Tr. 71.)

According to uncontradicted testimony by counsel for the General Counsel's witness Martin, Respondent's usual investigative process involves viewing the accused's personnel file; taking statements from witnesses; and collecting appropriate data. (Tr. 420.) Martin also testified that it was his experience that employers generally interview both bargaining unit and management witnesses during such investigations. (Tr. 414.) However, Respondent did not interview any of the bargaining unit employees who participated in the walk-in. (Tr. 232, 250, 273, 288; GCX 27.) According to Price, Kelley, and Martin, Clifford informed Kelley and Price that he would not interview bargaining unit employees who participated in the walk-in because he expected them to lie. (Tr. 76-77, 336, 403.) Counsel for Respondent did not rebut this testimony.

Based on the evidence collected during its investigation from management officials, Respondent concluded that Price had acted violently during the walk-in. (Tr. 358.) Via counsel, Respondent informed Kelley that Respondent was preparing to issue Price a no-trespass order. (Tr. 331.) Kelley testified that, according to counsel, in issuing the no-trespass order to Price, Respondent was "taking a stand against the walk-ins." (Tr. 331-332.)

also observed at hearing. (GCX 6.)

F. Price's February 21, 2023, Telephone Conversation with Clifford and Price's Receipt of the No-Trespass Order

On February 21, 2023, Clifford called Price and informed her that she was suspended from the premises as of that day. (Tr. 67.) In response to Price's attempt to relay her side of the story, Clifford declined to hear her out and stated that Price had been out of control and very unprofessional at the walk-in. (Tr. 67-68.) He said that Respondent could not have people walking into managers' offices whenever they feel like it without an appointment, to which Price replied that employees[16] do that all of the time. (Tr. 68-69.) Price asked Clifford about her current projects; Clifford said that she could continue her union work with the hospital, but it had to be via Zoom; she could not come on the premises. (Tr. 68.) Clifford told Price that an employee had been so afraid she asked hospital security to escort her to her car. (Tr. 71.) Price said okay and hung up. (Tr. 68.)

The same day, Clifford informed the Union and Price by e-mail that Respondent was issuing Price a no-trespass order for 30 days. (JX 5.) Referring to Price's conversation with Healy, Clifford wrote that Price had represented to Respondent that she acted not as an employee or union representative and instead was a "guest" in the building. Kelley replied that Price was acting as a union representative during the walk-in and questioned whether racial stereotypes[17] played a role in punishing Price.[18] (RX 15.)

In a subsequent email response to Price on February 22, Clifford reiterated how seriously Respondent viewed Price's alleged conduct. (JX 5.) He accused Price of acting with "physical aggression" causing a "fellow employee"[19] to be escorted out of the building by security and expressed the view that the walk-in was not a peaceful request to discuss a matter because Price had not accepted Cote's proposed meeting times.

There is no evidence that any other employees who participated in the February 9, 2023, walk-in were either disciplined or issued a no-trespass order. Price continued to perform her Union duties for the duration of her leave but by telephone, Zoom, or at the Union's Hall. (Tr. 73-74, 138.)

G. Respondent's View of Walk-ins and the March 3, E-mail to All Hospital Employees

Following a walk-in sometime in December 2022 to February 2023, chief nursing officer Kim Francis[20] told Kelley that the walk-ins were unprofessional and that she would no longer tolerate that kind of behavior. (Tr. 343.)

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[16] In her testimony, Price did not say "employees"—she said "they"; counsel for the General Counsel did not clarify this vague term. I have inferred from the context of her testimony, however, that Price was referring to employees.

[17] Price and Kelley repeated this concern at hearing. (Tr. 75-76, 129, 360, 362.)

[18] In fact, Price had admittedly also participated in previous multiple walk-ins without discipline, although, she testified that the February 9, 2023, walk-in was the first time a person of color had ever led a walk-in. (Tr. 32, 75-76, 119, 120, 123.)

[19] This was a reference to Coombs, to whom Cote had suggested that she might want a security escort to her car if she felt unsafe. (Tr. 523.)

[20] Although counsel for the General Counsel obviously elicited this testimony for the purpose of showing animus,

On March 3, 2023, Respondent's admitted 2(13) agent president Shannon R. Sullivan emailed all staff and stated that it was true that the hospital had issued a 30-day no-trespass order to a person acting in a union role to protect the physical and psychological safety of employees. (Tr. 82; JX 6.) She wrote that that Respondent welcomed discussions about departmental issues "when done in a planned and respectful manner." Later, Sullivan told Kelley and Martin in a Zoom meeting that Respondent did not like the walk-ins and did not want employees to continue having them. (Tr. 342.) Sullivan also told Kelley that Respondent did not think employees had the right to do walk-ins and that they had to stop. (Tr. 342.)

