

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.**

SODEXO AMERICA LLC

Case No. 21-CA-39086

and

PATRICIA ORTEGA, an Individual

SODEXO AMERICA LLC; AND
USC UNIVERSITY HOSPITAL

and

Case No. 21-CA-39109

SERVICE WORKERS UNITED

USC UNIVERSITY HOSPITAL

and

Case Nos. 21-CA-39328
21-CA-39403

NATIONAL UNION OF HEALTHCARE
WORKERS

**NOTICE OF LODGING UNPUBLISHED DISPOSITIONS AND OTHER
AUTHORITIES CITED IN SUPPORT OF MOTION BY RESPONDENT USC
UNIVERSITY HOSPITAL FOR SUMMARY JUDGMENT**

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1. Riesbeck Food Markets Inc v. NLRB, 91 F.3d 132 (4th Cir. 1996).
2. Garfield Medical Center, 2002 WL 31402769.
3. San Ramon Regional Medical Center, 2003 WL 22763700.
4. Fort Hood shooting, http://en.wikipedia.org/wiki/Fort_Hood_shooting.
5. Guidelines for Preventing Workplace Violence for Health Care & Social Service Workers, Occupational Safety and Health Administration, OSHA 3148-01R 2004.
<http://www.osha.gov/Publications/OSHA3148/osha3148.html#text4>
6. Workplace Violence In Healthcare, American Association of Occupational Health Nurses Alliance, June 2008.
https://www.aohn.org/component/option.com_docman/Itemid.0/task.doc_view/gid.290/
7. Hospital shootings rare, violence not, by Ross Arrowsmith, December 15, 2010.
<http://workplaceviolencenews.com/2010/12/15/hospital-shootings-rare-violence-not/>
8. Preventing Violence in the Health Care Setting, Joint Commission on Accreditation of Healthcare Organizations (JCAHO), Issue 45, June 3, 2010.
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PROOF OF SERVICE

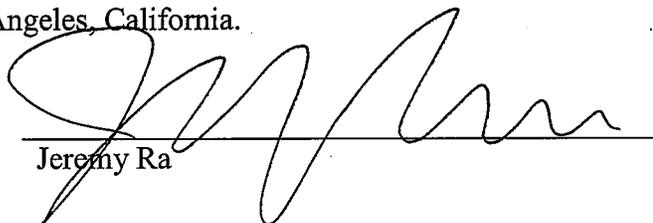
I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 888 S. Figueroa Street, 15th Floor, Los Angeles, California 90017.

On January 31, 2011, I caused to be served the foregoing documents described as NOTICE OF LODGING UNPUBLISHED DISPOSITIONS AND OTHER AUTHORITIES CITED IN SUPPORT OF MOTION BY RESPONDENT USC UNIVERSITY HOSPITAL FOR SUMMARY JUDGMENT on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed per the service list below.

By MAIL as follows: I am "readily familiar" with Bate, Peterson, Deacon, Zinn & Young LLP's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of party served, service shall be presumed invalid if postal cancellation date or postage meter is more than one (1) day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the state of California that the above is true and correct.

Executed on January 31, 2011, at Los Angeles, California.



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Exhibit 1

Unpublished Disposition

91 F.3d 132

NOTICE: THIS IS AN UNPUBLISHED OPINION.
(The Court's decision is referenced in a "Table of
Decisions Without Reported Opinions" appearing in
the Federal Reporter. See CTA4 Rule 32.1.
United States Court of Appeals, Fourth Circuit.

RIESBECK FOOD MARKETS, INCORPORATED,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

Local Union 23, AFL-CIO, CLC, United Food and
Commercial Workers International Union,
Intervenor.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

Local Union 23, AFL-CIO, CLC, United Food and
Commercial Workers International Union,
Intervenor,

v.

RIESBECK FOOD MARKETS, INCORPORATED,
Respondent.

Nos. 95-1766, 95-1917. Argued: April 1,
1996. Decided: July 19, 1996.

On Petition for Review and Cross-Application for
Enforcement of an Order of the National Labor Relations
Board. (8-CA-21274, 8-CA-22322)

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NLRB

REVIEW GRANTED; ENFORCEMENT DENIED.

Before MURNAGHAN and HAMILTON, Circuit Judges,
and LAY, Senior Circuit Judge of the United States Court
of Appeals for the Eighth Circuit, sitting by designation.

Opinion

Petition for review granted and enforcement denied by
unpublished per curiam opinion. Judge HAMILTON
wrote a separate opinion concurring in the judgment.

OPINION

PER CURIAM:

*1 Riesbeck Food Markets, Inc. ("Riesbeck") petitions to
set aside the order of the National Labor Relations Board
("NLRB"). The NLRB found that Riesbeck, a non-union
employer, committed an unfair labor practice in violation
of § 8(a)(1) of the National Labor Relations Act
("NLRA"), 29 U.S.C. § 158(a)(1), by prohibiting union
pickets and handbillers who were not Riesbeck's
employees from distributing do-not-patronize literature to
Riesbeck's customers on Riesbeck's property. *See*
Riesbeck Food Markets, Inc., 315 N.L.R.B. 940 (No. 134)
(Dec. 16, 1994).¹ The NLRB and the union, as intervenor,
crosspetition for enforcement of the NLRB's order. We
grant Riesbeck's petition and deny the cross-petitions.

Background

On September 7, 1988, Local 23 of the United Food and
Commercial Workers International Union ("the union")
commenced informational picketing and handbilling on
Riesbeck's premises near the customer entrances of
Riesbeck's food stores in Wheeling, West Virginia, and
St. Clairsville, Ohio. The union, which represented
employees at a number of Riesbeck's competitors, had
previously disclaimed any interest in representing
Riesbeck's employees.² The handbills and picket signs
truthfully said Riesbeck did not employ union labor and
asked customers to not patronize Riesbeck. The pickets
and handbillers did not interfere with the flow of
customers or goods. None of the union pickets or

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handbillers were employed by Riesbeck. Riesbeck asked the pickets and handbillers to leave its premises, but they refused. Riesbeck commenced trespass lawsuits in both West Virginia and Ohio state courts against the union. The state courts issued preliminary injunctions prohibiting the union's activities on Riesbeck's premises. The union pickets and handbillers thereafter conducted their activities on public property outside the driveway entrances to Riesbeck's stores in accordance with the injunctions.

The union filed unfair labor practice charges and the NLRB's General Counsel issued a complaint against Riesbeck alleging unfair labor practices. The case was tried before an administrative law judge ("ALJ"), who found Riesbeck had committed an unfair labor practice and entered a cease and desist order. After the ALJ's decision, the state courts ultimately vacated their injunctions and dismissed Riesbeck's lawsuits as preempted by the NLRA.

The ALJ found Riesbeck impermissibly discriminated against union solicitation by discriminatorily preventing the union's informational picketing and handbilling. According to the ALJ, Riesbeck "permitted all kinds of civic and charitable solicitation for a total of almost 2 months a year" at its stores, J.A. 37, including candy sales by volunteer fire departments, poppy sales by the Veterans of Foreign Wars, bell ringing by the Salvation Army, and other solicitations by youth sport groups, a school band, and the Easter Seals, but discriminated against the union by not allowing its solicitation.³

*2 In a three-to-two decision, the NLRB affirmed the ALJ's determination that Riesbeck had committed an unfair labor practice by discriminating against the union's solicitation. In addition to the fact that Riesbeck allowed significant amounts of charitable solicitations but not the union's solicitation, the NLRB also found Riesbeck's solicitation policy—which provided for limited access to customers by charitable organizations whenever Riesbeck, in its discretion, thought such access would enhance its business—to be inherently discriminatory against protected union solicitation.⁴

Section 7 Rights

Riesbeck first argues the union's do-not-patronize solicitation is not protected activity within the meaning of § 7 of the NLRA, 29 U.S.C. § 157,⁵ and thus prohibiting such solicitations is not a violation of § 8(a)(1).⁶ Riesbeck contends the union pickets and handbillers, who were not employed by Riesbeck, had no § 7 right to engage in consumer boycott activities against Riesbeck on the basis of Riesbeck's non-union status. Unlike organizational campaigns conducted by union organizers who are not employed by the targeted employer, in which the

organizers have rights derivative of employees, e.g., *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956), Riesbeck argues that union pickets, who are not employed by Riesbeck, have no § 7 right to inform Riesbeck's customers that Riesbeck does not employ union labor because such communication is not derivative of the rights of Riesbeck's employees. The NLRB contends, however, that the union representatives who engaged in the consumer boycott activities were not asserting rights derivative of Riesbeck's employees, but rather were asserting their own rights under the "mutual aid or protection" clause of § 7. See *Eastex, Inc. v. NLRB*, 457 U.S. 556, 564 (1978).

Riesbeck further argues that whether there is a § 7 right to engage in consumer boycott activities against a non-union employer outside of the employer's premises, does not resolve the issue of whether that right extends to such activities on the employer's property. The Supreme Court has held that union organizers may come onto an employer's property under two limited circumstances to communicate with employees: first, if there are no other reasonably available channels of communication ("the inaccessibility exception"); and second, "if the employer's notice or order ... discriminate [s] against the union by allowing other distribution" ("the discrimination exception"). *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 112 (1956). Accord *Lechmere*, 502 U.S. at 535; *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 205 (1978). In *Lechmere*, the Court found that the inaccessibility exception was "a narrow one," 502 U.S. at 539, applicable only when "the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them," *id.* (quoting *Babcock & Wilcox*, 351 U.S. at 113) (emphasis omitted). Riesbeck argues that any § 7 right to engage in consumer boycott activities is a right of such lesser value than the organizational rights at issue in *Lechmere* that it can never trump the employer's paramount right to control its private property even if the employer discriminates against union solicitations. In a pre-*Lechmere* decision, however, the NLRB found the discrimination exception of *Babcock & Wilcox* applies to the exercise of a § 7 right to engage in consumer boycott activities against non-union employers. See *D'Alessandro's, Inc.*, 292 N.L.R.B. 81, 83-84 (No. 27) (Dec. 29, 1988). The NLRB contends that the emphasis on the "narrow" inaccessibility exception in *Lechmere* has no effect on discrimination cases. See *Jean Country*, 291 N.L.R.B. 11, 12 n. 3 (No. 4) (Sept. 27, 1988) (multi-factor balancing test in inaccessibility cases, overruled in *Lechmere*, 502 U.S. at 535-38, involves "distinct analytical view" from discrimination cases).

*3 In view of our holding that Riesbeck did not discriminate in barring the union from its premises, we

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need not decide whether § 7 rights are involved in the consumer boycott picketing or whether the *Babcock & Wilcox* discrimination exception to an employer's right to control its property applies to such § 7 rights. Thus, for purposes of our decision, we assume without deciding that the boycott activities were protected by § 7 rights and that the discrimination exception applies. On the facts and circumstances of this case, however, we find no discrimination.

Discrimination

Babcock & Wilcox established that "an employer may validly post his property against nonemployee distribution of union literature ... if the employer's notice or order does not discriminate against the union by allowing other distribution." 351 U.S. at 112. Discrimination claims "inherently require a finding that the employer treated similar conduct differently [.]" *NLRB v. Southern Md. Hosp. Ctr.*, 916 F.2d 932, 937 (4th Cir.1990) (per curiam).⁷ In *Southern Maryland Hospital Center*, this court recognized "a difference between admitting employee relatives for meals and permitting outside entities to seek money or memberships" which defeated the NLRB's finding of discrimination by the hospital. *Id.* at 937.

Like *Southern Maryland Hospital Center*, we find legally significant differences between the charitable solicitation which Riesbeck allowed and the union's "do not patronize" solicitation which Riesbeck prohibited. Riesbeck could reasonably be seen to have allowed the civic and charitable solicitation out of feelings of altruism or civic duty; such motivations, however, would not allow for the union's donot-patronize distributions.⁸ The NLRB argues, however, that Riesbeck, under its solicitation policy, allowed consumer-oriented appeals by civic and charitable groups solely for the purpose of enhancing its business, and thus discriminated when the other side of the story—the union's message against Riesbeck's business—was prohibited from being told on Riesbeck's premises. Even if the civic and charitable groups thus became the tools of the employer, however, an employer must have some degree of control over the messages it conveys to its customers on its private property. *Cf. Sparks Nugget, Inc. v. NLRB*, 968 F.2d 991, 998 (9th Cir.1992) (finding no discrimination when employer sponsored anti-union speech oriented to customers but forbid nonemployees to distribute pro-union literature). As the Supreme Court stated in the free speech context:

Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and

inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.

*⁴ *Perry*, 460 U.S. at 49. In this case, Riesbeck has a strong interest in preventing the use of its property for conduct which directly undermines its purposes, i.e., the sale of goods and services to Riesbeck's customers, which was implicated by the union's solicitations but not by the charitable solicitations. Thus, we find Riesbeck reasonably distinguished between charitable solicitations which encouraged its business activity and the union's do-not-patronize message which was not "compatible with the intended purpose of the property." *See id.*

Furthermore, on the facts of this case, there is no evidence suggesting that Riesbeck was attempting to target union literature for special adverse treatment. First, Riesbeck allowed the union to disseminate information directly to the employees about membership in the union in February 1988. Second, Riesbeck had consistently prohibited other non-charitable solicitation of its customers on the premises, including, for example, prohibiting a political candidate from campaigning at the store. *Cf. D'Alessandro's, Inc.*, 292 N.L.R.B. at 84 (fact that employer allowed noncharitable vendors to sell on the premises as well as two political candidates to make press conferences on the premises, at which candidates criticized union pickets and advocated right to work laws, is evidence of disparate treatment against union pickets). Third, Riesbeck's policy states, without exception, that donot-patronize messages are not allowed on its premises and Riesbeck has represented to us that it would enforce this policy against other consumer boycotts sponsored by environmental and other groups. There is no evidence of even a single isolated incident in which commercial, political, or other controversial groups were permitted to solicit at Riesbeck's stores. *Cf. Be-Lo Stores*, 318 N.L.R.B. --- (No. 1), 151 L.R.R.M. (BNA) 1310, 1320-21, 1995 WL 457281, at *13 (July 31, 1995) (allowing distribution of religious and political literature, and the sales of incense by religious group, but prohibiting union distribution is discriminatory). In sum, we find that neither Riesbeck's policy nor its practices expressly discriminate against the union.⁹ Under these circumstances, Riesbeck did not discriminate against union distributions by prohibiting the union's do-not-patronize solicitations while allowing various other civic and charitable groups to solicit its customers.¹⁰ For the foregoing reasons, we grant Riesbeck's petition for review and deny the cross-petitions for enforcement.

PETITION GRANTED AND ENFORCEMENT DENIED

HAMILTON, Circuit Judge, concurring in the judgment:

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While I do not take issue with the majority's analysis regarding the discrimination issue, I find it unnecessary to reach that issue because I believe that the "mutual aid or protection" clause of § 7 of the NLRA does not protect the union's picketing of Riesbeck and its handbilling of Riesbeck's customers.

5 Riesbeck is appealing the NLRB's findings that it committed unfair labor practices when Riesbeck (1) refused to allow the union access to its property and (2) instituted state trespass actions against the union. Before the NLRB can find that Riesbeck committed unfair labor practices, the union's activity must be protected by § 7. See 29 U.S.C. § 158(a)(1).^{} Section 7 of the NLRA states, "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. ..." 29 U.S.C. § 157 (emphasis added). In the instant case, the Board and the union, as intervenor, both contend that the union's activity falls under the "mutual aid or protection" clause of § 7, and accordingly, they conclude that the NLRB did not err in finding that the union's activity was protected by § 7.

"The 'mutual aid or protection' clause of Section 7 protects employees who 'seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship.'" *New River Indus., Inc. v. NLRB*, 945 F.2d 1290, 1294 (4th Cir.1991) (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978)); see also *Office & Professional Employees Int'l Union v. NLRB*, 981 F.2d 76, 82 (2d Cir.1992) (stating that the NLRA "revolves around the protection of workers' efforts to better their working conditions through collective action"). Terms and conditions of employment that employees may seek to improve include "wages, benefits, working hours, the physical environment, dress codes, assignments, responsibilities, and the like." *New River Indus.*, 945 F.2d at 1294. But the "mutual aid or protection" clause does not protect employees who engage in concerted activity for purposes that do not relate to the improvement of the terms and conditions of their employment. See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962) ("It is of course true that § 7 does not protect all concerted activities."); *Office & Professional Employees Int'l Union*, 981 F.2d at 82 ("[T]he Act does not protect any 'union activity' engaged in by an employee if it is unrelated to the terms and conditions of employment."); *New River Indus.*, 945 F.2d at 1294-95 (finding that "a mocking letter about free ice cream supplied in appreciation for a new contract with a supplier" which did not relate to the employees' working conditions was not protected by the "mutual aid or protection" clause).

The fundamental flaw in the NLRB's and the union's contention that the union's activity was protected by the "mutual aid and protection" clause is that neither party has demonstrated, nor even asserted, how the union's activity would improve the terms and conditions of employment for the union employees of the grocery stores competing with Riesbeck. Especially significant is the absence of any claim that Riesbeck's nonunion status damaged or would damage the terms and conditions of employment for the employees of the grocery stores competing with Riesbeck, e.g., Riesbeck paying its employees less than the prevailing area standards. Although the NLRB has previously found union activity similar to the union's activity here as being protected by the "mutual aid or protection" clause of § 7, see *D'Alessandro's, Inc.*, 292 N.L.R.B. 81, 83 (1988); *Jean Country*, 291 N.L.R.B. 11, 17 (1988), *overruled in part on other grounds, Lechmere, Inc. v. NLRB*, 112 S.Ct. 841, 847-48 (1992), the NLRB's decisions in those cases suffer from the identical flaw that the NLRB's decision here suffers from: the failure to explain how "donot-patronize" messages will improve the terms and conditions of the employees of union stores.

*6 In *NLRB v. Great Scot, Inc.*, 39 F.3d 678 (6th Cir.1994), the Sixth Circuit dealt with a somewhat similar issue. In that case, the union activity at issue was area standards picketing and handbilling, *id.* at 679, which the NLRB contends is analogous to the union's activity here. Brief for NLRB at 14 n. 4. In *Great Scot*, the union's agents carried picket signs that stated the following: "Notice to the Public-Don't Shop [at Great Scot]. The store pays its employees wages and fringe benefits which are far below those paid to Unionized Grocery Store Employees in the area. This Company is attempting to destroy our higher Union Standards." *Great Scot*, 39 F.3d at 680 (alteration added by court). In response to the union's activity, *Great Scot* requested that the union agents stop distributing handbills on its property, contacted the police to aid in their removal, and filed a trespass action in state court seeking injunctive relief against the union. *Id.* The NLRB found that *Great Scot's* responses constituted unfair labor practices. *Id.* at 682.

On appeal, *Great Scot* argued that the union's activity was not protected by § 7 because the union did not show that the wages and benefits *Great Scot* gave its employees were below the area standards. The Sixth Circuit agreed, and it denied enforcement of the NLRB's order. The court stated: "Because it is 'the duty of a union that seeks to engage in lawful area standards picketing' to investigate wages and conditions alleged to be substandard, the union has the burden of 'coming forward with credible evidence' that establishes both the area standards and the claimed disparity." *Id.* at 684 (citations omitted) (emphasis added by court). Because "the union wholly failed to offer proof sufficient to permit the administrative

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law judge to determine that Great Scot was properly subject to area-standards picketing,” the court found that the union’s activity was unprotected by § 7. *Id.*

Like the union in *Great Scot*, the union here “wholly failed” to offer any evidence showing how the union’s “do-not-patronize” message would improve the terms and conditions of employment for the employees of the unionized grocery stores that competed with Riesbeck. Absent such evidence, the “mutual aid or protection” clause could not protect the union’s activity here.

Accordingly, I would grant Riesbeck’s petition for review and deny enforcement of the NLRB’s order on this sole ground.