Yet, admitted 2(13) agent human resources manager Enrique Cepeda testified at hearing that he was the target of a walk-in about July 2024 and peaceably met with the employees, who were serving him with a petition without notice, outside his office. (Tr. 593-594.) Although he did not feel physically intimidated, Cepeda stated that he felt "activated" in that his fight or flight response was triggered by being confronted by a crowd in a confined space. (Tr. 596-597.)

F. Respondent's Comparators

Without any witness examination or opposition, I received into evidence from counsel for the General Counsel the disciplinary records of asserted comparators who did not engage in union or protected concerted activity, which were proffered as subpoenaed business records of Respondent. (Tr. 428; GCX 28 (a-f).) I noted at the time of receipt that without any testimony to explain the documents, I would receive them for what they were worth and found some of the documents unclear upon cursory examination. (Tr. 428.) Having reviewed the documents in detail, I find that none of the asserted comparators evince conduct that is the same or substantially the same as that engaged in by Diaz or Price.

DECISION AND ANALYSIS

I find that Respondent has violated Section 8(a)(1) of the Act as alleged in the amended consolidated complaint, as further amended at hearing.

I. DIAZ'S DISCIPLINE ALLEGATION

A. Diaz Engaged in Protected Union Activity

Paragraph 8(b) of the amended consolidated complaint alleges that about October 20, 2022, Respondent issued a written warning to employee Josue Diaz for leading a walk-in while

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Francis is not alleged as a 2(11) supervisor or 2(13) agent in the amended consolidated complaint. The party asserting supervisory status must prove it by a preponderance of the evidence, and this requires detailed, specific evidence. *Veolia Transportation*, 363 NLRB No. 188, slip op. at 7 fn. 19 (2016); *G4S Regulated Security Solutions*, 362 NLRB No. 134 (2015). It is an individual's duties—not job title—that determines status. *Dole Fresh Vegetables*, 339 NLRB 785 (2003). Kelley testified that Francis "directs all the nurse directors, all of the people, below the nurse directors, the supervisors…she seems like really all the nursing decisions go through her." (Tr. 344.) I find that the evidence is sufficient to establish that Francis is a 2(11) supervisor in that Kelley testified without contradiction that Francis has "authority, in the interest of the employer, to…responsibly to direct [employees]… or effectively to recommend such action…using independent judgment." See 29 U.S.C. § 152(11). Even if Francis were not a 2(11) supervisor, she is certainly a 2(13) agent who, as the record shows, communicates with the Union and bargaining unit employees on behalf of Respondent. (Tr. 84, 122, 342, 343.)

he was on union leave. Paragraph 8(c) alleges that Respondent issued that written warning because Diaz led the walk-in and to discourage employees from engaging in these or other concerted activities.

Relying on the Board's access cases for off-duty employees, in particular, *U.S. Postal Service*, 318 NLRB 466, 466 (1995) and *Southern California Gas Co*., 321 NLRB 551, 557-558 (1996), counsel for the General Counsel argues (GC Br. 14.) that Diaz remained an employee of Respondent during his union leave.[21] Pursuant to *NLRB v. Burnup & Sims, Inc*., 379 US 21, 23 (1964), argues that Diaz's conduct was protected concerted activity in that it was representational; Respondent did not have a good faith belief that Diaz committed misconduct; and that Diaz did not, in fact, commit misconduct. (GC Br. 45-48.) Alternatively, balancing the *Atlantic Steel*, 245 NLRB 814 (1979) factors, counsel for the General Counsel contends (GC Br. 53-54.) that Diaz did not lose the protection of the Act. Finally, counsel for the General Counsel, despite correctly acknowledging that *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983), does not apply where an employer indisputably acts against an employee for engaging in protected activity, argues that Diaz's discipline was unlawful under that case as well. (GC Br. 57-59.)

Counsel for Respondent asserts that Diaz was not its employee on July 19, 2022, but an employee of the Union (R. Br. 51.), or, in the alternative, that Diaz was Respondent's employee, but lost the protection of the Act through his serious misconduct. (R. Br. 55.) Respondent's primary attack involves the interpretation of the collective-bargaining agreement's union access language (R. Br. 51.) and its secondary line of attack falls under *Atlantic Steel*, supra, although the brief does not cite that case. (R. Br. 55-58.)

Consistent with the Board's well-established case law, I find that Diaz remained a statutory employee while he was on union leave. See *BASF Wyandotte Corp.*, 278 NLRB 173, 183 (1986) (employer violated Sec. 8(a)(3) by issuing an oral warning to employee for his conduct when he was acting in the capacity of a union representative at a meeting with the employer's managers); *Gross Electric, Inc*., 366 NLRB No. 81 (2018) (employer's refusal to hire a union president because of his criticisms of the employer's hiring practices and a supervisor during representation of an employee at grievance hearing violated Sec. 8(a)(3)).

It is undisputed that Diaz was acting in his capacity as a Union organizer during his discussion with Rosa Martins on July 19. (GC Br. 12-13; R. Br. 6-8.) Diaz's representation of employee Perez was union activity and therefore, protected concerted activity. Disciplining Diaz because of this activity was inherently destructive of employees' Section 7 rights. *Pittsburgh Press Co*., 234 NLRB 408 (1978) (penalizing employees "for union-related conduct protected by Section 7 of the Act such as that considered here is inherently destructive of important employee rights and thus requires no proof of antiunion motivation.") (citing *NLRB v. Great Dane Trailers, Inc*., 388 U.S. 26 (1967)). Thus, the issue here is whether Diaz's union activity during the discussion with Rosa Martins on July 19 lost the protection of the Act. I find that it did not.

[21] Neither the General Counsel's nor Respondent's resort to the Board's access cases or the parties' agreements as to access is appropriate as to Diaz. The amended consolidated complaint does not allege, nor do the facts establish, that Diaz was denied access to the Respondent's facility—either as a union representative or as an employee.

B. The Appropriate Legal Standard

The Board has consistently held that where an employer indisputably acts against an employee for engaging in protected activity, a *Wright Line* analysis is not appropriate. See, e.g., *Lion Elastomers LLC*, 371 NLRB No. 83 (2023) (overruling *General Motors*, 369 NLRB No. 127 (2020)), vacated and remanded by 108 F.4th 252 (5th Cir. 2024); *Phoenix Transit System*, 337 NLRB 510, 510 (2002), enfd. 63 Fed.Appx. 524 (D.C. Cir. 2003); *Nor-Cal Beverage Co*., 330 NLRB 610, 611–612 (2000); *Neff-Perkins Co*., 315 NLRB 1229, 1229 fn. 2 (1994). *Wright Line* and its progeny do not apply in this case.[22]

Rather, where "an employee is discharged for conduct that is part of the res gestae of protected activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act, or of such character as to render the employee unfit for service." *Guardian Industries Corp*., 319 NLRB 542, 549 (1995) (quoting *Consumers Power Co*., 282 NLRB 130, 132 (1986)). Under the *Atlantic Steel*, supra, four-factor test in determining whether an employee's conduct during Section 7 activity loses the protection of the Act, the Board considers: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. If it is determined that the misconduct alleged by the employer did not cause the employee to lose the protection of the Act, the causal connection between the discipline and the employee's protected activity is established and "the inquiry ends."[23] *Nor-Cal Beverage Co*., 330 NLRB at 611-612.

When an employee engages in abusive or indefensible misconduct during activity that is otherwise protected, the employee forfeits the Act's protection. See *DaimlerChrysler Corp.*, 344 NLRB 1324, 1329 (2005). The Board, however, has held that the standard is high for forfeiting the protection of the Act, stating that there must be egregious or offensive conduct to lose the Act's protection. *Consolidated Diesel*, 332 NLRB 1019, 1020 (2000) (citations omitted), enfd. 263 F.3d 345 (4th Cir. 2001); see also *Trus Joist Macmillan*, 341 NRLB 369, 371 (2004). Yet, in assessing whether the employee's conduct removed the protections of the Act, the asserted impropriety "cannot be considered in a vacuum" nor "separated from what led up to it." *NLRB v. Thor Power Tool, Co.*, 351 F.2d 584, 586 (7th Cir. 1965).

The Board has historically given leeway to union stewards when they are representing employees in the context of a grievance meeting or other similar setting. See *Union Fork & Hoe Co.*, 241 NLRB 907, 908 (1979); and *Dreis & Krump Mfg.*, 221 NLRB 309, 315 (1975), enfd. 544 F.2d 320 (7th Cir. 1976). Union stewards are considered to stand upon equal footing with management with regard to addressing and resolving labor disputes. *United States Postal Service*, 251 NLRB 252, 252 (1980). It is well established, however, that although union

[22] If the Board disagrees with my conclusion on this point, I find that counsel for the General Counsel has established that Diaz engaged in protective concerted activity; that Respondent had knowledge and animus against this activity; and that Respondent failed to establish that it would have taken the same actions if not for Diaz's protected concerted activity. I further note that Respondent's arguments (R. Br. 51-54.) regarding violations of the collective-bargaining agreement are not relevant to the analysis as to Diaz.