Parallel Citations

1996 WL 405224 (C.A.4), 153 L.R.R.M. (BNA) 2320, 65 USLW 2070

Footnotes

- 1 The NLRB also found Riesbeck violated § 8(a)(1) because it failed to dissolve state court injunctions against the union after the NLRB’s General Counsel issued a complaint against Riesbeck.
- 2 In February 1988, Riesbeck gave the union access to its employees as part of an apparent union organizational effort.
- 3 The ALJ further found Riesbeck did not independently violate the Act by maintaining its state lawsuits against the union because, under *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), the lawsuits did not lack a reasonable basis and did not reflect a retaliatory motive.
- 4 The NLRB further found that maintaining the state court actions against the union was an independent unfair labor practice under *Makro, Inc. (Loehmann’s Plaza I)*, 305 N.L.R.B. 663 (No. 81) (Nov. 21, 1991), *rev’d on other grounds on rehearing, Makro, Inc. (Loehmann’s Plaza II)*, 316 N.L.R.B. 109 (No. 24) (Jan. 25, 1995), *rev. denied sub nom. United Food & Commercial Workers v. NLRB*, 74 F.3d 292 (D.C.Cir.1996). *Loehmann’s Plaza I* imposed on employers an affirmative duty to stay state court proceedings within seven days after the General Counsel issues a complaint against them. 305 N.L.R.B. at 671.
- 5 Section 7 of the NLRA provides: “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]” 29 U.S.C. § 157.
- 6 Section 8(a)(1) of the NLRA provides: “It shall be an unfair labor practice for an employer ... to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title[.]” 29 U.S.C. § 158(a)(1).
- 7 *See, e.g., NLRB v. Stowe Spinning*, 336 U.S. 226, 228-30 & n. 7 (1949) (employer’s denial of union organizer’s right to use the only meeting hall in a company town because of anti-union bias was properly found to be discrimination); *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1178 (D.C.Cir.1993) (allowing outside union members to enter building to communicate with employees but not allowing employees who were members of another union to picket outside building was “egregious” discrimination in violation of the NLRA), *cert. denied*, 114 S.Ct. 1368 (1994).
- 8 *Cf. Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 48 (1983) (“[E]ven if we assume that by granting access to the Cub Scouts, YMCA’s, and parochial schools, the School District has created a ‘limited’ public forum, the constitutional right of access would in any event extend only to other entities of similar character. While the school mail facilities thus might be a forum generally open for use by the Girl Scouts, the local boys’ club, and other organizations that engage in activities of interest and educational relevance to students, they would not as a consequence be open to an organization such as PLEA, which is concerned with the terms and conditions of teacher employment.”).
- 9 The union argues that Riesbeck’s solicitation policy, by favoring charitable organizations, facially discriminates against union activities, citing *NLRB v. Beverage-Air Co.*, 402 F.2d 411, 418-19 (4th Cir.1968). In *Beverage-Air*, this court invalidated an employer’s broad nosolicitation rule which the court found chilled its employees’ § 7 rights. *Id.* at 419. That case, however, did not involve an anti-discrimination principle. Here, Riesbeck’s policy does not single out union activity for adverse treatment. Thus, to the extent the policy chills trespassory union activity, it does not do so in a discriminatory manner, which is the relevant inquiry under the *Babcock & Wilcox* discrimination exception.
- 10 The NLRB found that Riesbeck independently committed an unfair labor practice by failing to take affirmative actions to dissolve its state court injunctions against the union after the General Counsel filed a complaint in this action, thereby preempting the state actions. The NLRB concedes that if the Court declines to enforce the Board’s threshold unfair labor practice finding, we agree that there would no longer be a predicate for the Board’s findings that the Company’s maintenance of the state court trespass actions constituted an unfair labor practice.... Accordingly, in that eventuality, the Court should deny enforcement of this second unfair labor practice as well. NLRB Br. at 18 n. 6. *See Loehmann’s Plaza II*, 316 N.L.R.B. at 114 (“Absent a finding that the picketing and handbilling on

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private property is protected, a lawsuit to enjoin that activity is not unlawful.”). In light of the NLRB’s concession, and given our finding that prohibiting the union’s consumer boycott activities on Riesbeck’s premises did not constitute an unfair labor practice on Riesbeck’s part, we also deny enforcement of the NLRB’s order finding Riesbeck committed an unfair labor practice by failing to dissolve its state court injunctions against the union.

- * The pertinent part of this statute states, “It shall be an unfair labor practice for an employer ... to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title[.]”

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Exhibit 2

2002 WL 31402769 (N.L.R.B. Div. of Judges)

National Labor Relations Board
Division of Judges

TENET HEALTHSYSTEM HOSPITALS, INC. D/B/A
GARFIELD MEDICAL CENTER
AND
AMERICAN FEDERATION OF NURSES, LOCAL 535,
SERVICE EMPLOYEES INTERNATIONAL UNION,
AFL-CIO, CLC

Cases 21-CA-34307-1
JD(SF)-81-02
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October 16, 2002

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General Counsel

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for Respondent

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DECISION

Statement of the Case

LANA PARKE, Administrative Law Judge. This case was tried in Los Angeles, California on June 24 through June 28, and July 22, 2002. [FN1] Pursuant to charges filed by American Federation of Nurses, Local 535, Service Employees International Union, AFL-CIO, CLC (the Union), the Regional Director of Region 21 of the National Labor Relations Board (the Board), in due course, issued a third order consolidating cases, second amended consolidated complaint and amended notice of hearing (the complaint) on May 22, 2002. The complaint alleges that Tenet Healthsystem Hospitals, Inc. d/b/a Garfield Medical Cen-

ter (Respondent) violated Sections 8(a)(1) and (3) of the National Labor Relations Act (the Act). [FN2]

Issues

1. Did Respondent violate Sections 8(a)(3) and (1) of the Act by the following conduct:
 - (a) on April 5, suspending employee Vinod Ganatra (Ms. Ganatra),
 - (b) on April 9, discharging Ms. Ganatra,
 - (c) in December, granting preference in terms and conditions of employment to employees who did not engage in a strike in support of the Union, and
 - (d) in December, engaging in conduct inherently destructive of the rights guaranteed by Section 7 of the Act?
2. Did Respondent independently violate Section 8(a)(1) of the Act by the following conduct:
 - (a) threatening employees with loss of benefits and telling employees it would be futile for them to select the Union as their bargaining representative,
 - (b) creating an impression of surveillance of employees' union activities
 - (c) interrogating employees,
 - (d) threatening employees with unspecified reprisals,
 - (e) threatening employees with loss of scheduled wage increases,
 - (f) engaging in surveillance of employees' union activities by taking photographs of employees engaged in union activities,
 - (g) promulgating, enforcing, and maintaining an overly broad rule denying off-duty employees access to the interior of Respondent's facility or to any work area outside Respondent's facility,
 - (h) discriminatorily promulgating and enforcing a rule denying off-duty employees access to the interior of Respondent's facility or any work area outside Respondent's facility, and
 - (i) offering bonus payments and other benefits to employees to induce them to refrain from taking part in a strike in support of the Union?

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

Findings of Fact

I. Jurisdiction

Respondent, a California corporation, with a facility located in Monterey Park, California (the facility or the hospital), is engaged in the operation of an acute care hospital. Respondent annually derives gross revenues in excess of \$250,000 from its operation of its acute care hospital at the facility. Respondent annually purchases and receives products valued in excess of \$50,000 at the facility directly from points located outside the state of California. Respondent admitted and I find it to be 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. Respondent admitted, and I find the Union to be a labor organization within the meaning of Section 2(5) of the Act. [FN3]

II. Alleged Unfair Labor Practices

A. The union campaign

Respondent's registered nurses (RNs) commenced a union organizing campaign in the summer of 2000. In September 2000, certain of the RNs formed a union organizing committee numbering about 50 employees, one of whom was Ms. Ganatra. Pre-election union handouts openly available in the nursing lounge to which supervising nurses had access identified Ms. Ganatra by photograph and name as a union supporter. Later, Ms. Ganatra served on the Union's contract negotiation committee.

Region 21 conducted a union election among certain of Respondent's RNs on January 18 through 20. The Union won the election and in August was certified as the collective-bargaining representative of a unit of Respondent's registered nurses at the hospital.

B. The discharge of Ms. Ganatra

1. The evidence

Ms. Ganatra began working for Respondent as a full-time RN in April 1982. From October 2000 until January 7, Ms. Ganatra was on disability leave. On January 3, she hosted a union meeting in her home attended by 14 to 16 nurses. Upon her return to work, Ms. Ganatra resumed working as a critical care nurse in Respondent's coronary observation

care unit (CCU).

Beginning in February, Kevin Kurtz (Mr. Kurtz), newly promoted Critical Care Director, supervised Ms. Ganatra's work. Mr. Kurtz reported to Sharon Lou Carpenter (Ms. Carpenter), Chief Nursing Officer. Sometime in March, Mr. Kurtz telephoned Ms. Ganatra and said that he wanted to bring an incident to her attention. Although Ms. Ganatra's testimony was unclear as to what was involved, it appears there was a question of her having delayed following a doctor's orders. [FN4] Ms. Ganatra explained to Mr. Kurtz that she had attempted to call the doctor over a period of time. Mr. Kurtz told her the next time such a situation occurred, she was not to wait too long but to go to the primary doctor within two hours, and if she got no response, to turn the matter over to the nursing supervisor. He said the new policy would be that if the attending doctor did not return a call within two hours, nurses should follow up with their supervisors.

On April 1, Dr. James Liu (Dr. Liu), cardiologist, gave various orders concerning a hospitalized patient whose care was Ms. Ganatra's responsibility. (To ensure privacy, the patient is identified only as M.L.) Dr. Liu telephoned in the first set of orders at 11:45 a.m. [FN5] and Ms. Ganatra wrote them on a form called the doctor's order sheet, a triplicate document with white, pink, and yellow pages, the last for pharmacy use. Dr. Liu directed that Compazine be administered. Ms. Ganatra signed the orders on the line marked "nurse noted," and added date and time when she began complying with them. Ms. Ganatra inadvertently noted the date as 3/3/01, but accurately set the time as 11:45 a.m.

Dr. Liu visited patient M.L. and personally wrote the next set of orders for on the doctor's order sheet, dating the orders April 1 at "12:30 noon" (Dr. Liu's 12:30 orders). In this set of orders, Dr. Liu, inter alia, directed that M.L.'s Compazine dosage be changed, and that the nurse "consult Dr. Dennis Chan for G[astro] I[n]testinal discomfort, N[ausea], V[omiting]." At the end of his orders, Dr. Liu wrote, "Pt may be transferred to DOU" (a lower care level unit). Ms. Ganatra testified that she read Dr. Liu's 12:30 orders between 12:30 and 1:00 p.m. She said that sometime between 1:00 to 2:00 p.m., she telephoned Dr. Dennis Chan (Dr. Chan.) Dr. Chan's exchange answered the call, and Ms. Ganatra left a message for Dr. Chan to call back. Ms. Ganatra did not sign the orders on the "Nurse Noted" line until 6:30 p.m., when she was catching up with paperwork at the end of her shift, but she noted the time as of when she began complying with the orders: 1:00 p.m.

[FN6]

In the course of patient care, Respondent's nurses also record nursing progress notes for each patient. Regarding 12:00 p.m.

2:00 p. m.

4:00 p.m.

5:30 p.m.

6:30 p.m.

When Ms. Ganatra began to do her paperwork at the end of her shift on April 1, she telephoned Beatrice Montes (Ms. Montes) unit secretary for the cardiac surgery unit (CSU) who, at that time, also filled in for the CCU secretary. According to Ms. Ganatra, she asked Ms. Montes to copy or recap the day's orders so they would be clear for the next nurse who would transfer the patient to DOU. She also asked Ms. Montes to call Dr. Chan because he had not returned her earlier call. Ms. Montes reported that Dr. Chan was gone for the day, and Dr. Thomas Lam (Dr. Lam), who was on-call, would call back. When Dr. Lam called a few minutes later, Ms. Ganatra give him a status report on M.L., and Dr. Lam said he would see the patient that evening.

Ms. Montes gave a different version of what transpired between her and Ms. Ganatra on the evening of April 1. According to Ms. Montes, Ms. Ganatra telephoned her sometime after 6:00 p.m. and asked why Ms. Montes had not done an order written at 12:30 p.m. Ms. Montes said she had been in CSU the whole day. When Ms. Montes went to CCU to prepare M.L.'s transfer order, she noted that Dr. Liu's 12:30 orders still had the yellow copy attached, which, to her understanding, should have been routed to the pharmacy shortly after the doctor gave orders. She also noted that no signatures or time notations appeared on the "Nurse Noted" lines. Ms. Montes telephoned Dr. Chan's office as directed in Dr. Liu's 12:30 orders and made a notation that Dr. Lam was on call. Ms. Montes denied that Ms. Ganatra told her of any earlier attempt to reach Dr. Chan. When Ms. Montes began to write the recap of Dr. Liu's orders, Ms. Ganatra asked her to note the recap time as 1:00 p.m. since that was the time of the orders. Ms. Montes did not comply with Ms. Ganatra's request, and instead noted the accurate time of her recap preparation:

the April 1 care of patient M.L., Ms. Ganatra wrote, in pertinent part:

Dr. J. Liu notified re patient's nausea and vomiting. Compazine 5 mg. IV given as order[ed].

Act 191 repeated. Not able to [discontinue] AV line. Next Act due @ [8:00 p.m.].

No nausea vomiting able to retain some food

AV sheath [discontinued], Pressure bandage applied and sand bag on rt groin cont.

Nutrition D[inner] taken small amt. No more blood spitting and nose bleed after Integraline [discontinued] @ 11:30 p.m. No nausea or vomiting. Dr. D. Chan notified Dr. Thomas Lam called back. Will see patient today. Cond stable.

6:15 p.m. Ms. Montes returned to CSU briefly, and when she came back to CCU, she saw that two of the formerly blank "Nurse Noted" lines on Dr. Liu's 12:30 orders now bore the signature, V. Ganatra, and the time 1:00 p.m.

On the following day, April 2, Ms. Montes reported the previous evening's events to her supervisor Mr. Kurtz. Mr. Kurtz directed her to write an incident report. The following day, April 3, Ms. Montes gave Mr. Kurtz a form entitled QUALITY/RISK/SECURITY REPORT, on which she had written in the "Narrative Description of Occurrence" box the following:

On 4/1/01 I was working in CSU when I received a phone call after 6 p.m. from Vinod Ganatra (CCU). She proceeded to question why I had not taken out an order for one of her patients which was written at 12:30 p.m. I replied that I had not been in CCU (I was assigned to CSU) at that time and I had not been aware of it. When I arrived in CCU, I noticed that the yellow copy was still attached to the page full of orders which had not been taken care of. There was an order for the patient to transfer to DOU with specific instructions and medications to be given. She then asked me to sign the order [1:00 p.m.]. I did not do as she asked. Later I found the order was signed by her [1:00 p.m.] although it was not taken care of until 6:45 p.m.

When Ms. Ganatra reported to work as scheduled on April 5, Mr. Kurtz assigned her to do paperwork rather than patient care. At the end of her shift, Mr. Kurtz told Ms. Ganatra to follow him to his office where Ms. Carpenter waited. Mr. Kurtz told Ms. Ganatra of Ms. Montes's incident report. Ms. Ganatra testified she told Mr. Kurtz she did not understand and asked him to show her what she had done wrong, to show her the charting or documentation of

what she had done. Mr. Kurtz refused. Mr. Kurtz then showed Ms. Ganatra an incident report in which one of her co-workers complained that Ms. Ganatra had not assisted in transferring a patient from a gurney to a bed. Ms. Ganatra explained that she had just returned from a neck disability. According to Ms. Ganatra, Mr. Kurtz said, "I'm not going to hear any more of anything from you. I'm just going to suspend you."

According to Ms. Ganatra, she said, "You have to give me a chance." Mr. Kurtz replied that he would give her a chance, that she was to report on the following Monday to Human Resources, and he would resolve it there. Before leaving, Ms. Ganatra protested again that Mr. Kurtz had not given her a chance to explain her side of the story.

The following Monday, April 9, Ms. Ganatra returned to Respondent's Human Resources office. Mr. Kurtz, Ms. Carpenter, and human resources substitute director, Pat Matsuo (Ms. Matsuo), were present. By Ms. Ganatra's account, Ms. Matsuo gave Mr. Kurtz a paper to give to Ms. Ganatra and told her she had been terminated and that she would need the paper for unemployment insurance filing. [FN7] Ms. Ganatra testified she said, "What is going on, you guys? I came here to resolve. You have to hear my side of the story." She was upset and angry and began screaming. Ms. Carpenter said, "You have been late carrying on orders, six hours." Ms. Ganatra denied the charge and again demanded a chance to explain, but Ms. Carpenter refused. Ms. Ganatra left the hospital without further conversation with her supervisors.

Concerning Ms. Ganatra's discharge, Mr. Kurtz testified that after reading Ms. Montes's written report on April 3, he obtained the medical records and chart for patient M.L. He also talked to employee, Dolores Ferriols, who told him what she had heard of Ms. Montes's side of her telephone conversation with Ms. Ganatra and essentially corroborated Ms. Montes's account. Mr. Kurtz then discussed his findings with Ms. Carpenter who agreed they should set up a meeting with Ms. Ganatra to hear her explanation. Among the items of particular concern to Ms. Carpenter were Ms. Ganatra's apparent failure to call Dr. Chan for consultation until 6:30 p.m., hours after Dr. Liu had requested the consultation, and Ms. Ganatra's solicitation to Ms. Montes to falsify the recap document.

According to Mr. Kurtz, at the April 4 meeting with Ms. Ganatra, he read portions of Ms. Montes's occurrence report to Ms. Ganatra and asked her to explain what had occurred with patient M.L. Ms. Ganatra said that she had

done some of the doctor's orders at one o'clock and that she had done the second half of the orders at six o'clock. Mr. Kurtz pointed out that Ms. Ganatra had noted on the orders that she had done all orders at 1:00 p.m. Ms. Ganatra offered no explanation. Mr. Kurtz told her that he found it unacceptable that she had asked another employee to write an erroneous time on the transfer orders. Further, Ms. Ganatra's recording the time as 1:00 p.m. on the orders although it was after 6:00 p.m. was not an appropriate way to note the chart. Mr. Kurtz told Ms. Ganatra that her explanation was not consistent and that Respondent would suspend her while he continued the investigation. Both Mr. Kurtz and Ms. Carpenter denied refusing to give Ms. Ganatra time to explain the situation.

After their meeting, Mr. Kurtz reviewed Ms. Ganatra's documentation again. He believed the documents showed that Ms. Ganatra had not started to complete some of the doctor's orders until after 6:00 p.m. He also considered Ms. Ganatra's asking Ms. Montes to write 1:00 p.m. on the transfer orders to be "inconsistent." He discussed the matter with Ms. Carpenter who said that soliciting another employee to falsify documentation was grounds for termination. Mr. Kurtz believed that Ms. Ganatra had not presented an adequate explanation for not completing Dr. Liu's orders in a timely fashion or for asking another employee to record an inaccurate time. Mr. Kurtz and Ms. Carpenter reported Mr. Kurtz's conclusions to Ms. Matsuo, and Mr. Kurtz recommended that Ms. Ganatra be terminated for falsification of patient records and delay in giving service. Ms. Matsuo approved the proposed termination.

Regarding the April 9 termination meeting, Mr. Kurtz testified he told Ms. Ganatra he had concluded that she had, in fact, documented M.L.'s records incorrectly and had asked another employee to record an incorrect time, that she had not offered an explanation or starting point for improvement, and that she was to be terminated. Ms. Carpenter recalled that Ms. Ganatra said she needed more time to present her side of the story, but that she offered no explanation for her actions at the termination meeting. [FN8] Ms. Ganatra protested that the termination was unfair and related to her union activities, which Mr. Kurtz denied.

After her discharge, Ms. Ganatra, following Respondent's "Fair Treatment Process," mailed a step I grievance to Mr. Kurtz on April 24, which, in pertinent part, reads:

On Thursday April 5th, my immediate supervisor Kevin Kurtz showed me three incident reports, one where I reported a Registry Nurse for a medication error. He

withdrew the first incident report immediately upon seeing that it was written by me, rather than about me. The next one was where our unit secretary had complained that I had delayed in copying my medication orders. The third one was a complaint from G.I. Lab nurses that I would not help them transfer a patient from Gurney to bed. This is not true, I did actually help but he didn't give me any opportunity to explain my side of things and said I was suspended without pay. He told me to see him in Human Resources at 8:00 am on Monday to "resolve the issue."

On April 9, 2001, I was terminated from my job as a registered nurse at Garfield after 20 years of employment there. Kevin Kurtz, my immediate supervisor, informed me that I was terminated but refused to explain or discuss why.

I believe that this is unfair and that I should not have been terminated. I believe that the termination is related to:

1. My support for the Union
2. My age (63 1/2)
3. My race (I am the only nurse from India in CCU and one of very few Indian nurses in the whole Hospital.)
4. My disability (I recently was on a disability leave for 89 days for a medical disability.)

By letter dated May 19, Mr. Kurtz responded:

Vinod,

Your letter is not an accurate description of what occurred. The reasons why you have stated you believe you were terminated are not accurate.