[23] I also find that there is, under the circumstances here, no need to resort to a *Burnup & Sims* analysis as urged by counsel for the General Counsel.

stewards enjoy protections under the Act when acting in a representational capacity and such employees are permitted some room for impulsive behavior when engaged in protected activity, that latitude is balanced against "an employer's right to maintain order and respect." *Piper Realty*, 313 NLRB 1289, 1290 (1994) (steward was insubordinate and profane). To determine whether an employee loses the Act's protection, the Board balances the four *Atlantic Steel*, supra, factors.

C. Analysis of Diaz's Conduct under Atlantic Steel

For the reasons discussed below, I find that consideration of the four factors set forth in *Atlantic Steel*, supra, weigh in favor of finding that Diaz's actions in the July 19, 2022 discussion with Rosa Martins did not cause his otherwise protected activity to forfeit the Act's protection. Two of the four factors do not weigh in favor of continued protection: "the nature of the employee's outburst" and "whether the outburst was, in any way, provoked by an employer's unfair labor practice"—they are neutral. The other two *Atlantic Steel* factors weigh in favor of finding continued protection.

The place of the discussion was in Rosa Martins' office with only bargaining unit employees and a supervisor present. This factor weighs in favor of protection. See, e.g., *Inova Health System v. NLRB*, 795 F.3d 68, 86 (D.C. Cir. 2015) (place of discussion favored protection when encounter occurred in administrative hallway away from patients and members of public); *Stanford Hotel*, 344 NLRB 558 (2005) (weighing location in favor of protection when the employee's outburst occurred away from work area with the door closed in effort to maintain privacy).

The subject matter of the discussion, factor two, favors protection. Diaz sought to secure a locker for bargaining unit employee Perez to securely store her belongings at work. The Board has long recognized that where an employer has a past practice of providing employee lockers, such provision becomes a term and condition of employment. See *E.I. Du Pont & Co*., 294 NLRB 563, 570 (1989) (employer's unilateral curtailment of locker room privileges were subject to a duty to bargain). Diaz was, as discussed above, simply performing his duty as a union representative in trying to determine why Perez did not have access to a locker (a term and condition of her employment), which is protected concerted conduct.

I find that the third factor, the nature of the outburst, is neutral. Diaz and Rosa Martins both engaged in uncivil conduct during their July 19, 2022, interaction. How close Diaz was sitting to her in the small office; his volume; Rosa Martins' perception that Diaz was significantly larger than her and attempting to intimidate her with his size; and Diaz's failure to acknowledge that he was incorrect as to what Rosa Martins believed to be an important distinction of fact regarding prior conversations with Perez regarding the locker issue—clearly offended and alarmed Rosa Martins, who was new to the workplace. In response, Rosa Martins swung her finger at Diaz and insulted his status as her equal in his capacity as a union representative.

Although the two parties were palpably at odds and in highly emotional states by the end of their interaction, they both apparently recognized that it had gone too far. Rosa Martins ended the interaction, and Diaz announced his intention to use the administrative tools at his disposal to

deal with their conflict. As such, viewing the entire interaction as a whole, I find that Diaz did not forfeit the Act's protection. *United States Postal Service*, 360 NLRB 677, 683 (2014) (steward did not lose protection although he moved close to supervisor, spoke loudly, and pointed a finger at supervisor when presenting grievances, where supervisor spoke at least as loudly); *Goya Foods, Inc*., 356 NLRB 476, 481 (2011) (employee did not lose protection by loudly telling supervisor to "come and take me out," when supervisor, also speaking loudly, told the employee to leave a union meeting); *Air Contact Transport, Inc.*, 340 NLRB 688, 695 (2003) (employee's loud and boisterous tone when questioning supervisor about benefits at luncheon attended by other employees did not cause loss of protection), enfd. 403 F.3d 206 (4th Cir. 2005).

Regarding the fourth factor, Diaz's conduct was not provoked by an unfair labor practice. The employer's failure to provide a locker for Perez was certainly subject to bargaining, but the failure to do so is not alleged to constitute an unfair labor practice here. Therefore, this factor does not favor protection, but nor does it disfavor protection. The Board has held that "a lack of employer provocation neither weighs in favor of nor against finding the conduct protected." *Fresenius USA Mfg*., 358 NLRB 1261, 1267 (2012).

I find that, on balance, consideration of the *Atlantic Steel*, supra, factors weigh in favor of finding that by his conduct in the course of his protected communications, Diaz did not forfeit the Act's protection. Accordingly, I find and recommend that Respondent violated Section 8(a)(1) of the Act as alleged in paragraphs 8(b), 8(c) and 21 of the amended consolidated complaint.

II. ISSUANCE OF THE NO-TRESPASSING ORDER TO PRICE

A. Price Engaged in Protected Union Activity

Paragraphs 9(b) and 11(a) of the amended consolidated complaint allege that about February 21, 2023, Respondent issued a no-trespass order to employee Price for leading a walk-in while she was on union leave. Paragraph 9(c) alleges that Respondent issued Price a no-trespass order because she led the walk-in and to discourage employees from engaging in this or other concerted activities.

Like Diaz, Price remained an employee of Respondent during her union leave under established Board law. Unlike with Diaz, however, it is unclear to me that the parties agree that Price's leading of the walk-in was protected concerted activity in the first place. (compare R. Br. 28 to JX 10.) However, it is beyond question that it is protected concerted activity within the meaning of Section 7 of the Act when employees join together for mutual aid and protection by, as a group, approaching management and petitioning for redress of their grievances regarding a supervisor's treatment of them. *Kysor Industrial Corp*., 309 NLRB 237 (1992) (unlawful to discipline employees where a group of 15 employees approached a manager's desk to ask for clarification of work assignments; the supervisor ordered them to get back to work and some dispersed, but others stayed behind and were disciplined); *Trompler, Inc*., 335 NLRB 478, 479 (2001) (employee walk out to protest supervisor's conduct was protected concerted activity), enfd. 338 F.3d 747 (7th Cir. 2003).

Therefore, I find that Price, in her capacity as an employee and union organizer, led the walk-in on February 9, 2023, to protest Coombs' alleged treatment of the EVS employees. This was union, and therefore protected concerted, conduct. As with Diaz, Respondent's penalizing Price for that conduct was inherently destructive unless, by her conduct during the walk-in, Price lost the protection of the Act. As with Diaz, I find that Price did not lose the protection of the Act during the course of the walk-in.

B. The Appropriate Legal Standard

The parties' briefs analyzed Price's ban from Respondent's facility using the same irrelevant cases used for Diaz's discipline. Although Price was excluded from Respondent's facility for 30 days, the amended consolidated complaint does not plead a violation of the Act because of that exclusion—either on the basis of Price's status as an employee or as a union representative. Rather, what is alleged is that the ban from the premises was a function of 8(a)(1) discrimination. That is to say, Price was banned from the premises for 30 days because of her protected concerted activities. Therefore, the access cases relied upon by in the parties' briefs are inapposite.

In addition, for the same reasons articulated above, I find that neither the *Wright Line*, supra, nor *Burnup & Sims*, supra, tests are appropriate in analyzing this allegation.[24] Nor does interpretation of the collective-bargaining agreement govern here as urged (R. Br. 51-54.) by counsel for Respondent. Rather, given that Respondent's discipline of Price because of her union activity was inherently destructive, the only question is whether Price's conduct, as part of the res gestae of the protected concerted walk-in, caused her to lose the protection of the Act. My answer to that question is no.

C. Analysis of Price's Conduct under Atlantic Steel

The general principles to be applied to Price acting in her capacity as a union representative and the *Atlantic Steel*, supra, balancing test to be applied here is the same as above. Three factors—the place of the discussion, the subject matter of the discussion, and the nature of the conduct—weigh in favor of protection. The fourth factor—whether the conduct was provoked by Respondent's unfair labor practices—is neutral.

The place of the discussion was in the EVS office, a non-patient area of the hospital, with only bargaining unit employees and supervisors present. This factor weighs in favor of protection.

Regarding the second *Atlantic Steel* factor—the subject matter of the discussion—I find that Price was acting squarely within her role as union representative by leading the walk-in of an aggrieved class of employees and requesting to meet with Cote about Coombs' treatment of the EVS employees. This factor weighs in favor of protection.

[24] If the Board disagrees with my conclusion on this point, I find that counsel for the General Counsel has established that Price engaged in protective concerted activity; that Respondent had knowledge and animus against this activity; and that Respondent failed to establish that it would have taken the same actions if not for Price's protected concerted activity.