In the previous two years, Respondent had discharged employees for, among other things, false documentation, delay of service, and falsification of medical records. [FN9] During that time, nurses were disciplined but not discharged for such breaches as erroneous medication administration, performing erroneous procedures, mislabeling a blood sample, giving the wrong baby for breast-feeding, not following orders correctly, sleeping on duty, and failure to carry out an order.

2. Credibility determinations as to the discharge of Ms. Ganatra

I found Ms. Ganatra to be an unprepossessing witness. She was often vague and sometimes vacillatory. Under cross-examination, she initially testified that she told Dr. Liu at 1:00 p.m. on April 1 that she was unable to act immediately on his orders. She then testified that she talked to Dr. Liu after an ACT test at 2:00 p.m. When

asked if she were changing her testimony, she said that she could not remember, but that she called after the ACT test. When asked why she did not write Dr. Liu's changed order on the doctor's order sheet, she testified:

Uh, that is my mistake. I should have written it right away. But I could have been distracted. Maybe the other patient was going sour. Maybe the doctor was on the telephone line and I took another line and started talking to him. And since there was no---no immediate medication ordered, it totally slipped my mind to write in, the doctor's order sheet. Even if I [signed at 6:00 p.m.], I should have entered [the changed orders] at that time. It just slipped my mind. And I am sorry.

Regarding the absence of notation in her Nursing Progress Notes or elsewhere that she called Dr. Chan shortly after receiving the Dr. Liu's orders (between 1:00 to 2:00 p.m.), Ms. Ganatra testified, "We don't note [requests for return calls.] Because I'm just leaving a message. I didn't get to the doctor yet." However, she did note at 6:30 p.m. that "D. Chan [had been] notified[.] Dr. Lam called back." When asked about the 6:30 p.m. notation, "D. Chan notified," Ms. Ganatra testified that she wrote that because she had called Dr. Chan and his exchange had taken a message. Her testimony of the 6:30 p.m. notation contradicts her earlier testimony that it was not her practice to note requests for return calls. Moreover, although Ms. Ganatra was admittedly aware of the hospital policy that if an attending doctor did not return a call within two hours, nurses were to follow up with their supervisors, she failed to do so. The record as a whole fails to support Ms. Ganatra's testimony that she attempted to call Dr. Chan as ordered, and I discredit her testimony in that regard.

Occasionally, Ms. Ganatra's testimony was inherently incongruous. She asserted that she did not know Respondent's reason for discharge until shortly before the hearing. Her testimony during cross-examination is as follows:

Mr. Bowles: ... When you read [Ms. Montes's Quality Risk/Security Report,] did you understand... that Ms. Montes was claiming that you had delayed carrying out some doctor's orders?

Ms. Ganatra: I did not understand that at that time. There was not enough time to even figure out what is written and what is going on. The first time I found out was just recently, here.

Mr. Bowles: The first time you found out what?

Ms. Ganatra: Never mind.

Mr. Bowles: I'm sorry?

Judge Parke: Answer the question, please.

Ms. Ganatra: Oh, that --- why I was fired. I did not

know until year and a half later, just recently, in the last month. Because I asked Kevin to write me the reason. He did not write me the reason.

....

Mr. Bowles: ...[P]rior to testifying today or yesterday...who did you discuss your testimony with?

Ms. Ganatra: A union lawyer and the---that is where I found out what is the reason of my firing.

On April 9, the Union filed an unfair labor practice charge alleging Respondent unlawfully fired Ms. Ganatra, following which Region 21 investigated the allegations and issued a complaint on November 30. I find it incredible that during that process, Ms. Ganatra remained unaware of the asserted bases of her discharge. Moreover, Ms. Ganatra's later testimony appears to contradict her claim of ignorance:

Ms. Ganatra: [When I went to Mr. Kurtz on [April 9]...I had a list of all the explanation and everything...to explain him why you suspended me.

Further, Ms. Ganatra agreed that in the meeting of April 9, Ms. Carpenter told her she had responded late to a doctor's orders. I cannot rely on Ms. Ganatra's testimony that Respondent's supervisors refused to explain the reasons for her termination.

In other contradictory testimony, Ms. Ganatra initially denied having spoken to Dr. Liu after April 5. After Dr. Liu testified that Ms. Ganatra telephoned him in February 2002 and asked him to support her in her controversy with the Hospital, Ms. Ganatra retook the stand and admitted having telephoned Dr. Liu. Ms. Ganatra explained her earlier denial as the result of imperfectly understanding counsel's question. In this, as in other testimony, I find Ms. Ganatra to be less than candid. Because of her overall lack of credibility, I decline to accept Ms. Ganatra's testimony except as specifically noted.

I found Ms. Montes to be a forthright and sincere witness. I accept her testimony that Ms. Ganatra asked her to misstate the time on the recap or transfer document.

General Counsel urges that Mr. Kurtz's testimony and avowed motivation for Ms. Ganatra's discharge be discredited because he was openly hostile to the Union. In January, before his promotion to supervisor, Mr. Kurtz prepared and distributed antiunion literature and served as Respondent's election observer. Mr. Kurtz was actively, even contentiously, antiunion. Moreover, he demonstrated a less-than-perfect recall of the termination events. [FN10]

In spite of these factors, I found Mr. Kurtz's testimony to be logically consistent with other credited testimony and undisputed facts. Upon review of the pertinent medical records and surrounding testimony, I accept the accounts of Ms. Carpenter, Ms. Matsuo, and Mr. Kurtz as to the discharge of Ms. Ganatra. While the three accounts differ in detail, the witnesses are consistent in maintaining that Ms. Ganatra was discharged because she asked another employee to falsify a medical document and because she delayed service.

3. Discussion of Ms. Ganatra's discharge

The question of whether Respondent violated the Act in discharging Ms. Ganatra rests on its motivation. The Board established an analytical framework for deciding cases turning on employer motivation in *Wright Line*. [FN11] To prove that an employee was discharged in violation of Section 8(a)(3), the General Counsel must first persuade, by a preponderance of the evidence, that an employee's protected conduct was a motivating factor in the employer's decision. If the General Counsel is able to make such a showing, the burden of persuasion shifts "to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089. The burden shifts only if the General Counsel establishes that protected conduct was a "substantial or motivating factor in the employer's decision." *Budrovich Contracting Co.*, 331 NLRB 1333, 1333 (2000). Put another way, "the General Counsel must establish that the employees' protected conduct was, *in fact*, a motivating factor in the [employer's] decision." *Webco Industries*, 334 NLRB No. 77 (2001).

The elements of discriminatory motivation are union activity, employer knowledge, and employer animus. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991). Here, the first two elements are met: Ms. Ganatra was actively involved in supporting the Union, and Respondent had to have been aware of her involvement. As to the third element, although Respondent made its opposition to the Union clear to employees, there is no direct evidence that Respondent bore animosity toward Ms. Ganatra or any other employee for his/her union support. Such direct evidence is not essential. In determining whether the General Counsel has met his initial burden of proving that an employee's protected activity was a motivating factor in an employer's decision to discharge the employee, the Board has held that "a discriminatory motive may be inferred from circumstantial evidence and the record as a whole, and that direct evidence of union animus is not required." *Tubular Cor-*

poration of America, 337 NLRB No. 13, at slip op. 1 (2001) citations omitted. Evidence of an employer's motive may be gleaned from the circumstances surrounding the discharge. Indications of discriminatory motive may include failure to conduct a full and fair investigation of alleged misconduct, [FN12] a failure to disclose the reason for the discharge, [FN13] a pretextual reason, [FN14] disparate treatment, [FN15] a departure from past disciplinary practice, [FN16] and/or the insubstantial nature of the alleged misconduct versus the extreme severity of the punishment. [FN17]

The General Counsel argues that Respondent failed to conduct a full and fair investigation of Ms. Ganatra's alleged misconduct and failed to disclose to her the basis for her discharge. Employee Ms. Montes brought Ms. Ganatra's conduct of April 1 to Respondent's attention, and Mr. Kurtz interviewed Ms. Montes and another employee concerning the events. He also reviewed pertinent documents. From his investigation, Mr. Kurtz could reasonably infer that, at the very least, Ms. Ganatra had delayed several hours in attempting to contact Dr. Chan and had asked another employee to falsify the time when a medical document was written. There is no evidence that Respondent sought to shape or distort the investigation or that there was no genuine fact gathering. No valid reason has been shown why Mr. Kurtz should not have believed Ms. Montes. See *American Thread Co.*, 270 NLRB 526 (1984). Moreover, although interviewing the subject employee is not a requirement for an adequate investigation, [FN18] Mr. Kurtz and Ms. Carpenter talked to Ms. Ganatra about the reported misconduct several days before her discharge. Therefore, neither Respondent's investigation nor its termination proceeding evidences animus.

The General Counsel also contends that Respondent used Ms. Montes's report as a pretext for weeding out a union supporter. No evidence supports that position. Credible testimony indicates that Mr. Kurtz and Ms. Carpenter believed Ms. Montes had alleged facts constituting significant misconduct on Ms. Ganatra's part. The Board will not substitute its judgment for an employer's as to what constitutes good grounds for discipline. [FN19] By any reasonable standard, Ms. Ganatra's request to another hospital employee that she misstate the time on a medical document was a serious charge. Moreover, the subsequent review of patient M.L.'s records revealed information that reasonably showed Ms. Ganatra had, at the very least, delayed following Dr. Liu's orders to call Dr. Chan for consultation. Dr. Liu gave the consultation order at 12:30 p.m., but in her Nursing Progress Notes, Ms. Ganatra noted

nothing about following the order until her entry of 6:30 p.m. It is reasonable to draw an inference from the wording of the entry, as Mr. Kurtz and Ms. Carpenter did, that Ms. Ganatra did not make the initial call until 6:30 p.m. -- a significant delay. Even accepting--as I have not--that Ms. Ganatra made a timely call to Dr. Chan, Mr. Kurtz had previously counseled Ms. Ganatra that she was to turn such a matter over to the nursing supervisor if a doctor failed to return a call within two hours. Ms. Ganatra did not follow that instruction. Given the setting of a hospital's high-level care unit, there is no valid argument that Ms. Ganatra's misconduct was insubstantial or that it did not reasonably warrant the severity of discharge.

Considering all the evidence, I cannot find that Ms. Ganatra's protected activity was a motivating factor in Respondent's decision to discharge her. Accordingly, I find the General Counsel failed to meet his *Wright Line* burden, and I shall dismiss the allegations of the complaint relating to Ms. Ganatra.

C. Alleged 8(a)(1) conduct

1. Respondent's statements in employee meetings

The General Counsel alleges in the complaint that, in the course of Respondent's meetings with employees in December 2000, supervisors Zenny Cabudol (Ms. Cabudol), director of post partum, Linda Wright (Ms. Wright), director of medical records, Phillip Cohen (Mr. Cohen), Respondent's chief executive officer, and Rosa Celera (Ms. Celera), education department manager, threatened employees with the loss of benefits if they selected the Union as their bargaining representative. The complaint alleges that in the same meetings, the supervisors made statements indicating to employees the futility of selecting the Union.

During the union campaign, Respondent held mandatory meetings of small groups of RNs. Working as team presenters, Ms. Cabudol, and Ms. Wright conducted some of the meetings; Mr. Cohen and Ms. Celera conducted others. In the course of the meetings, the team presenters took turns reading from a document entitled "DISCUSSIONS WITH GROUPS OF REGISTERED NURSES SCRIPT NO. 1 (CJH EDITS) DURING THE WEEK OF DECEMBER 4, 2000" (the script). Although employee witnesses recalled certain statements by the teams as being different from those reflected in the script, the team presenters credibly testified that they followed the script in conducting the meetings. Employee witness, Graciela Jaime agreed that presenters Ms. Cabudol and Ms. Wright

read from a document or script. Ms. Cabudol credibly testified that when employees asked questions, she or Ms. Wright reread relevant portions of the script. I find, therefore, that the script accurately reflects the statements made in the employee meetings. The script briefly described the union petition and election procedures and stated, in pertinent part, the following:

Tenet and Garfield Medical Center are 100% opposed to the SEIU's getting in here and becoming your legal representative and legal spokesman, and we intend to Oppose the SEIU's efforts by every legal means available to us.

....

...[T]he only thing that happens if a union wins an NLRB election is that the union wins the right to sit down and negotiate or bargain with hospital representatives. Before you give any consideration to voting for the SEIU and bringing them in here, we believe it is a very good idea that you know how the collective bargaining process works between a union, like the SEIU, and the hospital, like Garfield Medical Center.

...[T]he union cannot guarantee to live up to anything you are told, but the union certainly will try to charge you monthly dues and other fees even though you will have no guarantee of getting anything in return for your money...After all, you were hired by Garfield Medical Center, not the union, and you are employed by Garfield Medical Center, not the union. Right now, all of your pay and benefits come from Garfield Medical Center, not the union, and after the election, your pay and benefits will still be provided by Garfield Medical Center, not the union, regardless of whether or not the union wins the election. The SEIU has never given you anything, and the union never will. Your position, your pay, your benefits--all come from Garfield Medical Center, and they will all come from Garfield Medical Center after the election regardless of whether or not the SEIU wins. Before elections, union organizers and supporters are full of talk and full of promises, but when it comes right down to it, a union cannot guarantee to get anything for employees. ...If the SEIU wins the election and gets in here, the only thing which will automatically happen is that representatives of the hospital will sit down with representatives of the SEIU and negotiate or bargain over your pay, your benefits, and your working conditions. In such bargaining, we will be legally required to bargain in good faith, and that is exactly what we would do, but we would not be required to agree to anything in the bargaining which we did not believe was in the best interest of the hospital, our patients, and all of our employees.

...[B]oth sides must agree in order for any changes to be made. It is true that the SEIU representatives could come to the bargaining table and make proposals and demands on us to try to live up to the promises and other union sales talk...but...the hospital must agree to each one of them, or they simply will never happen...[W]e...have the absolute legal right to reject or say NO to [proposals or demands]. And, if we...say NO, the proposal or demand...never go[es] into effect. Does anyone know what a union contract looks like when the bargaining first begins between a hospital and a union? Well, we do not know what all union contracts look like, but we do know what our contract will look like WHEN BARGAINING BEGINS. [At this point, the presenter handed out or referred to a blank sheet of paper.] That's right--it's a blank piece of paper, and that's what our contract will look like when we first sit down with the SEIU to bargain. And, not one word, not one sentence, and not one paragraph will go in that contract until we say it is okay. Nothing will go in the contract until we decide it will be in our best interest to put it in there. In fact, your present pay and benefits do not go into the contract until we say it is okay. Bargaining between a hospital and a union is a two-way street, and employees are not guaranteed that they will get more as a result of bargaining. In fact, there is no guarantee that employees will keep all of their pay and benefits which they had before the bargaining started. Many employees have found out this fact the hard way when their pay or benefits were reduced as a result of good-faith bargaining between their employer and their union.

Barring outright threats of refusal to bargain in good faith, the Board and the courts do not find coercive any particular wording or phrases used by an employer in describing to employees its collective-bargaining obligations and intentions. Rather, the illegality of a particular statement "depends upon the context in which it is uttered." [FN20] Statements made in a coercive context or in a manner designed to convey to employees a threat that they will lose existing benefits if they vote for the union are unlawful [FN21] as are statements that "leave employees with the impression that what they may ultimately receive depends upon what the union can induce the employer to restore." *Earthgrains Company*, 336 NLRB No. 117, at slip op. 2 (2001); *Plastronics, Inc.*, 233 NLRB 155, 156 (1977). Applying "context" analyses, the Board has found statements to be lawful or unlawful depending on the surrounding circumstances. The Board found that telling employees that benefits "could go either way" as a result of collective bargaining was lawful in *Jefferson Smurfit*

Corporation, 325 NLRB 280, fn. 3 (1998). An employer's statement that everything was negotiable once the union was voted in was unlawful in the context of prior threats to withhold planned wage increases. *Earthgrains Company*, supra. Employees "could reasonably believe from [an employer's] remarks and gestures [pointing to the ground] that they would suffer a loss of wages and benefits by selecting the union." *Noah's Bay Area Bagels*, 331 NLRB 188, 189 (2000). An employer's expressed intention of bargaining from "ground zero" was unlawful in the context of other unfair labor practices. *Belcher Towing Co.*, 265 NLRB 1258 (1982). An employer's statement that negotiations would start from "ground zero" was an unlawful threat when accompanied with the suggestion that employees would have to negotiate to retain current wages and benefits. *Webco Industries*, 327 NLRB 172, fn. 4 (1999). However, an employer did not violate the Act by statements that bargaining would start from "zero," "scratch," or "minimum wage" when the statements were made in context of a discussion of bargaining realities in which benefits can be both gained and lost, and the employer told employees that benefits would be "reviewed not eliminated." *Somerset Welding*, supra, at 832.

Here, Respondent engaged in a preelection campaign that, except for isolated preelection violations of 8(a)(1) committed by lower level supervisors, set forth below, was free from unfair labor practices. The issue is whether Respondent's campaign rhetoric independently "convey[ed] to employees a threat that they [would] lose existing benefits if they vote[d] for the union" or left employees "with the impression that what they may ultimately receive depends upon what the union can induce the employer to restore." *Somerset Welding*, supra at 832; *Earthgrains Company*, supra at slip op. 2. In my opinion, the statements of Respondent's presenters at the employee meetings, as reflected in the script, did just that.

Respondent's presenters reminded employees that they were "hired by Garfield Medical Center, not the union, and employed by Garfield Medical Center, not the union," explaining further:

Right now, all of your pay and benefits come from Garfield Medical Center, not the union, and after the election, your pay and benefits will still be provided by Garfield Medical Center, not the union, regardless of whether or not the union wins the election. The SEIU has never given you anything, and the union never will. Your position, your pay, your benefits--all come from Garfield Medical Center, and they will all come from Garfield Medical Center after the election

regardless of whether or not the SEIU wins...a union cannot guarantee to get anything for employees.

The presenters mentioned Respondent's legal obligation to bargain with an elected union in good faith, but pointed out that Respondent

...would not be required to agree to anything in the bargaining which we did not believe was in the best interest of the hospital, our patients, and all of our employees...[B]oth sides must agree in order for any changes to be made. It is true that the SEIU representatives could come to the bargaining table and make proposals and demands on us to try to live up to the promises and other union sales talk...but...the hospital must agree to each one of them, or they simply will never happen...[W]e...have the absolute legal right to reject or say NO to [proposals or demands]. And, if we...say NO, the proposal or demand...never go[es] into effect.

While Respondent was technically accurate in its statement that it might lawfully say "no" to whatever proposals an elected union might put forward, Respondent did not explicate the normal give and take of collective bargaining negotiations. Respondent did not "clearly articulate...that the mere designation of a union will not automatically secure increases in wages and benefits, and that all such items are subject to bargaining." *Coach & Equipment Sales Corp.*, 228 NLRB 440, 441 (1977). Respondent did not explain that "any reduction in wages or benefits will occur only as a result of the normal give and take of collective bargaining." *Plastronics, Inc.*, supra, at 156 (1977). See also *Pearson Education, Inc.*, 336 NLRB No. 92 (2001), citing *Mercy General Hospital*, 334 NLRB No. 13, slip op. 5 (2001). Rather, Respondent postulated a one-sided form of negotiations in which the Union was permitted to advance proposals that Respondent might or might not accede to as whim dictated, with Respondent's "NO" being the final, unappealable verdict. In case employees missed the point, Respondent's presenters gave, or showed, employees a blank sheet of paper, saying:

...we do not know what all union contracts look like, but we do know what our contract will look like WHEN BARGAINING BEGINS. That's right--it's a blank piece of paper, and that's what our contract will look like when we first sit down with the SEIU to bargain. And, not one word, not one sentence, and not one paragraph will go in that contract until we say it is okay. Nothing will go in the contract until we decide it will be in our best interest to put it in there. In fact, your present pay and benefits do not go into the con-

tract until we say it is okay. Bargaining between a hospital and a union is a two-way street, and employees are not guaranteed that they will get more as a result of bargaining. In fact, there is no guarantee that employees will keep all of their pay and benefits which they had before the bargaining started. Many employees have found out this fact the hard way when their pay or benefits were reduced as a result of good-faith bargaining between their employer and their union.

Respondent relies on *Liquitane Corp.*, 298 NLRB 292 (1990) as supporting the legality of its campaign statements. While that employer likened the start of negotiations to a blank piece of paper, the employer also emphasized the “give and take” process of bargaining, and pointed out that present and/or future wages and benefits were “negotiable” and that the union might “trade off a benefit.” *Id.* at 297. Similarly, the statements in *Telex Communications, Inc.*, 294 NLRB 1136 (1989) and *Meditex of Connecticut, Inc.*, 319 NLRB 281 (1995), cited by Respondent, reflect an expressed intent to engage in the give and take of bargaining, an intention negated here by the overall tone of Respondent’s statements.