The third *Atlantic Steel* factor concerns the nature of Price's conduct at the walk-in. It is important to remember here, particularly given the focus of Respondent's defense at hearing and in its brief on how walk-ins make its supervisors and managers *feel*, that whether employees have lost the protection of the Act does not depend on the employer's subjective perception of their behavior. "Rather, the question is an objective one, i.e. whether the alleged misconduct is so serious that it deprives the employees of the protection the Act normally gives for engaging in concerted activity." *Kiewit Power Constructors Co.*, 355 NLRB 708, 711 (2010), enfd., 652 F.3d 22 (D.C. Cir. 2011).

With this in mind, I find that the conduct exhibited by Price was not unreasonable and was within the bounds of conduct which has been sanctioned by the Board as regards a union representative's advocacy generally. *Union Fork & Hoe Co*., 241 NLRB at 907; see also *Severance Tool Industries*, 301 NLRB 1166, 1170 (1991) (evidence of disrespect, rudeness, and the use of vulgar language was insufficient to deny steward the protection of the Act); see, *Noble Metal Processing, Inc.*, 346 NLRB 795, 800 (2006) (in particular, see cases discussed therein by Judge Brakebusch). The Board has observed that "disputes over wages, hours and working conditions are among the disputes most likely to engender ill feelings and strong responses." *Consumers Power Co.*, 282 NLRB 130, 132 (1986). In assessing whether an employee's protected, concerted activity loses the protection of the Act, the Board has long found that a line "is drawn between cases where employees engaged in concerted activities that exceed the bounds of lawful conduct in a moment of animal exuberance or in a manner not motivated by improper motives and those flagrant cases in which the misconduct is so violent or of such a character as to render the employee unfit for further service." *Prescott Industrial Products Co.*, 205 NLRB 51, 51-52 (1973) (citing *Bettcher Manufacturing Corp.*, 76 NLRB 526 (1948) and *Socony Mobile Oil Co., Inc.*, 153 NLRB 1244 (1965), enfd. as modified, 357 F.2d 662 (2d Cir. 1966)). Here, I find that Price's conduct did not cross that line. This factor favors protection.

Regarding the fourth *Atlantic Steel* factor, whether the conduct at issue was provoked by the Respondent's unfair labor practices, there was an unremedied unfair labor practice pending in that Diaz had already been disciplined unlawfully. Yet, his discipline was not the reason for the walk-in led by Price. I find therefore that the unfair labor practice here occurred after the fact, as a consequence of Price's advocacy, and was not a causative factor. This factor is neutral. *Fresenius USA Mfg*., supra at 1267.

I find that, on balance, consideration of the *Atlantic Steel*, supra, factors weighs in favor of finding that by her conduct in the course of her union activity, Price did not forfeit the Act's protection. Accordingly, I find and recommend that Respondent violated Section 8(a)(1) of the Act as alleged in paragraphs 9(b), 9(b), 11(a), and 21 of the amended consolidated complaint.

III. THE REMAINING 8(A)(1) ALLEGATIONS

Paragraph 10 of the amended consolidated complaint alleges that on February 21, 2023, Respondent, by Clifford, threatened to suspend employees[25] for their protected concerted activities. Paragraph 11(b) alleges that, on the same day, by an e-mail from Clifford, Respondent

[25] Referring to Price.

informed employees[26] that a no-trespass order was issued because of employees' protected concerted activities. Paragraph 12 alleges that, on March 3, 2023, Respondent, by email from Sullivan, informed employees that the no-trespass order was issued because of employees' protected concerted activity.

Without reference to any Board cases, counsel for the General Counsel argues on brief (GC Br. 61-62.) that the conduct alleged in paragraphs 10 and 11(b) were unlawful threats and that the conduct alleged in paragraph 12 implied that "the kind of discussion the Union sought in the February 9th walk-in was dangerous and unsafe." Although denied in the answer (GCX 1(t) and GCX 1(v).), Respondent's brief does not address these allegations specifically. For the reasons explained below, I find that paragraph 10 is not an unlawful threat but a coercive statement, as are the statements in paragraphs 11(b) and 12.

A. The Legal Standard

It is well-settled that informing employees that they will be disciplined because they engaged in Section 7 activities is unlawful. *Bowling Transportation*, 336 NLRB 393, 393-394, 398 (2001) (employer violated Section 8(a)(1) by telling employees they were being removed from the property because of their protected discussion about a safety bonus and, with respect to one employee, because of suspected union activity), enfd., 352 F.3d 274, 285 (6th Cir. 2003); *Benesight, Inc*., 337 NLRB 282, 283-284 (2001) (statement to employee linking her unlawful discharge to her protected activity independently violated Section 8(a)(1) separate from the discharge violation) (citing *Sands Hotel and Casino, San Juan*, 306 NLRB 172, 184 (1992), enfd. 993 F.2d 913 (D.C. Cir. 1993). It is also unlawful to inform employees that they were disciplined for exercising rights protected by the Act. *TPA, Inc.*, 337 NLRB 282, 283 (2001). And, finally, it is unlawful to inform employees that another employee was disciplined for engaging in such activities. *Extreme Building Services Corp*., 349 NLRB 914, 928 (2007) (informing employee that another employee was fired because he was with the union is unlawful because it is an implied threat of discharge for engaging in union activities) (citing *Watts Electric Corp*., 323 NLRB 734, 735 (1997)).

Having found that Price engaged in union, and therefore, protected concerted activities, each of the statements alleged in the amended consolidated complaint was unlawful because those statements "would reasonably tend to discourage future protected concerted activity." *Benesight*, supra at 283. Employees subjected to those statements could not but conclude that participating in walk-ins would result in discipline. Therefore, I find that Respondent violated Section 8(a)(1) of the Act as alleged in paragraphs 10, 11(b), 12, and 21 of the amended consolidated complaint by its conduct.

CONCLUSIONS OF LAW

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

2. At all material times, the Union has been a labor organization within the meaning of

[26] Also referring to Price.

Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) of the Act by issuing a written warning about October 20, 2022, to employee Josue Diaz for leading a walk-in while he was on union leave.

3. Respondent has violated Section 8(a)(1) of the Act by issuing a no-trespass order about February 21, 2023, to employee Kelli Price for leading a walk-in while she was on union leave.

4. Respondent violated Section 8(a)(1) of the Act by, about February 21, 2023, informing employees that they would be suspended from Respondent's facility because of their union or protected concerted activities.

5. Respondent violated Section 8(a)(1) of the Act by, about February 21, 2023, informing employees that the no-trespass order issued to an employee was because of employees' union or protected concerted activities.

6. Respondent violated Section 8(a)(1) of the Act by, about March 3, 2023, informing employees that the no-trespass order issued to an employee was because of employees' union or protected concerted activities.

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

8. Respondent did not violate the Act in any other manner alleged in the complaint.

REMEDY

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

Respondent, having unlawfully disciplined Josue Diaz and Kelli Price, is ordered to make them whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms they may have suffered as a result of the discrimination against them.

The make whole remedy shall be computed in accordance with *F.W. Woolworth Co.,* 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), Respondent shall compensate Josue Diaz and Kelli Price for search-for-work and interim employment expenses regardless of whether those expenses exceed his interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons,* supra, compounded daily as prescribed in *Kentucky River Medical Center,* supra. In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB 101 (2014), Respondent shall compensate Josue Diaz and Kelli Price for the adverse tax

consequences, if any, of receiving lump sum backpay awards, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016), Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 1 a report allocating backpay to the appropriate calendar year for each employee. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

Respondent shall also be required to remove from its files any references to the unlawful discipline and no-trespass order issued to Josue Diaz and Kelli Price, respectively, and to notify them in writing that this has been done and that the discipline and suspension from Respondent's premises will not be used against them in any way.

Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in Respondent's Providence facility in Providence, Rhode Island wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since October 20, 2022. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 1 for the Board what action it will take with respect to this decision.

Counsel for the General Counsel has requested a notice reading to remedy the unfair labor practices alleged. (GC Br. 62.) The Board has recently recognized that a notice reading is an appropriate remedy where a broad order is warranted. *WR Reserve*, 372 NLRB No. 80, slip op. at 6 (2023). That is to say, "when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." *Id*. at 4 (quoting *Hickmott Foods*, 242 NLRB 1357, 1357 (1979)). There is no indication that that Respondent has met either prong of this standard so as to warrant a broad order. Nor is a notice reading warranted under past articulations of the standard for imposing that remedy. See e.g., *Postal Service*, 339 NLRB 1162, 1163 (2003) (notice reading appropriate where the violations are so numerous and serious that the reading aloud of a notice is considered necessary to enable employees to exercise their Section 7 rights in an atmosphere free of coercion, or where the violations in a case are egregious). I decline to recommend a notice reading remedy in this case.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[27]

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

ORDER

Respondent, Women and Infants Hospital, Providence, Rhode Island, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing disciplinary notices to employees for engaging in union or other protected concerted activity.

(b) Issuing no-trespass orders to employees for engaging in union or other protected concerted activity.

(c) Informing employees that they will be suspended from entering Respondent's Providence, Rhode Island facility because they engaged in union or other protected concerted activity

(d) Informing employees that they are being issued a no-trespass order and suspended from entering Respondent's Providence, Rhode Island facility because they engaged in union or other protected concerted activity.