I have considered Respondent’s campaign statements as a whole, and I have taken into account the lack of contemporaneous, extensive unfair labor practices. Nevertheless, I find that the statements could reasonably convey to employees the likelihood that Respondent would adopt an intransigent bargaining strategy, even a “regressive bargaining posture” in any future negotiations with the Union. *Coach & Equipment Sales Corp.*, supra; *Histacount Corp.*, 278 NLRB 681 (1986). Accordingly, the statements constituted threats of loss of benefits and of the futility of employees selecting the Union as their collective bargaining representative and violated Section 8(a)(1) of the Act.

2. Creating an impression of surveillance

The complaint alleges that in January, Ms. Ratanavonges created the impression that Respondent was engaging in surveillance of employee union activities.

On the day of Ms. Ganatra’s return to work, January 7, Sue Ratanavonges (Ms. Ratanavonges), House Supervisor and friend, welcomed her back. Ms. Ganatra “hushed her” to the side and asked what she thought of the Union coming to the hospital. According to Ms. Ganatra, Ms. Ratanavonges “screamed”, “What do you want to know about the

Union when you had a meeting in your own home?”

Ms. Ganatra said, “Hey, what is wrong with that? I didn’t go to the Union. They came to me and had a meeting. Is there something wrong with that?” Ms. Ratanavonges made no response and walked away.

According to Ms. Ratanavonges, having heard that Ms. Ganatra had hosted a party shortly before returning from medical leave, Ms. Ratanavonges said to her on her return to work, “I heard you had a big party in your home.” Ms. Ganatra smiled by way of reply. Ms. Ratanavonges denied referring to the Union. Assessing all testimony regarding this incident, including the demeanor of the witnesses, I find that Ms. Ratanavonges knew the “party” at Ms. Ganatra’s home was related to the union organizing campaign, and that she revealed that knowledge to Ms. Ganatra. I do not credit Ms. Ganatra’s account that Ms. Ratanavonges “screamed” at her. No witnesses corroborated any such scenario, which would be expected to have aroused general interest. Rather I find that Ms. Ganatra asked her friend something about the Union, and Ms. Ratanavonges answered, in effect, that Ms. Ganatra was in a position to know, having hosted a union party.

“The Board’s test for determining whether an employer has created an impression of surveillance is whether the employee[s] would reasonably assume from the statement in question that [their] union activities had been placed under surveillance.” *Grouse Mountain Lodge*, 333 NLRB No. 157 at slip op. 1 (2001). [FN22] It is not necessary that employees attempt to keep their activities secret to create a violation, and it is not necessary that the employer’s words indicate the information has been obtained illegally. *Tres Estrellas de Oro*, supra. The question is whether statements by supervisors or agents of an employer would lead employees “reasonably to assume that their union activities had been placed under surveillance.” *Grouse Mountain Lodge*, supra at slip op 2. The Board has found employer statements that reveal or claim knowledge of union meetings or knowledge of the identity of union supporters create an impression of surveillance. [FN23] I note that none of the hostility evidenced in *Beverly California Corporation*, 326 NLRB 232, 233 (1998), exists here. There is also no evidence that Ms. Ratanavonges illegally acquired her knowledge of Ms. Ganatra’s union activity or that she was angry or upset about it. Nonetheless, although Ms. Ratanavonges may innocently have known that Ms. Ganatra hosted a union meeting, and although she may have felt goaded into mentioning it, her revealed knowledge of the meeting reasonably created the impression of

surveillance and violated Section 8(a)(1) of the Act.

3. Interrogation of employees and threat of unspecified reprisal

The complaint alleges that through Lou Dulos (Ms. Dulos) Acting Director of Nursing, Respondent interrogated and threatened an employee with unspecified reprisals.

A week to ten days after Ms. Ganatra returned to work in January, Gloria Romero (Ms. Romero), state assemblywoman, visited the hospital at the request of union supporters. While on break, Ms. Ganatra saw Ms. Romero and Mr. Moreau with a group of employees in the lobby and joined them. One of the employees said to her, "Gloria Romero has come. State Assemblywoman has come from Sacramento. But Phil Cohen is making her wait. So we are waiting for her to go....stay and come with us." While waiting, Ms. Ganatra was introduced to Ms. Romero and shook her hand. Ms. Ganatra followed the group to Mr. Cohen's office. The group waited in the hallway and secretarial area outside Mr. Cohen's office for 15 to 20 minutes until Mr. Cohen's assistant invited Ms. Romero into Mr. Cohen's office. [FN24] A hospital employee named Stephanie told the gathered on-duty employees to return to work. Ms. Ganatra got a cup of coffee from the cafeteria and returned to her unit. According to Ms. Ganatra, about an hour later, while Ms. Ganatra was talking to other unit employees about Ms. Romero's visit, Ms. Dulos asked Ms. Ganatra to join her in the nurse's lunchroom.

Closing the door, Ms. Dulos asked, "Who called you to go down? I know somebody called you."

Ms. Ganatra said no one had called her, that she had just gone downstairs for coffee and had seen the assembled employees.

Ms. Dulos said, "Don't do it next time. If you do it, you're going to get in big trouble with Administration."

Ms. Dulos denied Ms. Ganatra's account and said that on two occasions after Ms. Ganatra's return from disability leave, she counseled her about impermissibly extending break time. On both occasions, someone in CCU had informed Ms. Dulos that Ms. Ganatra was needed on the floor but had not returned from break. On the latter occasion, Ms. Dulos arrived at the CCU floor just as Ms. Ganatra returned from break. Ms. Dulos told Ms. Ganatra that she needed to observe break restrictions but did not refer to

Ms. Romero's visit and said nothing about Ms. Ganatra's union activity. Ms. Dulos could not identify, in either situation, who had complained about Ms. Ganatra's absence.

I do not find either Ms. Ganatra's or Ms. Dulos's testimony in this regard to be fully credible. Ms. Ganatra's testimony of the length of her absence from the CCU conflicts logistically with credible testimony that employees, including Ms. Ganatra, waited with Ms. Romero outside Mr. Cohen's office for 15-20 minutes. I find it probable that Ms. Ganatra extended her break time. On the other hand, Ms. Dulos insisted both counseling sessions were on a different day from Ms. Romero's visit, which is inherently incongruous with her testimony as a whole, and she was vague about how she had known that Ms. Ganatra extended her break. [FN25] Given the witnesses' dual lack of objective credibility, I rely on manner and demeanor in making findings as to what occurred between them on the day of Ms. Romero's visit. As set forth, I did not find Ms. Ganatra to be a forthright or sincere witness. Overall, Ms. Dulos' testimony was more convincing. I find, therefore, that Ms. Ganatra did impermissibly extend her break time and that Ms. Dulos counseled her for doing so without explicit or implicit reference to the Union. Accordingly, I shall dismiss this allegation of the complaint.

4. Threat of loss of wage increases

The complaint alleges that in January, Ms. Cabudol, and Shirley Tang (Ms. Tang), director of Rehab/Pediatrics, respectively, threatened employees with loss of scheduled wage increases if they selected the Union as their bargaining representative and with loss of future wage increases because employees had selected the Union as their bargaining representative.

Zarah Cuevo (Ms. Cuevo) credibly testified that in January, Ms. Cabudol told her that if she voted for the union, she would not get her merit increase or adjustment since her anniversary date was after the election. Ms. Cabudol explained that if the Union won the election, the hospital would have to freeze its funds. Therefore, employees whose anniversary dates fell after the election would not get merit increase. Ms. Cabudol admitted saying that if the Union won the election, wages and benefits would be frozen until the negotiations were over. Although Ms. Cabudol denied specifically stating that if Ms. Cuevo voted for the Union, she would not get a wage increase, the two accounts are essentially corroborative.

Millie Leung (Ms. Leung) testified that in the cafeteria during her break on January 31, Ms. Tang spoke to several employees, including Ms. Leung, about the Union. Ms. Tang said, "There is not going to have a contract," and employees would not have any increase in salary for two years. Ms. Leung admitted that she had not recalled Ms. Tang's statement about the contract when she gave an affidavit to the NLRB nine days later. While I discount Ms. Leung's testimony that Ms. Tang told employees there would be no contract, I accept her testimony that Ms. Tang told employees there would be no salary increases for two years.

Credited testimony establishes (1) that Ms. Cabudol told Ms. Cuevo that she would not get a scheduled merit increase if the Union won the election as Respondent would have to freeze its funds, and (2) that Ms. Tang told employees there would be no salary increases for two years because the Union had been selected. The law is clear that during an election period or negotiations an employer has a duty to "implement benefits which have become conditions of employment by virtue of prior commitment or practice." *More Truck Lines*, 336 NLRB No. 69, at slip op. 2 (2001) [citations omitted]. Accordingly, Ms. Cabudol's threat that allowance of scheduled merit increases depended on rejection of the Union violated Section 8(a)(1) of the Act. Ms. Tang's threat that selection of the Union meant a two-year cessation of salary increases also violated Section 8(a)(1) of the Act.

5. Promulgation and maintenance of an overbroad access rule and/or discriminatory enforcement of the rule

The complaint alleges that Respondent has promulgated and maintained an overbroad employee access rule, and, in January, discriminatorily enforced the rule.

Respondent's Human Resources Policies and Procedures manual contains a written "Off-Duty Access" policy, which Respondent has also posted at the facility. In pertinent part, the policy reads:

Policy

Access to Hospital property by off-duty employees is permitted except as expressly prohibited by this Policy.

Guidelines

Off-duty employees are not allowed to enter or re-enter the interior of the Hospital or any work area

outside the Hospital except to visit a patient, receive medical treatment or to conduct hospital-related business.

A. An off-duty employee is defined as an employee who has completed his/her assigned shift.

B. Hospital-related business is defined as the pursuit of the employee's normal duties or duties as specifically directed by management.

The General Counsel contends that the access policy is overbroad on its face and that it was discriminatorily enforced in two separate instances in January by the denial of access accorded Ms. Kawai and Ms. Leung. On January 12, Ms. Dulos sponsored a going-away party in the hospital's blue conference room on the lobby level. While off-duty, Ms. Kawai, an open union adherent, attended the party with her young daughter. At about 8:00 p.m., Ms. Kawai left the party with her daughter and went to the hospital elevators, intending to accompany several co-workers to the nursing unit for social purposes. Ms. Kuwai recalled that the group boarding the elevator included other off-duty nurses, but she was unsure that any other nurse was accompanied by a child. As Ms. Kawai was about to enter the elevator with her daughter, Doris Markwell (Ms. Markwell), Respondent's house supervisor, asked Ms. Kuwai where she was going. Ms. Kuwai said she was going to DOU to visit for awhile. Ms. Markwell reminded Ms. Kawai that she could not go upstairs when she was off duty. Ms. Markwell asked Ms. Kawai to accompany her to the nursing operations office. In the nursing operations office, Ms. Markwell gave Ms. Kawai a copy of Respondent's off-duty hospital policy. After Ms. Kawai read the policy, she left the hospital. Ms. Markwell has enforced the off-duty policy on several occasions in the last two years.

On January 20, the last day of the union election, off-duty nurse Ms. Leung, returned to the hospital at about 6:00 p.m. to serve as a union observer in the last voting session (6:30 to 8:30 p.m.) Ms. Leung, who was wearing street clothes with a union badge, identified herself as a union observer, and security guards directed her to the blue conference room on the lobby level. Ms. Leung remained after the balloting for the vote count, which concluded at about 9:30 p.m. She then left the conference room to go to her workstation, removing her union badge and joining coworkers "Helda," also dressed in street clothes, and "Peter," dressed in a uniform. As the three approached an elevator, a security guard asked Helda and Ms. Leung if they were working at that time. Helda said she was, and Ms. Leung said she was not. The guard told Ms. Leung she could not go to the medical floor. Ms. Leung showed him

her hospital identification card and said she only wanted to retrieve her lunchbox. The guard said that hospital administration had directed that only working staff could go upstairs that day. In the past, Ms. Leung had been permitted to return to her workstation when she had forgotten her lunchbox. [FN26] In 2000, as a nurse in the home health agency, she was also permitted to take paperwork and medical supplies for patients to one of the nurses on the medical floor.

The test for valid no-access rules is set forth in *Tri-County Medical Center*, 222 NLRB 1089 (1976). In that case, the Board explained that a no-access rule concerning off-duty employees is valid if it (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. Rules that deny off-duty employees entry to "outside nonworking areas of the employer's facility will be found invalid." *Healthcare Corporation*, 336 NLRB No. 62, slip op. 2 (2001), discussing *Tri-County Medical Center*. Here, Respondent's access rule specifically permits off-duty employees access to outside non-working areas of the hospital, and its prohibition is within the guidelines of *Tri-County*. The rules are extant in employee handbooks and have been posted on Respondent's bulletin boards and have thus been clearly disseminated. The rules apply to all off-duty employees except those visiting a patient, receiving medical treatment, or conducting hospital-related business and are thus not protected-activity exclusive. As for discriminatory application of the rules, the General Counsel has presented no supporting evidence. Both Ms. Kawai and Ms. Leung sought entry to working areas of the hospital for personal reasons wholly unprotected by Section 7. There is no evidence that they were targeted for no-access enforcement because they were union supporters, and there is no evidence that the rules were not generally enforced. While employees may have evaded detection and breached the rules, there is no evidence that any supervisor "winked" at the rules. I shall, accordingly, dismiss these allegations of the complaint.

6. Surveillance of employees' union activities

The complaint alleges that on June 29, Respondent engaged in surveillance of employees' union activities by taking photographs of employees engaged in informational picketing and attending a union rally.

On June 29, from 6:00 to 8:00 p.m., approximately 120

informational picketers (mostly Respondent's employees) traversed about 300 feet of the public sidewalk fronting the Hospital along Garfield Boulevard, crossing two hospital driveways. Five or six uniformed security guards employed by Respondent were positioned on hospital property near the picketing. Several television news crews were also present. Picketers carried signs with such legends as "Garfield Unfair to Nurses," "Honk if You Support Nurses," "Say NO to Corporate Greed," and "We Deserve a Contract." Some of the signs bore Chinese characters. [FN27] Picketers chanted, "We want a contract now." Under Respondent's direction, employee Ariel Shen (Ms. Shen), photographed the picketing activity. [FN28] After the picketing, the Union staged a rally in a medical building parking lot across from the Hospital, which activity Ms. Shen also photographed. In all, she took more than 50 photographs for the stated purpose of memorializing the written content of the picket signs, whether picketers blocked Respondent's driveway, and whether they entered Respondent's property.

Absent proper justification, the photographing of employees engaged in protected concerted activities violates the Act because it has a tendency to intimidate. *Waco, Inc.*, 273 NLRB 746, 747 (1984) and cases cited therein. Here, the record provides no basis for Respondent reasonably to have anticipated misconduct by the informational picketers, and, in fact, the picketing and following rally were conducted peacefully. A mere suspicion that something might happen to justify the recordation is insufficient when balanced against the tendency of interference with protected rights. *F.W. Woolworth Co.*, 310 NLRB 1197, 1204 (1993). I conclude, accordingly, that Respondent violated Section 8(a)(1) of the Act by photographing its employees protected activities on June 29.

7. The offer of incentive payments and other benefits to induce employees to refrain from striking

The complaint alleges that Respondent, in violation of Section 8(a)(1) of the Act, offered bonus payments and other benefits to employees to induce them to refrain from taking part in protected strike activity on December 21.

On December 10, the Union gave written notice to Respondent of its intent to engage in an unfair labor practice strike commencing December 21. California health services regulations require that hospitals meet certain staffing ratios. California hospitals must also have strike preparation and staffing contingency plans. Joel Yuhas (Mr. Yuhas), Respondent's chief operating officer, credibly

testified that failure to meet staffing ratios would, under California law, require current patients to be transferred to facilities with adequate ratios and incoming patients to be diverted to other facilities. In order to maintain legal nurse/patient ratios, Respondent developed a strike preparation plan that included polling employees as to whether they intended to report to work on the strike date, arranging offsite parking and extra security for the day of the strike, and providing incentive payments for all employees who actually worked that day. As to the latter strategy, Mr. Yuhas testified that Respondent wanted to attract employees to work who might be discouraged by security concerns and the inconvenience of offsite parking.

On December 14, Respondent posted the following notice in various areas of the Hospital and distributed it to nursing and non-nursing staff.

APPRECIATION

BONU

Good News!!!!

SEIU Local 535 has chosen to spread holiday cheer on December 21, 2001 by calling an RN strike. To demonstrate the Hospital's appreciation to those employees who choose to enjoy December 21st with us by caring for our patients, the Hospital will pay the following bonus o those of you who work the day, evening or night shift of December 21:

\$150 to Charge Nurses
 \$100 to RNs
 \$50 to all other hourly employees

+ Special Raffle for Bonus Recipients --
 4 Las Vegas Vacations to be Raffled ***

Certain of Respondent's employees ceased work concertedly and engaged in a strike against Respondent from 6:30 a.m., December 21 to 7:00 a.m., December 22. On December 21, Respondent had 185 admitted patients and 450 to 460 employed nurses. During the 24-hour period of the strike, 250 registered nurses were scheduled to work. Of the 250 nurses, 50 failed to report for work.

The Board has found that bonus payments to employees who cross picket lines and work during a strike violate 8(a)(1) of the Act. *Rubatex Corp.*, 235 NLRB 833 (1978) enf. granted 601 F.2d 147, (4th Cir. 1979) cert. denied, 444 U.S. 928, 100 S.Ct. 269 (1979); *Aero-Motive Manufacturing Company*, 195 NLRB 790 (1972). enf. 475 F.2d 27

(C.A. 6, 1973), cert denied, 414 U.S. 922. In *Aero-Motive*, the employer's asserted motive in making the payments was to compensate the nonstrikers for the special risks involved in view of the violence which took place during the strike, a position similar to Respondent's. Rejecting the employer's defense the Board said:

Whatever Respondent's motives may have been, therefore, it seems to us that the impact on employees is plain for all to see--that nonstrikers did, and presumably will in the future, receive special benefits which strikers will not receive. Employer actions which have this impact are violative of Section 8(a)(1). [Id. at 792.]

Respondent asserts that "payments to returning strikers that are limited to the duration of the strike do not violate the Act." The cases cited by Respondent do not support such a proposition: In *Texaco, Inc.*, 285 NLRB 241 (1987) the Board found an employer unlawfully terminated accrued nonoccupational illness and injury benefits and suspended a pension credit during a strike; In *River City Mechanical*, 289 NLRB 1503, 1505 (1988), the Board found an 8(a)(5) violation, noting that "the cessation of benefit fund payments preceded the strike and that the wages paid to the returning strikers were not made pursuant to any claim that the strike relieved the Respondent of the duty to bargain and were not expressly limited to the period of the strike." In *Service Electric Company*, 281 NLRB 633, fn. 1 (1986), Chairman Dotsun expressed his view that the Act did not require an employer to apply preexisting terms of employment to its economic strike replacements after the strike and an employer had no "greater duty to bargain during the strike over [returning strikers as opposed to strikers'] terms of employment than it [did] over the strike replacements."

Respondent also argues that *Aero-Motive* and comparable cases are inapposite because Respondent offered its incentives before the strike. Cases cited by Respondent, while illustrating the unlawfulness of post-strike compensation to nonstrikers, provide no legal support for a distinction between pre-strike and post-strike conduct. In an analogous case, *Kimtruss Corp.*, 305 NLRB 710 (1991), the Board reversed the judge's finding that an employer violated Section 8(a)(1) when, in anticipation of a strike, it announced a bonus, and Section 8(a)(3) when it paid the bonus, denying it to otherwise eligible striking employees. The Board pointed out that the bonus payment was an implementation of the employer's final offer at impasse, and that an employer "may implement its wage increase proposals and pay the wage increase to employees who

cross the picket line and to employee replacements.” The inference to be drawn from *Kimtruss* is that pre-strike bonus announcements and implementations not privileged by bargaining impasse rules violate the Act. Accordingly, I find Respondent's announcement of incentive payments to employees who worked on the day of the strike, violated Section 8(a)(1) of the Act.

8. The payment of bonuses to employees who worked on the day of the strike

The complaint alleges that Respondent, in violation of Section 8(a)(3) of the Act, granted preference in terms and conditions of employment only to employees who did not engage in protected strike activity on December 21 by paying bonuses to employees who worked on the day of the strike. [FN29]

Respondent paid promised bonuses, described above, to employees who worked at the hospital on the day of the strike and awarded Las Vegas vacations to raffle winners. Respondent argues that in devising the bonus/raffle plan, it had no intent to interfere with employees' protected strike activities. Respondent insists that only compelling business considerations motivated the plan and that it lawfully sought to meet crucial staffing requirements by compensating employees who worked on December 21 for strike-related anxiety and inconvenience.