(e) Informing employees that their coworkers were issued a no-trespass order and suspended from entering Respondent's Providence, Rhode Island facility because they engaged in union or other protected concerted activity.

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

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

(a) Make Josue Diaz and Kelli Price whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

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

(c) Compensate Josue Diaz and Kelli Price for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 1 within 21 days of the date the amount of backpay is

fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for each employee.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline, and within 3 days thereafter, notify Josue Diaz in writing that this has been done and that the discipline will not be used against him in any way.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful no-trespass order, and within 3 days thereafter, notify Kelli Price in writing that this has been done and that the no-trespass order will not be used against her in any way.

(f) Within 14 days after service by the Region, post at its Providence, Rhode Island facility, copies of the attached notice marked "Appendix."[28] Copies of the notice, on forms provided by the Regional Director for Region 1 after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by 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, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since October 20, 2022.

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

(h) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[28] 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."

Dated at Washington, D.C., March 4, 2025.

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Renée D. McKinney
Administrative Law Judge

APPENDIX A

Corrections to Transcript Errors

Women and Infants Hospital, Cases 01-CA-312111 and 01-CA-312613

p. 217, line 14 “Hasbun” corrected to “Whalen”
p. 241, line 3 “EBS” corrected to “EVS”
p. 248, line 15 “Ronaldo” corrected to “Renata”
p. 285, line 3 “How many employees—actually, strike that” is shown as part of the witness answer but corrected to be attributed to Hasbun as part of the next question
p. 296, line 1 “Absolutely” attributed to Creane but corrected to attributed to the witness
p. 296, line 2 “Okay” attributed to witness but corrected to be attributed to the Creane as part of line 3
p. 316, line 6 “age 35” corrected to “page 35”
p. 356, line 19 “oban pen” corrected to “Au Bon Pain”
p. 356, line 21 and 23 “au bon pan” corrected to “Au Bon Pain”
p. 357, line 25 “intimidated” corrected to “intimidating”
p. 373, line 6 “weakly” corrected to “weekly”
p. 403, line 1 “table in chairs” corrected to “table and chairs”
p. 509, line 1 “t” corrected to “to”
p. 527, line 24 “what is your suggestion” corrected to “was it your suggestion”
p. 531, line 11 “hard” corrected to “heard”
p. 532, line 24 “room sin” corrected to “rooms in”
p. 541, line 11 “meet” corrected to “met”
p. 544, line 16 “quiet” corrected to “quite”
p. 556, line 24 “seating” corrected to “sitting”
p. 560, line 24 “you” corrected to “your”
p. 562, line 23 “Brian” corrected to “Brandon”
p. 564, line 4 “approved” corrected to “approached”
p. 569, line 10 “has” corrected to “had”
p. 570, line 11 “can’t” corrected to “can”
p. 584, line 3 “does” corrected to “did”
p. 591, line 1 “where” corrected to “were”
p. 592, line 8 “Gioffre” corrected to “Whelan”
p. 594, line 20 “where” corrected to “were”
p. 600, line 2 “Gioffre” corrected to “Whelan”
p. 642, line 14 “San Francisco” corrected to “Washington, D.C.”

APPENDIX B

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has Ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union.
Choose representatives to bargain with us on your behalf.
Act together with other employees for your benefit and protection.
Choose not to engage in any of these protected activities.

WE WILL NOT issue discipline or a no-trespass order to employees because you have engaged in union or protected concerted activities.

WE WILL NOT inform employees that they will be or are being issued a no-trespass order because you engaged in union or protected concerted activities.

WE WILL NOT inform employees that we have issued a no-trespass order to employees who engaged in union or protected concerted activities.

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 make Josue Diaz and Kelli Price whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms resulting from their discipline and receipt of a no-trespass order, respectively, less any net interim earnings, plus interest.

WE WILL compensate Josue Diaz and Kelli Price for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and **WE WILL** file with the Regional Director for Region 1 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discipline issued to Josue Diaz and **WE WILL**, within 3 days thereafter, notify him in writing that this has been done and that the discipline and suspension will not be used against him in any way.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful no-trespass order issued to Kelli Price and **WE WILL**, within 3 days

thereafter, notify her in writing that this has been done and that the discipline and suspension will not be used against her in any way.

Women and Infants Hospital
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation, and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

10 Causeway Street, 6th Floor, Boston MA 02222-1072
(617) 565-6700, Hours: 8:30 a.m. to 5:00 p.m.

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/01-CA-312111 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (857) 317-7816.