Assuming, arguendo, that Respondent's bonus/raffle plan, in and of itself, does not evidence the discriminatory intent required under Section 8(a)(3), I consider, as the General Counsel asks, whether Respondent's conduct was inherently destructive of employee rights and thus violative of Section 8(a)(3) of the Act.

It is well established that certain conduct is so inherently discriminatory and destructive of Section 7 rights that proof of antiunion motivation is unnecessary. In such a case, the employer “must be held to intend the very consequences which foreseeably and inescapably flow from his actions.” *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 228 (1963). In *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33 (1967), the Court articulated a framework for the analysis of such conduct:

[I]f it can reasonably be concluded that the employer's discriminatory conduct was ‘inherently destructive’ of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business

considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is ‘comparatively slight,’ an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.

The Supreme Court has found inherently destructive conduct in several cases. In *NLRB v. Erie Resistor Corp.*, above, the employer's grant of superseniority to replacement workers and returning strikers was considered inherently destructive of employee rights. In *Great Dane Trailers*, above, the withholding of vacation benefits from employees who continued to strike was also inherently destructive. In *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), more severe discipline meted to union leaders than nonunion leaders was found to be inherently destructive of employee rights. In each of these cases, the Court found employer conduct inherently destructive where the employer differentiated among members of the bargaining unit based on their union activities. The Ninth Circuit has also held that where “discriminatory conduct is directly related to protected activity...such conduct is inherently destructive and an inference of improper motive is warranted,” *Kaiser Engineers v. N.L.R.B.*, 538 F.2d 1379, 1386 (9th Cir. 1976). In *International Paper Co.*, 319 NLRB 1253 (1995), enf. denied 115 F.3d 1045 (D.C. Cir. 1997), the Board set out four fundamental guiding principles for application of the doctrine of employer conduct inherently destructive of employee rights: First, conduct which directly and unambiguously penalizes or deters protected activity is inherently destructive; second, conduct that has far reaching effects as would hinder future bargaining and create visible and continuing obstacles to future exercise of employee rights is inherently destructive; third, conduct exhibiting hostility to the process of collective bargaining itself is inherently destructive; and fourth, conduct may be inherently destructive of employee rights if it discourages collective bargaining by making it seem a futility in the eyes of employees. [FN30]

Respondent's bonus/raffle plan fits squarely within the first of the *International Paper Co.* principles: it directly and unambiguously deters protected activity. Offering employees an economic inducement to work rather than to

engage in protected strike activity is inimical to uncoerced choice and calculated to interfere with employees' right to strike. Respondent's incentive plan was designed to encourage both unit and nonunit employees to abstain from engaging in or supporting the strike; its adverse impact on employees is highly significant, and would likely "chill" union support. [FN31] In these circumstances, Respondent's business purpose "cannot stand as a sufficient justification" for the grant of benefits to induce employees not to strike. See *Schenk Packing Co.*, 301 NLRB 487, 493 (1991) [citations omitted] where conferral of a bonus package on actively employed workers in a lockout situation violated Section 8(a)(3). Accordingly, I find that Respondent's payment of bonuses and bestowal of raffle privileges to employees who worked on December 21 violated Section 8(a)(3) of the Act. [FN32]

Conclusions of Law

1. Respondent violated Section 8(a)(1) of the Act by
 - (a) threatening loss of benefits and the futility of employees selecting the Union as their collective bargaining representative,
 - (b) creating an impression that Respondent was engaging in surveillance of employee union activities,
 - (c) threatening employees with loss of scheduled wage increases if they selected the Union as their bargaining representative and with loss of future wage increases because employees had selected the Union as their bargaining representative,
 - (d) engaging in surveillance of employees' union activities by taking photographs of employees participating in informational picketing and a union rally, and
 - (e) offering bonuses and raffle participation to employees to induce them to refrain from taking part in protected strike activity.
2. Respondent violated Sections 8(a)(3) and (1) of the Act in granting preference in terms and conditions of employment to employees who did not engage in protected strike activity by paying bonuses and raffling vacations to employees who worked on the day of a strike.
3. The unfair labor practices set forth above affect commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.
4. Respondent has not violated the Act as otherwise alleged in the complaint.

Remedy

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Respondent must confer on those employees who did not work on December 21, because they engaged in protected strike activity, the same bonus payment and Las Vegas vacation raffle opportunity that Respondent made available to employees who worked on December 21. *Schenk Corp.*, supra; *Aero-Motive*, supra. The sums due employees are to be paid with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [FN33]

ORDER

The Respondent, Tenet Healthsystem Hospitals, Inc. d/b/a Garfield Medical Center, Monterey Park, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) threatening loss of benefits and the futility of employees selecting the Union as their collective bargaining representative,
 - (b) creating an impression that Respondent is engaging in surveillance of employee union activities,
 - (c) threatening employees with loss of scheduled wage increases if they select the Union as their bargaining representative and with loss of future wage increases because employees have selected the Union as their bargaining representative,
 - (d) engaging in surveillance of employees' union activities by photographing employees participating in union activity,
 - (e) offering bonuses and raffle participation to employees to induce them to refrain from taking part in protected strike activity,
 - (f) granting preference in terms and conditions of employment to employees who do not engage in protected strike activity, and
 - (g) 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) compensate all employees who did not work

on December 21 because they engaged in protected strike activity for the bonus and raffle opportunity they were denied in the manner set forth in the remedy section of this Decision and Order. (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 compensation due under the terms of this Order.

(c) within 14 days after service by the Region, post at its facility in Monterey Park, California copies of the attached notice marked "Appendix." [FN34] Copies of the notice, on forms provided by the Regional Director for Region 21 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 6, 2001.

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

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

Dated, at San Francisco, CA: October 16, 2002

Lana H Parke
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board

An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT threaten our employees that they will lose benefits if they select American Federation of Nurses, Local 535, Service Employees International Union, AFL-CIO, CLC (the Union) as their collective bargaining representative.

WE WILL NOT tell our employees that it will be futile for them to select the Union as their collective bargaining representative.

WE WILL NOT create an impression that we are watching our employees' union activities.

WE WILL NOT threaten employees that they will lose scheduled wage increases if they select the Union as their bargaining representative or that they will lose future wage increases because they have selected the Union as their bargaining representative,

WE WILL NOT watch our employees' union activities by photographing employees participating in union activity.

WE WILL NOT offer bonuses and vacation raffle participation to employees to induce them to refrain from taking part in protected strike activity.

WE WILL NOT grant bonuses and raffle vacations to employees who do not engage in protected strike activity.

WE WILL NOT in any like or similar manner interfere

with, restrain, or coerce employees in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL compensate all employees who did not work on December 21 because they engaged in protected strike activity for the bonus and raffle opportunity they were denied because they did not work instead of striking.

TENET HEALTHSYSTEM HOSPITALS, INC. d/b/a
GARFIELD MEDICAL CENTER

(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.nlr.gov.

888 South Figueroa Street, 9th Floor, Los Angeles CA
90017-5449

(213) 894-5220, Hours: 8:30 a.m. to 5 p.m.

**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, DE- FACED, OR COVERED BY ANY OTHER MA- TERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVI- SIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (213) 894-5229.

FN1. All dates are in 2001 unless otherwise indicated.

FN2. At the hearing, the General Counsel amended the complaint to delete complaint paragraphs 7, 8, and 14 and to add an allegation of promulgation and maintenance of an overly broad rule denying off-duty employees access to the interior of Respondent's facility or any work area out- side Respondent's facility.

FN3. Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, and/or unchallenged credible evidence.

FN4. Mr. Kurtz testified that about two weeks before Ms. Ganatra's termination, she had failed, during her shift, to give a patient blood platelets as ordered by the doctor. Mr. Kurtz said he told Ms. Ganatra she should have given the blood product in a reasonable time. Whether this was the same or a different incident than the one Ms. Ganatra tes- tified to is uncertain.

FN5. Witnesses and document texts switched between military and a.m./p.m. in identifying times. Times reflected herein are in a.m./p.m. regardless of how they were origi- nally stated.

FN6. The parties adduced exhaustive and conflicting tes- timony concerning whether or not accepted practice was to note the time on the doctor's order sheet as of when they commenced fulfilling the orders as opposed to when they completed the orders or actually signed the form. Abun- dant and conflicting testimony was also offered regarding whether the yellow copy of doctors' orders should be im- mediately sent to the hospital pharmacy. In light of my findings hereafter, I find it unnecessary to resolve these issues.

FN7. Addressed to Ms. Ganatra, the letter informed her that "[a]s a result of the recent change in [her] employment status, [she] had the right to file for unemployment insur- ance benefits with ...EDD."

FN8. Ms. Matsuo offered a somewhat different account. She said that Ms. Ganatra asked why she was being fired. When Ms. Carpenter began to explain, Ms. Matsuo inter- rupted and told Ms. Ganatra that she was terminated for falsification of records and delay of service.

FN9. Counsel for the General Counsel inadvertently states that employee Mohammad Imtizauddin's discharge record shows him to have been discharged for numerous rule

infractions whereas only the “Falsification of any hospital record” reason is marked.

FN10. Mr. Kurtz initially testified that Aurora had made the telephone call to Dr. Chan's office, but admitted under cross-examination that Ms. Ganatra had said she took the return call from Dr. Lam, on-duty doctor in Dr. Chan's office.

FN11. *Wright Line*, 251 NLRB 1083, 1089 (1980), enf. 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 (1983).

FN12. *Bonanza Aluminum Corp.*, 300 NLRB 585 (1990).

FN13. *N.L.R.B. v. Griggs Equipment*, 307 F.2d 275 (5th Cir. 1962).

FN14. *Pacific FM, Inc.* 332 NLRB No. 67 (2000); *Fluor Daniel*, 311 NLRB 498 (1993).

FN15. *In re NACCO*, 331 NLRB 1245 (2000).

FN16. *Sunbelt Enterprises*, 285 NLRB 1153 (1987).

FN17. *Detroit Paneling Systems, Inc.*, 330 NLRB 1170 (2000).

FN18. *Frierson Building Supply Co.*, 328 NLRB 1023 (1999).

FN19. See *Detroit Paneling Systems, Inc.*, above, at 2 and fn. 6 (citations omitted.)

FN20. *Exxon Research & Engineering Co. v. NLRB*, 89 F.3d 228, 231 (5th Cir. 1996), denying enf. 317 NLRB 675 (1995), quoting *TRW-United Greenfield Div. V. NLRB*, 637 F.2d 410, 420 (5th Cir. 1981); *Somerset Welding & Steel, Inc.*, 314 NLRB 829, 832 (1994).

FN21. *Somerset Welding & Steel, Inc.*, supra.

FN22. Quoting from *Tres Estrellas de Oro*, 329 NLRB 50 (1999).

FN23. *Keystone Lamp Mfg. Corp.*, 284 NLRB 626 (1987), enf. 849 F.2d 601 (3d Cir. 1988), cert. denied 488 U.S. 1041 (1989); *Airport Distributors*, 280 NLRB 1144

(1986); *Jordan Marsh Stores Corp.*, 317 NLRB 460 (1995).

FN24. The time period is based on credited testimony of General Counsel's witness, Joanne Kawai, ICU nurse.

FN25. I accept the testimony of Ofelia Alegre (Ms. Alegre), charge nurse in CCU during January, that she authorized Ms. Ganatra to take a break on the day of Ms. Romero's visit and did not complain to anyone about its length.

FN26. Ms. Leung did not state whether, in the past, she was still in uniform on those occasions when she returned for her lunchbox or whether she was challenged.

FN27. The translation of one sign, written in Mandarin, is “We want to be treated fair.”

FN28. Respondent admitted that Ms. Shen served as its agent while photographing the picketers.

FN29. The complaint inadvertently omits mention of the Las Vegas vacation raffle. It is clear, however, that the General Counsel intended to include implementation of the raffle as a violation of Section 8(a)(3).

FN30. The Board continues to apply these four principles. See *W.D.D.W. Commercial Systems*, 335 NLRB No. 25, fn.14 (2001).

FN31. In determining a purpose to “chill,” the Board has concluded that *Darlington Manufacturing Co.*, 380 U.S. 263 (1965) requires only “a finding of the foreseeability of the chilling effect rather than evidence of its actual occurrence.” *George Lithograph Company*, 204 NLRB 431 (1973).

FN32. The General Counsel has not alleged that Respondent violated 8(a)(5) by this conduct (see *Aero-Motive*, supra), and I have not considered that issue.

FN33. 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.

FN34. If this Order is enforced by a Judgment of the

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."

2002 WL 31402769 (N.L.R.B. Div. of Judges)
END OF DOCUMENT

3

Exhibit 3

2003 WL 22763700 (N.L.R.B. Div. of Judges)

National Labor Relations Board
Division of Judges
San Francisco Branch Office

SAN RAMON REGIONAL MEDICAL CENTER,
INC. DBA SAN RAMON REGIONAL MEDICAL
CENTER
AND
CALIFORNIA NURSES ASSOCIATION

Cases 32-CA-19917
JD(SF)-82-03
San Ramon, Calif.

November 12, 2003

Virginia L. Jordan, Oakland, California, for the General Counsel.

James A. Bowles and Richard S. Zuniga of Hill, Farrer and Burrill, Los Angeles, California, for Respondent

Jane Lawhon and Karen Sawislak of The Law Offices of James Eggleston, Oakland, California for the Charging Party.

DECISION

Statement of the Case

JAMES M. KENNEDY, Administrative Law Judge: This case was tried in Oakland, California on July 7, 8 and 9, 2003 upon a consolidated complaint issued by the Regional Director for Region 32 of the National Labor Relations Board on November 25, 2002. [FN1] It is based upon unfair labor practice charges originally filed on August 16, [FN2] and September 26 by California Nurses Association (CNA, the Union or the Charging Party). The complaint [FN3] alleges that San Ramon Regional Medical Center, Inc. dba San Ramon Regional Medical Center (Respondent) has engaged in certain violations of §8(a)(3) and (1) of the National Labor Relations

Act (the Act).

Issues

The consolidated complaint [FN4] alleges that Respondent, in countering a union organizing campaign, engaged in a variety of conduct and maintained a rule which supposedly violated §8(a)(1); it also asserts that Respondent unlawfully discharged registered nurse. Lynda Bredleau, and issued a written warning to RN Janet Thomas, both in violation of §8(a)(3) and (1). Respondent denies the conduct and observes that it took immediate steps to reverse Bredleau's discharge, taking appropriate self-remedying steps sufficient to render a Board order unnecessary.

The General Counsel and Respondent have filed briefs which have been carefully considered. Based upon the entire record, including my observation of the demeanor of the witnesses, I make the following:

Findings of Fact

I. Jurisdiction

Respondent admits that at material times it has been a California corporation operating an acute care hospital in San Ramon, California and that during the 12 months prior to the issuance of the complaint its gross revenues exceeded \$250,000. It also admits that during the same period it purchased and received goods and materials valued in excess of \$5000 from sources outside the State of California. Accordingly, it admits, and I find, that it is an employer engaged in commerce within the meaning of §2(2), (5) and (6) of the Act. Furthermore, it admits, and I find, that the Union is, and has been, a labor organization within the meaning of §2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. Introduction

Respondent is a subsidiary of Tenet Healthcare Systems, Inc. Tenet operates about 119 hospitals nationwide, including 10 in its Northern Region (Northern California plus one in Nebraska). It has about 40 oth-

ers elsewhere in California. Largely a surgical facility, Respondent has 123 acute care beds, 12 beds for intensive care, a family birthing center, a 24-hour emergency room and, in a separate building, an ambulatory surgical center. One of the medical-surgical units is known as the Diablo unit. [FN5]

The CNA began organizing Respondent's registered nurses in March or April. On August 15 it filed a petition for a representation election with the Board's Regional Office in Oakland seeking a unit of RN's. That same day Respondent discharged Bredleau, reinstating her a short time later. But, within a week it issued a written warning to registered nurse Janet Thomas. Both of these incidents are alleged as violations of §8(a)(3). The election, which the Union won, was conducted on October 9 and 10 and a certification of representative followed in favor of the Charging Party.

Respondent's managerial staff at the time included Diane Lowder, the CEO; Sue Micheletti, the Chief operating officer (COO); Jason Black, the chief nursing officer; Beth Eichenberger, director of the family birthing center; Satveer Dhaliwal, a shift manager for the Diablo medical surgical unit; and Deanna Holm, the ambulatory care coordinator (for the out-patient surgical center). All are admitted supervisors with the meaning of §2(11) of the Act. In addition, Kathy Bailey-Stahlnecker served as the acting human resources director during the period in question. Although Respondent did not call her as a witness, she is doubtless a §2(13) agent. In addition, the Diablo unit manager was Pam Ranahan. Dhaliwal's immediate superior.

B. The No-Access Rule

The employee handbook sets forth Respondent's rule concerning the rights and limitations of off-duty employees seeking to enter the facility. It states:

NO-ACCESS POLICY

Off-duty employees may access the Hospital only as expressly authorized by this policy. An off-duty employee is any employee who has completed or not yet commenced his/her assigned shift.

An Off-duty employee is not allowed to enter or re-enter the interior of the Hospital or any Hospital work area, except to visit a patient, receive medical treatment, or to conduct hospital-related

business. "Hospital related business" is defined as the pursuit of the employee's normal duties or duties as specifically directed by management.

An off-duty employee may have access to non-working, exterior areas of the Hospital, including exterior building entry and exit areas and parking lots.

Any employee who violates this Policy will be subject to disciplinary action up to and including termination.

The complaint challenges this rule as unlawful on its face. Indeed, counsel for the General Counsel has not presented evidence regarding any instances of application or interpretation. She simply asserts that the rule is overbroad as it bars off-duty employees from the facility, thereby prohibiting employees from communicating with one another regarding matters protected by §7. Respondent observes that this rule meets the test established by the Board in *Tri-County Medical Center*, 222 NLRB 1089 (1976), arguing that the case is still good law. [FN6] Certainly its test has not been overturned and has been widely accepted.

The *Tri-County* test is: "... [S]uch a rule is valid only if it (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. Finally, except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid."

Respondent's rule meets the test. It governs only the hospital's interior and interior working areas; has been widely and clearly disseminated, for it is set forth in the employee handbook which is routinely given to all employees; and is not limited to those off-duty employees who wish to engage in union activity; nor does it bar off-duty employees access to areas outside the building(s) such as parking lots, planted areas, walkways and the like. Indeed, it specifically permits such access. Moreover, the limited exceptions allowed by the rule "visit[ing] a patient, receiv[ing] medical treatment, or [] conduct[ing] hospital-related business" are the types of exceptions which the Board has permitted and which do not render it unlawful through an uneven-handedness theory. See the no-access rule in *Southdown Care Center*, 308 NLRB 225, 232

(1992), which allowed off-duty employees to come to a health care facility if they "... [have] family or friends in the home [to] visit ... but [they] must follow visitor rules." There, Administrative Law Judge Richard Judge Linton held: "On its face, [the home's] limited-access rule complies with the *Tri-County* conditions."

Undeterred by this case law, counsel for the General Counsel argues that *Tri-County* has been superseded, citing *Hudson Oxygen Therapy Sales Co.*, 264 NLRB 61 (1982), arguing that if there are non-work areas inside the plant, such as *Hudson's* lunchroom, then denying off-duty employees access to those areas (such as Respondent's break rooms or cafeterias) is discriminatory. However, the case is easily distinguishable and the Board, subsequent to *Hudson*, has never so held. Specifically, the General Counsel relies on what in my opinion is an inconsequential portion of the facts there. Indeed, the rule itself barred access to the lunchroom and the administrative law judge, accordingly, noted it as a fact. Even so, that portion of the rule had nothing to do with the rule's unlawfulness. The rule had been discriminatory from the outset, having been promulgated as a response to union organizing; moreover, it also barred off-duty employees from the grounds as well as the interior of the plant. Not only was it was unlawful on discrimination grounds, being promulgated as an antiunion tactic, it never met the *Tri-County* test in the first place. The judge's reference to the lunchroom in *Hudson* is only a non-dispositive, somewhat tangential, fact having no bearing on the rule of law to be applied either there or in subsequent cases such as this. Indeed, former Chairman Stephens thought *Hudson* should be overruled with regard to the lunchroom issue. *TRW Vidar*, 290 NLRB 6 (1988). Moreover, the Board in *TRW Vidar* held the no-access bar to be unlawful as it was applied to the company cafeteria only because the rule was enforced discriminatorily. It did not find the rule itself ("No employee will be allowed access to the plant for personal reasons during off hours,") to be too broad. So far as I can tell, the Board has never cited *Hudson* as support for off-duty entry to an interior lunchroom as part of a no access rule which complies with *Tri-County*, supra.

Therefore, treating Respondent's no-access rule in the abstract, as one must when determining whether a rule on its face is lawful or unlawful, I find it to meet the requirements of *Tri-County* and is therefore lawful on

its face. This judgment in no way reflects upon whether Respondent's application of the rule might be lawful or unlawful in the future. Deciding that issue would be speculative and, in any event, is not a part of this complaint. Accordingly, the portion of the complaint alleging the no-access rule as a §8(a)(1) violation will be dismissed.

C. No-Union Talk Admonishment; Lynda Bredleau's Discharge and Reinstatement; Mailbox Limitations

Lynda Bredleau is a registered nurse. During the period in question, the spring and summer of 2002, she was assigned to the Diablo medical-surgical unit. Her immediate supervisor was Satveer Dhaliwal. At that time Bredleau had worked for Respondent for about 3-1/2 years. She was active on behalf of the Union, attending CNA organization meetings and soliciting authorization cards. On May 6, Dhaliwal met with Bredleau in an unoccupied patient room to provide her with a copy of her annual appraisal. Their discussion lasted 20-30 minutes. According to Bredleau, Dhaliwal raised an issue not related to the evaluation. Bredleau says Dhaliwal told her that she knew that Bredleau was one of the nurses involved with CNA, and that nurses weren't allowed to discuss it at the nurses station. Bredleau responded that she thought she could, but Dhaliwal said she wasn't to do it any more. Bredleau said she would abide by the instruction. Dhaliwal agrees that she issued the instruction Bredleau described. Her testimony is set forth in the footnote. [FN7]

The nurses station is a large desk-like affair near the intersection of the two hallways comprising the T-shaped unit. It is the operations center for the ward. Patient call lights are located there and the charge nurse's (Dhaliwal) desk is there, as well as a work area for the unit secretary. The desk area is only a few feet from the nearest patient room. At the station nurses receive physicians' orders and perform the routine task of "charting", i.e., making entries on each patient's medical chart. At that location the nurses regularly talk to each other about patient care, the job assigned to them, and anything else that they choose to. Common non-work discussion subjects are family matters, weekend pastimes, entertainment, politics and the like. All these discussions, both work-related and nonwork-related, occur both while working at tasks and between tasks. They occur at the nurses station, in the hallways, in the rooms and all over the

hospital, wherever nurses choose to socialize while simultaneously working. Talking about non-work matters is tolerated whether in non-work areas such as the break rooms or in working areas. There is not even a rule against it, probably because no such rule would be honored, much less enforced. Indeed, many of these conversations occurred in Dhaliwal's presence since her desk was in the center of things. The only thing Dhaliwal interdicted at the nurses station was "solicitation" from outside vendors and, she said, "Girl Scout cookies." Those she routed to the break room.

As noted, on August 15, the Union filed its election petition. The NLRB's Regional Office immediately notified Respondent, apparently by FAX. Simultaneously the CNA issued a pre-prepared flyer announcing the filing to the employees. These flyers had been given to the union activists, including Bredleau the day before. On the morning of August 15, Bredleau posted one of the flyers on one of the three bulletin boards in the break room and put one in the nurses' mail slots located there. Sometime later, she took a break in that room and observed that more flyers had been posted and some were now on the table. In addition, Bredleau had posted a second union flyer showing pay rates at unionized hospitals, intended as a comparison to rates paid by Respondent. On the bottom of the second flyer she wrote "It is illegal for management to remove to remove this."

Dhaliwal entered the room while Bredleau sat at the table and observed the postings. She took the comparison flyer off the board saying "This is not true." The she asked Bredleau if she was the one who had posted the flyer announcing the petition's filing. Bredleau acknowledged that she had done so. Dhaliwal stayed in the room for a few minutes, then left, taking both flyers with her.

About 3 p.m., department manager Pam Ranahan (Dhaliwal's superior) told Bredleau she had to go to chief nursing officer Jason Black's office, saying she would accompany Bredleau. Bredleau, fearful, said she didn't want to go. Ranahan then spoke by phone to someone and shortly thereafter Black came to the unit. All three went into Ranahan's office. Black, who did not testify, told Bredleau she was discharged for violating then no-solicitation/no-distribution policy, conflating soliciting and distributing with bulletin board posting. He said she would get her paycheck in

the mail and asked her to sign the termination slip. The termination slip reflects his confusion. She refused to sign. He then escorted her out, and as he did so, she told some nearby nurses that she had just been fired, and this was the reason they needed a union.

The following day, Friday, August 16, Black called her. He told her that he believed she had misunderstood the no-solicitation/no-distribution policy. He unconditionally offered her job back, saying he hoped she would return the next day, Saturday, August 17. She did not answer immediately telling him she wished to consider the matter. Later she called back, leaving a message on his answer machine. In her message she accepted and, due to scheduling, never missed a day's work.

Bredleau's termination slip had been prepared on August 15 and had been signed by Black. It was placed in her personnel jacket. The slip now contains the handwritten note, "retracted", initialed "KB" by human resources officer Kathy Bailey-Stahlnecker. The modified slip has never been shown to Bredleau.

Upon her return on Saturday, Ranahan (who like Black, did not testify) called Bredleau to say she was glad Bredleau was back and hoped everything would be okay. During her Sunday shift, chief operating officer Sue Micheletti spoke to Bredleau at the Diablo unit saying she was sorry, that the hospital had made a mistake, and she was glad Bredleau was back, also expressing the hope that everything would be okay. Finally, on Monday, Bredleau was called to CEO Diane Lowder's office where Lowder repeated the apology, saying the discharge had not been a one-man decision, but the buck stopped with her and she took responsibility.

Bredleau was off on Wednesday and Thursday, August, 20-21. When she returned to work on Friday, August 22, she learned a meeting had been scheduled between the nurses and Micheletti and Black. Ranahan told Bredleau that her attendance would not be necessary as Black had already apologized to her. Bredleau told Ranahan that Black had not apologized and she was going to the meeting. Ranahan said she would talk to Black. A short while later Black came to Bredleau, saying he was sorry if she hadn't realized he was apologizing on the phone, but that he had apologized. Despite his claim that he had apologized, he didn't repeat it for her then. She, sensitive to Black's

claim, decided to see if he would do so at the meeting.

Bredleau attended the 2 p.m. meeting. It began by Black publicly apologizing for discharging her. From her perspective, this was the first time he had done so. He then left the meeting, saying he thought they would be more comfortable speaking directly with Micheletti. During the meeting Micheletti asserted that management had not been as approachable as it should have been, and they were narrowing Ranahan's duties to allow her to spend more time with the Diablo unit nurses. She then went on to explain that in management's view a union wasn't necessary and would not be beneficial. Near the meeting's end she spoke of the no-solicitation/no-distribution rule saying CNA flyers could now be placed on the bulletin boards, but not placed in the mailboxes. Micheletti says she explained the CNA could use the bulletin boards because the hospital had not uniformly enforced its bulletin board rules, but the mailboxes were for hospital-related communications, and for that reason were not to be used for union literature. There is a handbook rule concerning use of the bulletin boards, but there is no written rule concerning mailbox limitations. Historically, mailboxes have often been used for personal messages between and among the staff, and vendors sometimes place solicitations and free samples in the slots.

D. Beth Eichenberger; Alleged Prohibitions Concerning Reading Union Literature and/or Discussing the Union at Work

Beth Eichenberger, during this period, was the director of the Family Birthing Center. She had held that position for about 2- 1/2 years. The birthing center is Respondent's obstetrics unit and provides a labor and delivery service, supports a nursery, offers post partum care and mother/baby counseling, including lactation services. The center employs about 50 registered nurses and one licensed vocational nurse who all provide direct care. In addition, there is a small secretarial staff. Eichenberger plays a big role; she is responsible for budget, hiring, firing, staffing, scheduling, and oversight for competency. In addition, she is responsible for maintaining and purchasing equipment.

About August 8 or 9, she had a conversation with RN Cheryl "Cherri" Dobson. She is a specialist in intensive care nursing and has been assigned to the birthing

center since her hire in 1999. On one of the days in question she observed a copy of a union pamphlet, G.C.Exh. 15, on the desk of the nurses station. The pamphlet is easily recognizable, if one has perused it. Its cover is bright orange, displaying a large, easily read, title: "CNA POCKET NOTES: NAVIGATING THROUGH AN ANTI UNION CAMPAIGN"; it also contains the drawn figure of a professional woman holding a clipboard. At the bottom is the California Nurses Association logo, followed by its slogan "A Voice for Nurses, A Vision for Healthcare." The back cover shows an even larger CNA logo, together with the Union's internet web page address. One would not mistake it for a Tenet document, nor would one think it was anything other than what it was, advice to employees regarding what to expect from an employer mounting opposition to the Union's organizing.

Attracted by its color, Dobson picked it up to see what it was. As she paged through it, not reading it with any great care, Eichenberger walked past her, but said nothing. However, according to Dobson, a few hours later, Eichenberger called Dobson to her office. Already present was HR manager Bailey-Stahlnecker, whom Dobson did not know, learning her identity afterwards. Dobson testified:

Q (By Ms. JORDAN) And what did Ms. Eichenberger say to you?

A She told me that she had seen me reading union literature, and that she needed to inform me that reading union literature was not allowed, and further that it was unprofessional.

Q And did you say anything in response to her?

A Yes, I requested a clarification from her, in that I asked her, my statement was "I can understand where it might not be acceptable to read this in a public area, but that it was my understanding that I was allowed to read this in all non-public areas such as the break room."

Q Did she say anything?

A She said that was not the case. That the hospital was private property and that I was not allowed to read it anywhere on hospital property.

Dobson said she did not think Eichenberger was correct and that she would check with someone at the Labor Board (which she thought was in Sacramento; perhaps a state agency?). Dobson really had no idea what the correct rule was, but knew that staff members read anything they wanted in the break room; that

there was no rule against it. Dobson says Eichenberger reiterated her prohibition against reading unapproved material on the company's 'private property.' She also said that the HR representative said nothing during the entire meeting, which lasted about 10 minutes.

Later that afternoon, after consulting someone else, she told Eichenberger that she had learned it was okay to read union literature in the break room. Eichenberger said she would follow up on it, but "that was not what she had been told." Dobson never heard the results of any follow-up, if there was one.

Eichenberger's testimony about the incident is a little different. She said she assumed Dobson was on work time when she observed her reading the union literature since Dobson was at the nurses station which is a work area. Nurses on breaks are not expected to be at the nursing station. She did not ask if Dobson was working or on her break. Yet she conceded she would have asked that question had Dobson been reading a novel. If the reader had been on break, Eichenberger would have sent her to the break room.

With respect to the meeting in her office, Eichenberger denies barring Dobson from reading union literature on hospital property, but did testify: "I had seen her reading materials, union literature, at the nurses station earlier in the day, and I told her - we explained to her -- I explained to her that union material was not allowed to be read in working areas and on working time, and that she needed to not do that anymore." Eichenberger explained she was simply enforcing Respondent's no-solicitation/no-distribution rule. She also said that employees could read the literature in the break room. She denied that she had any second conversation with Dobson or telling Dobson she would check into anything Dobson had said. She also said Bailey-Stahlnecker spoke to Dobson about some hospital rules.

Later, Eichenberger testified:

JUDGE KENNEDY: You [...] And this [observing Dobson reading the pamphlet] triggered your discussion with [Dobson] in your office with Stahlnecker?

THE WITNESS: Both that she was reading at the desk and that she was reading the union material at a public place.

JUDGE KENNEDY: Let me ask you, if you had seen her reading a novel there, would you have

reacted the same way?

THE WITNESS: I would have asked her -- would have acted the same way? Hm. I would have asked her if she was on her break, you know. If she was, she really needed to go to the back into the break room because it is a very limited space at the nurses station, so I would have questioned her if she had been reading a novel or a magazine at the desk, yes.

JUDGE KENNEDY: Okay. You said a second ago that you were concerned that she was reading union material.

THE WITNESS: Right.

JUDGE KENNEDY: [Do] You distinguish between union material and any other kind of literature she might have been reading[?] [I]f she had been reading that novel?

THE WITNESS: I distinguish because of the area where she was reading it. Just because I saw her reading it doesn't mean she wasn't soliciting, it doesn't mean she wasn't discussing it. I mean, if she is reading a book, most likely she is not going to be discussing that at the nurses station. Union literature during that period of time was being kept in drawers and handed out to others and discussed in a public area, in the work area where there patients around, physicians around, and other nurses.

JUDGE KENNEDY: I'm not sure you answered my question, but you think you did -- you would react a little differently because it was union material?

THE WITNESS: Yes, I would, if that is all you are asking.

JUDGE KENNEDY: When you had the meeting in your office with her, and I think you testified and you can correct me if I am wrong, you then went over the hospital policy which was [...] concerned reading, I think you said? Is that right? (No response.)

JUDGE KENNEDY: And solicitation?

THE WITNESS: Solicitation and posting.

JUDGE KENNEDY: Posting?

THE WITNESS: Reading. Okay, I'm sorry, I am confused.

JUDGE KENNEDY: No, she was reading, right?

THE WITNESS: Okay.

JUDGE KENNEDY: I think you testified that -- maybe it was Stahlnecker who reiterated the hospital policy.

THE WITNESS: She reiterated the policy.

JUDGE KENNEDY: I see, and what did she say

again?

THE WITNESS: Review the policy about -- Oh God, reading union literature, you know, having union literature in a working area on working time.

JUDGE KENNEDY: I see.

THE WITNESS: That is, essentially, what the problem was. She was reading at the nurses station on work time, and she was reading the union literature at the nurses station on what we assumed to be work time.

JUDGE KENNEDY: I see. What -- did she also say anything about solicitation at that point? Stahlnecker?

THE WITNESS: I believe she reviewed that with her.

JUDGE KENNEDY: The solicitation policy?

THE WITNESS: The solicitation of [sic] policy, I believe so, and this - [indicating pamphlet]

JUDGE KENNEDY: From your point of view it didn't sound to me like Dobson was doing any solicitation, she was simply abusing her time by reading material at that moment? Solicitation didn't seem to me to be a concern, and I am just wondering whether that was -- what was the concern about solicitation at that point?

THE WITNESS: In that she was at the nurses station where other nurses were working, she had the union literature there, so she was imposing -- she potentially could be imposing that union literature on working people in a work area. [FN8]

Thus, while their testimony is similar, the differences are clear. Dobson recalls a bar against reading union literature on the property; Eichenberger describes it as a reminder concerning the no-solicitation rule. The problem with Eichenberger's testimony is that she clearly draws a distinction between reading union literature and other literature because, as she testified, nurses are less likely to discuss a novel while working than they would union literature. She regards such discussion as "solicitation" (perhaps because of something Bailey-Stahlnecker said) and thus a potential violation of the no-solicitation rule. The thrust of her testimony was that she wanted no discussion of the Union at the nurses station or any other work area, despite the fact that nurses were generally free to discuss any other topic they wanted while they worked.

About a week later, perhaps August 12, Eichenberger

observed RN Ann Wolff as Wolff entered the break room from the locker room. Both, of course, are non-work areas. Wolff, who had worked at Respondent for about 1- 1/2 years, was carrying a copy of the same bright orange CNA pamphlet Dobson had been seen handling. She put it back on the break room table where she had picked it up to read in the rest room. About an hour later, according to Wolff, Eichenberger called Wolff to her office. Eichenberger told her that she 'needed' to tell Wolff that she was not allowed to have or discuss union material on hospital property. Wolff asked "Is this conversation going to go any further than this?" When Eichenberger said no, Wolff responded, "Well, I believe federal law supersedes any hospital policy regarding this." Wolff recalls Eichenberger saying, "That's not what I've been told," reiterating that employees were "not allowed to have or discuss union material anywhere on hospital property."

As before, Eichenberger denied any reference to barring union literature from hospital property, again asserting that she was simply reminding Wolff "that union material, again, was not to be read or solicited or posted in working areas during working time." Her admonition is curious, as Wolff had done nothing of the kind. She hadn't been seen reading the document during working time, she hadn't solicited anybody concerning anything during working time, nor had she posted any union material in a working area. Yet she agrees that when Wolff questioned her regarding the legality of the limitation being imposed, she responded by saying, "I said well, no, this is a hospital, and this is Tenet, and this is our private property, so that doesn't necessarily apply on private property."

Frankly, it seems to me that this is a classic case of retrenchment where backing away from one version of a statement has led Eichenberger to describe another version that also constitutes a misstep. She first denied the property bar described by the mutually corroborative Dobson and Wolff, while simultaneously admitting that she wanted no union talk on the job. Then she conceded that in her conversation with Wolff that she did impose a property bar. In this situation, I must credit both versions, Dobson/Wolff's and Eichenberger's admission that she equates talk with solicitation and that Respondent could bar union material from the hospital. As discussed below, both have consequences under §8(a)(1) of the Act. I do observe, however, that Eichenberger's statements preceded the

Bredleau discharge which occurred about 3 days after the admonition to Wolff. They also preceded the bulleting board posting permission extended to union messages which Micheletti announced in her discussion with the Diablo unit RNs on August 22 following Bredleau's discharge/reinstatement.

Eichenberger, at the Birthing Center did not appear to be aware of Micheletti's announcement to the Diablo unit permitting the Union's use of the bulletin boards, though depending on timing, Micheletti may not yet have made her announcement. The complaint alleges that on August 19, Eichenberger removed union literature from the birthing center bulletin board while permitting non work-related postings to remain. Eichenberger readily admitted removing a copy of G.C. Exh. 7 from the board sometime in August. [FN9] No witness offered a more specific date. Eichenberger says she routinely removes items she deems 'inflammatory', union messages, commercial solicitations not related to the department, off-color jokes and anything not approved by the Hospital.

However, she permits staff and patient pictures, postcards and thank-you notes. In addition, there are some commercial messages which she approves, even if the human relations department has not. These include solicitations by for-profit companies offering continuing education classes, at least some of which are aimed at keeping nursing licenses current. Yet Micheletti has specifically approved for posting commercial advertising by a skin care products company (Mustela), one of whose products (nursing lotion) is, or has been, sold to patients at the hospital. She explains her approval on the basis that the product is closely connected to the birthing center's mission. She does not explain why the advertisement is posted in a break room for nurses who are not the target market. [FN10]

E. Deanna Holm; No-Distribution Bar; Warning to Janet Thomas

Deanna Holm is the Ambulatory Care Coordinator for the out patient surgery department. She is an admitted supervisor. She has oversight of about 25 RNs and has held the position for 6 of her 13 years with Respondent.

On August 21 or 22, 5 days after the discharge/reinstatement of Bredleau, Holm issued a

written counseling form to outpatient surgery nurse Janet Thomas. [FN11] Thomas has worked as a staff nurse for Tenet for about 12 years, the last 8 or 9 at Respondent. This was the first time she had ever been written up. About 3 p.m. on August 20, she was at the department nursing station. At that time, Martha Lindstrom, a pre-op nurse came up to the nursing station with an armload of charts for the next day's patients. Thomas offered a union flyer to her, asking if she wanted to read it. Lindstrom replied that she did but needed to drop the charts off first. Holm, coming out a nearby room, heard the exchange and saw the flyer, which Thomas had put down on the desk for Lindstrom. She told Thomas that she could not distribute the flyer during working hours. Lindstrom, who by then had delivered the charts, said she was about to pick up the flyer and take it to her own office, but Holm took it and walked away.

The following day, Holm wrote the counseling form. There is some inconsequential memory difference regarding the day it was delivered to Thomas, either the same day or August 22. Thomas was called to Holm's office from post-op monitoring duty. When she arrived she found Holm's supervisor, the director of pre-op services, Virginia Field there as well. Field said nothing during the 5 minute session. It began with Holm telling Thomas she was uncomfortable, but Thomas had violated the no-solicitation/no-distribution policy and she was obligated to write Thomas up. Holm then handed the form to Thomas, told her to read it, make any written comment she wished and sign it. The form shows Thomas wrote a comment to the effect that she was unaware of the rule. Holm recalls Thomas's remark and signature were added the next day, August 22; that Thomas had taken the time to compose the comment.

Consistent with her comment, Thomas testified that she was unaware of the policy. She had seen many things on the nursing station desktop and counter which employees picked up and read or handled. These included uniform catalogs, photos of non hospital-sponsored events, a videotape cassette with a name on it, sign-up sheets for dinners given by grateful physicians, and postcards. She, herself, after the terrorist attacks of September 11, 2001, had over a 3 week period, taken orders for a needlepoint American flag which a friend was making and selling. She had placed an example on a white board at the nurses station. Holm knew of the flag offer and permitted it as

a patriotic gesture. Finally, Thomas testified without contradiction that on-duty nurses, when not actually caring for a patient, often congregate at the nurses station and discuss any number of topics, often personal or family-related.

Holm's testimony about the reason for the counseling was somewhat different from the reasons written on the form. The form was conclusionary in its language, saying, "This will confirm that you have been advised that you have violated the hospital's no-distribution/no-solicitation policy by engaging in a solicitation and distribution of literature during your working time and/or the working time of others in an immediate patient care area. Future violations of this policy may lead to future disciplinary action, up to and including discharge."

She then described two incidents, only one about which she had personal knowledge, the occasion when Thomas offered Lindstrom the flyer. The second event was that she claimed to have received complaints that Thomas had solicited authorization cards. She says she told Thomas, a few moments after the Lindstrom distribution, that "she could not be distributing literature during work time and in a patient care area." She never mentioned the latter to Thomas and the first time she told anybody about it seems to have been in the following testimony:

[WITNESS HOLM] There were two different incidents, one which was actually distributing some literature to other nurses in patient care areas during their work time. The other was soliciting signatures for the cards, which was also being done during work time and in patient care areas. Several of the staff -- the one incident I witnessed as I came into the department as far as the giving out, the distributing of the information. The asking the people to sign the cards was done never in my presence, it was deliberately not done in my presence, and I had several staff that came to me and were upset about it because they felt like they were being harassed trying to get [them] to sign these cards that they really didn't want to sign.

Holm says the card solicitation occurred a few days after the Lindstrom matter. Since, according to her information, Thomas had done so during work, it prompted her to take the next step, the counseling write-up. Despite that, she agrees there was no oral

discussion about either matter with Thomas, even though the two complainants supposedly asserted that Thomas was misleading them about the nature of the card. She never even asked Thomas for her version of the authorization card complaints. No 'if, when, where or with whom.' It was all hearsay (in the colloquial sense). It may not have even constituted solicitation if the only thing that happened was persuasive talk, leading, hopefully, to signing a card after work. Holm's information was incomplete at the very least. Nonetheless, she testified it was included in the counseling -- despite never mentioning the matter to Thomas during their meeting in the office.

Frankly, Holm's testimony seems to be one part embellishment and one part unreliable hearsay. Accordingly, I discredit her claim that an authorization card incident contributed to the warning. Even if it did contribute, her knowledge about the incident was too vague to support any kind of warning.

F. Fringe Benefit Increases as the Representation Election Approached

The complaint alleges that Respondent timed the announcement of three fringe benefit plan enhancements during the pre-election period. No representation issue is presented as the CNA won the election despite the announcements. Moreover, the complaint asserts, and the General Counsel has reiterated, that the only issue being presented here is the timing of the announced increases, not the grants. Accordingly, I will focus only on the timing, not the fact of the benefits. Timingwise, the first occurred the day before the election petition was filed; the second and third pronouncements occurred only 7 and 6 days, respectively, before the first polling session on October 9.

The facts are straightforward. Specifically, the complaint avers that in August on an unknown date (the evidence shows it was August 15), [FN12] Respondent announced a two-pronged wage increase. Earlier, as part of the annual budget prepared for the fiscal year beginning in June, the RNs were scheduled for a 5% across the board hourly raise to become effective on the first pay period in November. In August, however, the day before the petition was filed, Respondent announced that the 5% raise was being bumped up to 7%. Simultaneously, in the same announcement, it advised the nurses, but not the support staff, that the RNs could pay themselves an additional

5% effective in January 2003, by “opting out” of the benefit plans. Under this option, for example, if an RN had no need for a health plan (say, due to coverage by a spouse's health plan), she could drop Respondent's plan and Respondent would pay her directly the 5% it currently paid the health insurance company. The “opt-out” portion was entirely new; it had not been offered before.

Then, according to the complaint, in September (the evidence shows it was October 2), Respondent announced a change in the 401(k) retirement plan. Again, there is no dispute. This had three prongs. The first increased the Company matching contribution from 3% to 5%. The second was a dollar for dollar match for any amount contributed by the employee, even if the employee did not contribute the entire allowable amount. Third, was a decrease of a new employee's 401(k) eligibility period. Previously, to participate, an employee had to have been employed for 1 full year; this change reduced the waiting time to 91 days. The new policy was to apply nationally to all Tenet hospitals.

The announcement of the third benefit improvement came a day later. This was a remarkable due to its generosity. It, too, was system-wide. It was: Beginning in January, 2003, Tenet would offer free employee and family PPO health coverage (with a \$500 deductible and would simultaneously increase the lifetime benefit to \$1 million without regard to length of tenure). Again, there is no dispute regarding the facts.

In Lampi, L.L.C., 322 NLRB 502, fn. 4 (1996), the Board reiterated the rule of law to be applied in timing cases. There, the Board, quoting itself, said:

It is well established that the mere grant of benefits during the critical period is not, per se, grounds for setting aside an election. Rather, the critical inquiry is whether the benefits were granted for the purpose of influencing the employees' vote in the election and were of a type reasonably calculated to have that effect. NLRB v. Exchange Parts Co., 375 U.S. 405 (1964). As a general rule, an employer's legal duty in deciding whether to grant benefits while a representation proceeding is pending is to decide that question precisely as it would if the union were not on the scene. R. Dalkin, supra, quoting Red Express, 268 NLRB 1154, 1155 (1984). In determining

whether a grant of benefits is objectionable, the Board has drawn the inference that benefits granted during the critical period are coercive, but it has allowed the employer to rebut the inference by coming forward with an explanation, other than a pending election, for the timing of the grant or announcement of such benefits. Uarco Inc., 216 NLRB 1, 2 (1974). See, e.g., Singer Co., 199 NLRB 1195 (1972).

And, although the quote seems to be referring to an election objection case, the Board there made clear that the same test is to be applied in unfair labor practice cases, citing Holly Farms Corp., 311 NLRB 273, 274 (1993), enfd. 48 F.3d 1360 (4th Cir. 1994) [FN13] and Speco Corp., 298 NLRB 439 fn.2 (1990).

Similarly, with respect to the timing of such announcements the Board even more recently said in Waste Management of Palm Beach, 329 NLRB 198 (1999):

The Board has held that benefits granted during an election campaign are not unlawful if the employer shows that its action was governed by factors other than the pending election. The employer can meet its burden by showing the benefits granted were part of an already established company policy and the employer did not deviate from that policy upon the advent of the union. American Sunroof Corp., 248 NLRB 748, 748-749 (1980), modified on other grounds 667 F.2d 20 (6th Cir. 1981). But, an employer cannot time the announcement of increased benefits to employees in order to dissuade their union support. Reno Hilton, 319 NLRB 1154, 1154-1155 (1995); Capitol EMI Music, 311 NLRB 997, 1012 (1993), enfd. 23 F.3d 399 (4th Cir. 1994).

Furthermore, in analyzing the facts themselves to determine whether the announcement was based on factors other than the union organizing/pending election, no presumption may be drawn solely from the timing, but inferences may be drawn from the surrounding circumstances. “The Board makes no presumption that increases granted during an organizing campaign are unlawful, but it will draw an inference of improper motivation and interference with employee free choice from all the evidence and Respondent's failure to establish a legitimate reason for the timing of the increases.” Cardinal Home Products, 338 NLRB No. 154 (2003); Speco Corp., supra, n. 2; Montgomery Ward & Co., 288 NLRB 126 (1988). Cf.,

Domino of California, 205 NLRB 1083 (1973).

Respondent proffers slightly different explanations for each announcement. With respect to the wage increase, in past years, the budget was put in place in June, but the budgeted wage increase for RNs was not granted until November. For other staff, the increase usually became effective in June at the start of the fiscal year. For the most part, according to the testimony, the same percentage increase granted to the non-nursing staff was usually given to the RNs, but 5 months afterwards. Even so, it is not so clear that the RNs were actually aware of the practice. Usually nurses were notified of their wage increases in October, not by general announcement, but by individualized notification. In June 2002, however, Respondent announced, via a flyer, the 5% wage budgeted increase to the nurses, to be effective in November. This was followed by second announcement on August 14, that the November increase would be 7%, not 5%.

Chief operating officer Micheletti, who had been at the Hospital in various capacities since 1990, said she did not remember Respondent ever issuing a June flyer to the RNs before 2002, only that the information became available in June, apparently by word of mouth. She did say that the reason the additional 2% was added in August was the result of complaints by RNs that the 5% raise was insufficient, and that RNs were threatening to leave for higher paying hospitals in the area. She observed that there is strong competition for RNs in the East Bay hospital market. There are several major employers of RNs in the general area served by Respondent. These include Kaiser Permanente (at least 2 hospitals as well as several clinics); Valley Care in both Pleasanton and Livermore; John Muir/Mount Diablo Health System in both Walnut Creek and Concord; and Eden Hospital in Castro Valley. Moreover, there are multiple hospitals within commuting distance to the west in the Berkeley/Oakland /Fremont string of cities, including at least one Tenet sister hospital, Doctors Medical Center in San Pablo and Pinole.

Micheletti testified that Respondent regularly participates in salary surveys conducted by the Hospital council of Northern California and also responds to market issues by commissioning wage studies by the Watson & Wyatt market analysis firm. Based on some threats to leave, Lowder commissioned a Watson & Wyatt survey. On August 6, CEO Diane Lowder sent a

memo to Dennis Brown, a Tenet regional vice-president, recommending the additional 2% based on a perceived need to retain RNs. The memo was supported by information said to have been prepared by Watson & Wyatt, asserting that the increase would involve a budget increase of \$250,000 for the remainder of the fiscal year. Brown promptly approved the request; there is no evidence regarding what internal discussions he may have had with Lowder or other of Respondent's management team or with any financial people at the corporate level.

Simultaneously, the opt-out option had been being prepared. According to Micheletti, in response to employee requests, an opt-out survey was sent to the entire staff in April or May. The results showed that the primarily interested employees were the RNs, not the support staff. As a result, the program was offered only to the nurses. In late July, HR officer Bailey-Stahlnecker prepared a draft memo [FN14] for Brown's approval. She e-mailed it to corporate officials, copying Lowder. Lowder responded on July 31 complimenting Bailey-Stahlnecker for her work. There is nothing in the record showing the next steps taken, the date the proposal was finalized, when it was approved, or by whom; we only know that the program was consolidated for announcement with the 7% wage announcement of August 14. [FN15] Micheletti did acknowledge that the opt-out benefit, like the additional 2% wage increase, was not system-wide but directed only to Respondent's RNs. We also know, from R.Exh. 18 (second page), a printscreen record recording the announcement's creation (a file called '7RRMC.PUB'), THAT THE RECORD SHOWS THE DOCUMENT WAS LAST MODIFIED AT 7:15 P.M. ON AUGUST 14, WELL AFTER THE NORMAL BUSINESS DAY. IT WAS POSTED AND DISTRIBUTED THE NEXT DAY, AUGUST 15..

The exhibit shows that the file is located in a computer's "F:" drive, a letter suggesting that it is a drive located on a network server, particularly since the exhibit on its face shows the folder is being accessed through a 'local intranet.' Furthermore the file is located in a sub-folder entitled "Union." It also shows, consistent with Micheletti's testimony, that the file was created by B.J. Yonenaka. Although Yonenaka's title and duties are not shown in the record (she was not called as a witness), one can infer from Micheletti's testimony that she is a clerical. The General

Counsel in her brief argues the 'union'-named folder is evidence that items found there reflect the fact that these documents were created in connection to CNA organizing. Given the likelihood that this folder is not local to Ms. Yonenaka's computer (that would more likely be a C, D or E drive), it is probable that the folder was created in order to separate its contents from the contents of other subdirectories. It was not placed in a "salary" or "budget" subdirectory, but a "union" one. Such a separation would not have been done by a rank-and-file computer user. The folder, and its separation for easy access, would have been created by managers who needed to find its contents easily. Accordingly, I find that documents (files) found in that folder were created to deal with the organizing drive.

Even if the wage increase to 7% was made in response to a perceived business need, the "opt-out" additur was not. It was something entirely new and, according to Micheletti, in response to an employee request. And, by its terms, haste was not required. It was not to take effect until January 2003. It could easily have been folded in to the annual "open season" which began in November. Why was it announced mid-August in connection with the pay raise?

Clearly the flyer was hastily finished and published. Were its announcements being made deliberately to counter the Union's probable election petition? Did Respondent expect the petition to come the next day or within the next few days? Perhaps it was simple coincidence that both this flyer and the Union's reached the RNs on the same day? Or, was it simply Respondent's early effort to counter the drive by announcing a benefit whether or not an election petition was filed? Whether it was a coincidence is unnecessary to decide. Clearly, the document came from that part of management which was seeking to counter the organization drive. Its presence in the "union" folder, together with its after-hours finalization, leads to the inescapable conclusion that it was anything but routine. It had a specific purpose, to make an announcement that would help blunt the employee-perceived need for union representation.

The 401(k) retirement/investment plan announcement had a little different history. According to Respondent's current CEO, Gary Sloan, its genesis was partly due to the collective bargaining process between the CNA and Tenet's Doctors Medical Center in San

Pablo. He became Respondent's CEO in April 2003; prior to that he had been the CEO at Doctors. The CNA collective bargaining contract there had expired on August 31, 2002 and a nurses strike began on November 4. One of the sticking points was a pension plan which the CNA wanted. Sloan had learned sometime in June that Tenet was in the process of improving the extant 401(k) plan on a system-wide basis. He hoped that the plan's improvements would become known before the contract expired at the end of August.

At this point, the election had been scheduled for October 9. With negotiations proceeding in San Pablo, Respondent announced a series of meetings about the 401(k) plan as it then existed. The meetings were scheduled for a hospital conference room on October 1 and 2. Invitations were directed only to the nursing staff, not to support personnel. In the past, 401(k) plan issues had been dealt with during the November open period. Here, however, it is clear that the upcoming election was driving these meetings. The CNA's pension proposals were known to Tenet from its experience at Doctors. It wanted to compare the 401(k) plan to the CNA plan as part of the debate, believing it could persuade the RNs that the Tenet 401(k) plan was a better option. Tenet assigned two individuals, styled as 'educators,' from its Texas headquarters to run the meetings, Troy Bond and Debra Andone. Andone appears to have been the leader.

RN Janet Thomas and Sue Micheletti are in agreement regarding what occurred at the 2 p.m. meeting on October 2. Thomas was one of about twenty interested nurses; Micheletti as COO was an observer from the administrative staff. During that meeting Andone announced that she had just learned a few minutes before the session that Tenet's match of contributions to the 401(k) plan would increase in January 1, 2003 from 3% of salary to 5%, that the eligibility period for participation would be reduced from 1 year to 91 days, and that Tenet would match, dollar for dollar an employee's contribution which was less than 5%.

This announcement was immediately followed by a flyer created locally making the same announcement. [FN16] That document (5RRMC.DOC), ALSO LOCATED IN THE SAME 'UNION' SUB-FOLDER IN THE COMPANY'S NETWORK AS THE SALARY INCREASE ANNOUNCEMENT, WAS FINISHED AT 6:37 P.M. ON OCTOBER 2. IT, TOO,

WAS DISTRIBUTED ALMOST IMMEDIATELY, BEARING LOWDER'S SIGNATURE. [FN17] AT THE SAME TIME, HOWEVER, IT APPEARS THAT DOCTORS MEDICAL CENTER CEO SLOAN HAD TAKEN A HAND. ON OCTOBER 3, SHORTLY AFTER 4 P.M., A COMPANY ATTORNEY, JAMES BOWLES (TRIAL COUNSEL HERE) WHO WAS PROVIDING ADVICE REGARDING THE NEGOTIATIONS, E-MAILED A COPY OF THE NEW 401(K) PLAN TO THE CNA'S NEGOTIATORS THERE. THE FOLLOWING DAY, AT 1:30 P.M. SLOAN, IN POSSESSION OF BOTH THE FLYER AND A LETTER FROM TENET'S CHAIRMAN OF THE BOARD, JEFFREY C. BARBAKOW, E-MAILED THEM TO HIS SUBORDINATES, DIRECTING THEM TO NOTIFY ALL EMPLOYEES OF THE CHANGES TO THE 401(K) PLAN. FROM SLOAN'S PERSPECTIVE, THE 401(K) IMPROVEMENTS WERE A COUNTERPROPOSAL TO BE GIVEN THE CNA AT DOCTORS MEDICAL CENTER. HE HAD ASKED FOR ITS ACCELERATION TO DEAL WITH HIS NEGOTIATIONS. EVEN SO, THERE IS NO EVIDENCE THAT THE INFORMATION NEEDED TO BE SIMULTANEOUSLY ANNOUNCED AT SAN RAMON. THE ELECTION THERE WAS ONLY DAYS AWAY. THE NOVEMBER OPEN SEASON WAS ONLY 3 WEEKS AWAY AND WAS THE MOST LIKELY TIME FOR ROUTINE ANNOUNCEMENTS ABOUT THE 401(K) PROGRAM. INSOFAR AS SAN RAMON WAS CONCERNED, NOTHING ABOUT THE ENHANCEMENT, EXCEPT FOR ELECTION DISSUASION, NEEDED TO BE ISSUED ABRUPTLY.

Almost immediately thereafter, a third [FN18] document was created in that same 'union' sub-folder. [FN19] This file, known as (5lusSRRMC.PUB), was a flyer announcing free PPO medical insurance for employees and their families. (It also reiterated the 5% 401(k) match.) The printscreen [FN20] of the folder shows the file to have been last modified on October 3. Micheletti says she first learned of the free PPO benefit on either October 2 or 3. She says because it was such a big benefit, together with its lifetime maximum coverage being increased so dramatically, she had the flyer posted as soon as it was ready that day.

In my view, the totality of the evidence supports the conclusion that all three announcements of the new benefits were timed to influence the electorate. First,

the annual raise had never before been publicly announced in June. It had always been provided more privately in October, shortly before the November effective date. When the raise was elevated from 5% to 7%, the announcement was made to match the June announcement, as if that were the norm. Furthermore, by its terms the "opt-out" feature was not even available until January 2003. There was absolutely no need to announce it in August, except to be a double-barreled shot across the CNA's bow as it proceeded toward filing the election petition. This was followed in early October by the 401(k) enhancement and the free PPO health coverage. Again, a double-barreled shot occurring 7 and 6 days before the election.

The former would not normally have been necessary until the November open season, for as far as Respondent's employees were concerned it really didn't matter because the 401(k) change could not be invoked until January, anyway. It may well have been of legitimate utility as a bargaining stance at Doctors Hospital, but it had no immediacy at Respondent except as a carrot to undecided voters in that week's election. The latter, the free PPO health insurance for the employee and family (and million dollar lifetime coverage) seems almost too good to be true. Respondent really offers no explanation for the timing of this offer. Its appearance seems to have surprised local management as much as anyone. This benefit must have been under study for some time and carefully examined. Presumably it went through some sort of corporate vetting to determine its financial viability. Yet no one testified about its origins. Respondent argues that because it was announced to all 119 Tenet hospitals, the timing could not have been intended to bear on the union activity at San Ramon. Intent, of course is not the test for §8(a)(1) interference. [FN21] The test is, as has been said many times, "whether the employer's conduct may reasonably be seen as tending to interfere with the free exercise of employee rights under the Act." See, *American Freightways Co.*, 124 NLRB 146, 147 (1959); *El Rancho Market*, 235 NLRB 468, 471 (1978); *Williamhouse of California*, 317 NLRB 699, 713 (1995). Moreover, the Board has held that benefit grants to large groups may only mean that the interference is aimed at everyone, not just the unit sought by the union. See *Holly Farms Corp.*, 311 NLRB 273 (1993) where it said:

The Respondents also contend that the fact that the increase was given to all 11,000 Holly Farms employees who were not represented by bar-

gaining units indicates the lack of an intent to coerce or discriminate against the 201 members of the live haul unit. Although we recognize that the unit employees comprised only a small percentage of the total number of employees receiving the increase, this factor does not persuade us, under the totality of the circumstances here, that the wage increase was not unlawful. In addition to the factors discussed above, we note that at the time the wage increase was given, Holly Farms' production employees were in the midst of union organizing activities. [footnote omitted] Thus, *the wage increase might have been reasonably calculated to discourage union activity throughout Holly Farms. See St. Francis Federation of Nurses v. NLRB, 729 F.2d 844, 852 (D.C. Cir. 1984), enfg. 263 NLRB 834 (1982).* (Italics supplied.)

If a wage increase to an entire company can be seen to discourage union activity in a small portion, certainly a deliberately timed announcement can have the same effect. There is really no doubt that Respondent's announcements here were all accelerated. The question is what was the purpose or effect of doing so? Certainly Respondent has not persuasively shown that the timing was neutral. The August additional 2% wage bump is the only one of the three that has no clear connection to the Union. Even so, we have only Micheletti's testimony that it was in response to nurses' threats to leave for better paying jobs. The wage survey run by Watson & Wyatt was not presented, nor was any contract for the survey presented. There is Lowder's memo to a regional vice-president which asserts the claim. nonetheless, it was adopted seemingly without discussion despite a pricetag of a quarter million dollars. Standing by themselves, those facts certainly create a suspicious circumstance, but are not conclusive. Yet, it must not have been deemed to have been enough, for the increase was simultaneously sweetened with the brand new "opt-out, give yourself an additional 5% increase" offer. What purpose did that serve? Why announce the "opt-out" benefit in the same breath? It could have been held until November for either of the neutrally established period for changes, the annual wage increase or the open season. Adding the 'opt-out' feature in the fashion it did, in my opinion, demonstrates that there was a dissuasive purpose behind the announcement. Finally, the announcement memo is found in the 'union' folder on the network server.

Yet that circumstance was followed by announcements connected to the Union's presence by even more concrete facts in October. All of the memos dealing with both those announcements came from the same 'union' computer folder. But the 401(k) flyer was preceded by the October 2 surprise announcement to the nurses themselves at an 'education' meeting conducted by headquarters personnel. That doesn't seem like pure chance to me. It sounds more like theater or a sales stunt, rather than the customary and thoughtful presentation of benefits by a professional HR officer. Notice that it was not one, not two, but three separate tasty enticements. That truth becomes more evident when one realizes the announcement could have been made routinely 3 only weeks later during the open season when such matters were normally discussed.

But, as an infomercial salesman would say, there was more! The very next day came the free PPO health insurance. It, too, carried an extra inducement, the \$1 million lifetime benefit. Again, this was a surprise. As disc jockeys often say, "The hits just kept on coming."

Synchronized sales pitches such as these during union organizing are designed for only one thing: to influence the manner in which the employees might choose to vote. It can hardly be said that the timing of these announcements was based on Respondent's neutral business needs. This was coordinated timing, timing based in each instance on an effort to interfere with the employees' right to freely exercise their §7 right to choose a representative. It had no other purpose. Respondent's timing here violated §8(a)(1) as alleged. *Waste Management of Palm Beach*, supra; also, *Brooks Bros.*, 261 NLRB 876, 883 (1982), enfd. 714 F.2d 111 (2d Cir. 1982)(table) and *H-P Stores, Inc.*, 197 NLRB 361 (1972). Respondent's evidence in support of the rebuttal is simply insufficient.

III. Additional Analysis and Conclusions

Miscellaneous §8(a)(1) Allegations

Above, I have performed an analysis and reached some conclusions regarding the no-access rule and the timing of the fringe benefit announcements of section II. B and F. Here, I scrutinize the §8(a)(1) and (3) allegations, together with the defenses, relating to the facts set forth in section II. C, D and E.

The first speech-restrictive incident was supervisor Satveer Dhaliwal, on May 6, telling Lynda Bredleau that she was not permitted to discuss the CNA at the nurses station. The second was a near-identical directive issued by birthing center director Beth Eichenberger to Cherri Dobson that there be no discussion about the Union at the nurses station. She issued a similar directive to RN Ann Wolff in a nonworking area. Eichenberger, and Dhaliwal to a lesser extent, appear to equate talking about the union with either solicitation or distribution. In fact, Eichenberger regards union talk as 'potential solicitation.' It seems she also regards reading union publications in the same light, as she would treat union pamphlets differently from a novel. She would bar the first without asking if the employee was on duty, but bar the second only after determining that the employee was on duty.

The Supreme Court has said, "The place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees." NLRB v. Magnavox Company of Tennessee, 415 U.S. 322, 325 (1974). That observation, of course, is tempered with the requirement that employees are expected to be performing their work during their work time and should not be distracted from working by matters unrelated to work. Every employer knows that workers talk about all sorts of things while they work. They also know that talking can be distracting, but that it often is not. If a distraction of that nature occurs, it is easily correctible ("*Hey, folks, get back to work!*"). But a rule prohibiting discussion of certain subject matters while allowing others is problematical. Thus, a rule which bars talking about any subject at all might theoretically pass muster under the Act. But, such a rule would make for a very unpleasant place to work and could not be easily enforced. For that reason, such rules are never seen. Recognizing that reality, the Board has held company rules which prohibit talking about matters protected by §7 [FN22] during work while permitting talk about any other subjects violate §8(a)(1) of the Act. Opryland Hotel, 323 NLRB 723 (1997), citing Teksid Aluminum Foundry, 311 NLRB 711, 713-714 (1993); Meijer, Inc., 318 NLRB 50, 57 (1995); Jennie-O Foods, 301 NLRB 305, 316 (1991); T & T Machine Co., 278 NLRB 970 (1986); Orval Kent Food Co., 278 NLRB 402 (1986); Cerock Wire & Cable Group, 274 NLRB 888, 897 (1985). Also, Saginaw Control and Engineering, 339 NLRB No. 76

(2003). Such a rule does not prevent an employer from telling employees who have stopped work to talk to get back to work.

Furthermore, the Board, just weeks ago, again stated the limits on a no-solicitation rule vis-à-vis talking about a union. The distinction had been clearly set forth by Judge John M. Dyer in two cases in the mid 1970's, International Signal and Control Corp., 226 NLRB 661, 665 (1976) and W. W. Grainger, Inc., 229 NLRB 161 (1977), *enfd.* 582 F.2d 1118 (7th Cir. 1978). But, in Wal-Mart Stores, Inc., 340 NLRB No. 76, *sl. op.* at 3-4 (Sept. 30, 2003), the Board had occasion to revisit the issue again. There it said:

In the context of a union campaign, "[s]olicitation' for a union usually means asking someone to join the union by signing his name to an authorization card." W.W. Grainger, Inc., [supra]. However, an integral part of the solicitation process is the actual presentation of an authorization card to an employee for signature at that time. As defined, solicitation activity prompts an immediate response from the individual or individuals being solicited and therefore presents a greater potential for interference with employer productivity if the individuals involved are supposed to be working. Solicitation is therefore subject to rules limiting it to nonworking time and, in the special circumstances of retail stores, to nonselling areas:

* * *

Once again, our analysis turns on the distinction between union solicitation and other employee activity in support of union organizing. "[S]olicitation' for a union is not the same thing as talking about a union or a union meeting or whether a union is good or bad." In recognition of this distinction, the Board found that an employee did not engage in conduct lawfully proscribed by no-solicitation rules when she merely asked a coworker if she had a union authorization card. In another instance, the Board held that an employee's act of introducing a union representative to a coworker, and her subsequent statement that the coworker would go along with the union, did not constitute solicitation for which the employee could be disciplined under the employer's no-solicitation rule. (footnotes omitted.)

Clearly, Dhaliwal and Eichenberger have confused the distinction between talking about a union and soliciting. In that circumstance, their interdiction violated §8(a)(1) of the Act.

One other comment about the definition of solicitation and perhaps the source of their confusion: Respondent's definition found on p. 45 of the handbook reads: "... solicitation is the act of seeking, urging, persuading or petitioning somebody to do something...." That definition is inconsistent with Board law and, although not attacked in the complaint, is too broad, for it does bar union talk in the workplace. Were the rule before me, I would strike it.

Similarly, Eichenberger operated under a misconception concerning reading material. Not only did she treat union-published reading material differently from pleasure reading, the credible evidence is that she sought to bar such reading material from the entire hospital property. This effectively barred the material from non-work locations such as the break room, the locker room and even, as Wolff must have perceived, from the rest room.

Deanna Holm's warning to Janet Thomas concerning the violation of the no-solicitation/no-distribution rule, is also a problem. I do think that Thomas can be seen as having distributed the union flyer to Martha Lindstrom. Both Thomas and Lindstrom were on duty at the time. On its face, there is nothing improper about the rule itself. It clearly bars distribution of literature during working time and in working areas. "Distribution" is defined in the handbook as "the act of delivering or passing out written materials." The prohibition itself says hospital employees

... may never distribute literature [to] any person, including fellow employees, during their working time or the other employee's working time. 'Working time' means the period of time scheduled for the performance of job duties, not including mealtimes, break-times or other periods when an employee is properly not working. The distribution of literature is never permitted in any work area. 'Work areas' do not include cafeteria(s), gift shops, employee lounges, locker rooms, rest rooms, and parking areas. Additionally, Hospital employees may never ... distribute literature in any immediate patient care area.

And, Thomas did seek to hand the flyer to Lindstrom during a time when both were on duty and both were in a working area. Literally, Thomas was in violation of the no-distribution rule.

Respondent's problem here is that Thomas's warning/correction was for violating both the no-distribution portion of the rule and the no-solicitation portion. As noted above, there is no credible evidence that she had ever engaged in solicitation as defined by the Board. Indeed, there is no evidence that she engaged in solicitation under Respondent's excessively broad definition, either. Neither Holm nor any other manager ever observed such a thing. At best, all Holm had was uncorroborated hearsay from two rank-and-file employees who complained she was seeking signatures during work times and in patient care areas; at worst, the incident was made of whole cloth. Holm's proper response in that situation was either not to include it as part of any discipline or to remind Thomas about the rule. But the rule, as noted, bars union talk and is therefore overbroad.

The warning treats the two incidents as if they were one. Assuming that Thomas could appropriately receive an admonishment of some kind for the distribution to Lindstrom, it does not follow that the same admonishment can be aimed at conduct not demonstrated to be true. Holm never investigated the claimed incident in any way. She did not get statements from the two nurses who supposedly complained; she doesn't seem to know when it occurred (or even where, given her lack of specificity); she did not ask anyone else about it (perhaps a charge nurse or other supervisor familiar with the time and place; nor did she attempt to discuss it with Thomas at all, much less in a manner which could have been noncoercive. Even so, she concluded that her earlier discussion with Thomas had gone unheeded and just tossed the two episodes together in a collective warning.

It can be argued, I suppose, that the write-up did not constitute discipline and therefore did not violate the Act. And, it is true that the rebuke was very minor. Yet, it is nearly identical to the "coaching" which was found violative in *Wal-Mart*, supra. That case demonstrates even minor reproaches such as this may reasonably be seen to interfere with the exercise of an employee's §7 rights. In any event, Holm's write-up confused unprotected with unproven conduct and was

based in large part on a rule which was too broad.

In my opinion, the write-up violated §8(a)(1) of the Act. It should be stricken. Daylin Inc., Discount Division d/b/a Miller's Discount Dept. Stores, 198 NLRB 281 (1972), enfd. 496 F.2d 484 (6th Cir. 1974). Furthermore, according to Daylin, given the fact that the overbroad solicitation portion of the rule became entangled with the valid no-distribution portion and its concomitant invalidity, it became incumbent upon Respondent to demonstrate that Thomas's distribution actually interfered with production. In Daylin, two employees were discharged for "admittedly soliciting union support during working time." Because the no-solicitation rule invoked by the employer was overbroad, the Board held that the discharges pursuant to it were unlawful, and announced the following doctrine, saying at 281:

The Chairman's [dissenting] view appears to be that, because the employer may in a presumptively valid way limit solicitation, there can be no interference with employees' rights by discharging them for soliciting on work-time. The *correct view, however, is that any prohibition of solicitation, by rule or discipline, interferes with employee rights, and that such interference must--in the absence of a valid rule--be supported by an affirmative showing of impairment of production.* (emphasis supplied). [FN23]

The same analysis holds true for this intertwined distribution rule. No showing has been made that Thomas's offering Lindstrom the flyer caused any disruption in production. Lindstrom wouldn't even accept it until after she had delivered the files she was carrying. Had Holm not injected herself into the conversation and taken the flyer, Lindstrom would simply have carried it back with her down the hall to read when she could. Moreover, Respondent has made no showing that Thomas's own production suffered. Since Holm never had, nor even sought, evidence that Thomas had solicited authorization cards, the definition of solicitation was too broad, and there is no showing that anyone's production was impaired, I find that the admonition Holm gave Thomas violated §8(a)(1) of the Act. The only conclusion can be that Respondent, driven by Company policy (witness department director Field's silent presence), was too eager to issue the warning, knowing that it would have a salutary effect upon others. In addition, since the write-up tended to weaken Thomas's tenure as an employee, the

admonition violated §8(a)(3) of the Act. Victoria Partners, 328 NLRB 54 (1998).

Insofar as removing CNA flyers from the bulletin boards in both the Diablo unit (Dhaliwal) and the birthing center (Eichenberger) bulletin boards is concerned, the testimony and evidence was that personal items such as photographs, postcards and thank you notes as well as some commercial advertising appeared on the bulletin boards. Although Respondent's bulletin board rule seems to limit postings to Hospital designated documents, any other document supposedly required the approval of the human resources department. Yet even Chief Operation Officer Sue Micheletti recognized that the policy had not been followed when she announced during the August 22 meeting that union flyers could be posted there. No doubt she had become aware of Board law concerning inconsistent use of such boards and was seeking to defuse the situation. Of course, as the General Counsel notes in her brief, an employer may limit the use of bulletin boards to official company business, but if it permits other types of postings, denial of union-sponsored postings will be regarded as discriminatory. Honeywell, Inc., 262 NLRB 1402 (1982), enfd. 722 F.2d 405 (8th Cir. 1983); Alliance Steel Products, 340 NLRB No. 65 (Sept. 30, 2003). There is no showing that the HR department ever approved anything that went on these Boards or that it made any effort to enforce the rule. That was left to the ad hoc decisions of the supervisor for each department. Under the rule, they had no authority to grant approval. As a result, Micheletti threw in the towel on the point. Even so, prior to her August 22 announcement, both Dhaliwal and Eichenberger removed union flyers from the Boards. Under the Honeywell rule that violated §8(a)(1) of the Act.

Also on August 22, Micheletti, in response to an employee question, said that the mailboxes were for hospital-related communications and could not be used for union business. There was testimony that the mailboxes are commonly used for personal messages between staff members and that outside vendors occasionally placed advertising and free sample in them. There is a photograph in evidence of one such distribution, a promotional gift from Enfamil® (a brand of baby formula), sticking out of a mailbox.

Board law concerning mailbox limitations is the same as for bulletin boards. Specifically, see Cincinnati

Enquirer, 279 NLRB 1023 (1986); Fairfax Hospital, 310 NLRB 299, 305 (1993). Since the mailboxes are used for communications other than hospital-only matters, I find the oral limitation imposed by Michelletti to be in violation of §8(a)(1) as being disparate and promulgated as result of union organizing. It was therefore discriminatory.

Issues Concerning Lynda Bredleau's Discharge and Subsequent Reinstatement

Aside from the discharge allegation concerning Lynda Bredleau, the complaint asserts that supervisor Satveer Dhaliwal coercively interrogated Bredleau about her involvement in posting the two flyers on August 15. Later, of course, Dhaliwal reported the incident to nursing director Jason Black who fired Bredleau for violating the bulletin board rule. That occurred a little over 3 months after Dhaliwal had illegally told Bredleau that she couldn't discuss the union at the nurses station.

On August 15, after observing the Union's flyers on the bulletin board, Dhaliwal removed at least some of them. Then she asked Bredleau, the only nurse in the break room, if she was the one who had posted them. Clearly, Dhaliwal was hunting for a culprit, intending to level discipline on such an individual. When Bredleau acknowledged that she had posted some of them, Dhaliwal had all the information she needed. Taking a few moments, Dhaliwal undoubtedly recalled her May 6 directive regarding discussing the Union and concluded that Bredleau had failed to heed it, even though the two incidents were of a somewhat different character. She promptly bucked the issue up the chain of command to Black.

However, it is Dhaliwal's asking Bredleau if she had put the flyers on the board which is the question here. Did it have a reasonable tendency to interfere with, restrain or coerce an employee in the exercise of rights guaranteed under §7? I conclude that it did. When Dhaliwal saw the flyers, she had choices. The first was to ignore it. The second was to police the board and generally remind employees that union notices did not meet the Company's rules concerning postings; the third was to hunt the offender and visit whatever was company policy upon her. Dhaliwal chose the last, an ad hominem approach. Why that was necessary escapes me. There were many copies of the two flyers on the board, suggesting that more than one hand was

involved. Why ask a specific person when the problem needed to be addressed to the staff as a whole? In picking a person to ask, Dhaliwal was sending the message that there would be consequences for persons making these postings. Her inquiry had no neutral purpose. Indeed, it does not appear that she mentioned to Bredleau that the Company had a rule prohibiting the postings or suggesting that the poster (or the Union) try to get permission from the HR department. [FN24] Looking for someone to punish is a coercive act. That is what Dhaliwal's question accomplished. It violated §8(a)(1) of the Act as an unlawful interrogation.

And, as the parties basically agree, Dhaliwal's report to nursing director Black resulted in Bredleau's discharge. Respondent argues that it could lawfully discharge an employee who breached the bulletin board policy, [FN25] even if the discharge was not proportional to the infraction. Had the bulletin board policy been even-handedly enforced, I might agree. As discussed above, it was not. Little more needs to be said. The bulletin board policy was applied discriminatorily and Respondent discharged Bredleau for doing what had been allowed. Her discharge breached §8(a)(3) and (1). Avondale Industries, 329 NLRB 1064 (1999); Marshall Durbin Poultry Co., 310 NLRB 68 (1993), *enfd. in pert. part*, 39 F.3d 1312 (5th Cir. 1994); Brookwood Furniture, 258 NLRB 208 (1981).

Then it appears Respondent began having second thoughts about the discharge. No doubt several factors were considered. First, the discharge was picked up by the news media, forcing a positive public relations response. Second, the discharge was obviously disproportionate to the nature of the offense. Third, the wrong rules were being applied. And fourth, there was opposition to it within Respondent's own managerial hierarchy. Whether that opposition was based on a sense of fairness or a sense that management had just given the CNA the advantage it was seeking, is not clear. Whatever the reason, Black was ordered to reverse himself. He did so, but grudgingly. His attempt to apologize on the telephone fell short. He only managed to ask Bredleau to work her next scheduled shift while disingenuously saying that it all happened because she had misunderstood the no-solicitation/no-distribution rule.

Black apparently told his superiors that he had apologized, and for that reason department manager Pam

Ranahan believed it was not necessary for Bredleau to attend Micheletti's meeting. When Bredleau told Ranahan that he had not apologized, Ranahan called Black who spoke to Bredleau again. This time he got closer, but still didn't actually utter words of apology. Instead, he said he "was sorry if she hadn't realized he was apologizing on the phone, but that he had apologized." He simply waltzed around it, still claiming he had done so. However, at the meeting, with Bredleau in attendance, he finally said he was sorry. Then he left.

The termination slip Black prepared is still in Bredleau's personnel jacket. The only notation showing that it was withdrawn is HR officer Bailey-Stahlnecker's handwritten note that it had been "retracted." Bredleau was unaware of the notation.

On this record Respondent argues that it never committed an unfair labor practice with respect to Bredleau's termination, or if it did, by reinstating her, it has been cured. The General Counsel argues otherwise. Both cite Passavant Memorial Area Hospital, 237 NLRB 138 (1978) in support of their respective positions.

In *Passavant*, the Board said that for a repudiation of an unfair labor practice to be effective, it must be timely, unambiguous and to specifically refer to the unlawful conduct. Moreover, the repudiation must be broadly published and no further violations must have occurred. In *Holly Farms*, supra, the Board said the employer must admit wrongdoing. Here, at the very least, similar conduct continued to occur. Based on the facts extant here, I conclude that Respondent has not met the requirements set forth there. First, Respondent has never admitted wrongdoing in the sense that it ever admitted that discharging Bredleau interfered with her §7 rights. And, admitting to a 'mistake' is not a confession of wrongdoing. At best there was a public apology, [FN26] but it fell short of an admission of misconduct. I do agree that the steps it did take were timely, as the decision was reversed on the following day and Bredleau never lost any work (although that still needs to be confirmed at the compliance stage). Moreover, the discharge record remains in her personnel file. Since it is still there, it becomes a tenure [FN27] matter, for unaware personnel officials may in the future regard it as a previous discipline, subject to heightened punishment in the event of some subsequent incident; indeed, Respondent should have given

Bredleau written notice that the discharge had been, in Bailey-Stahlnecker's words, "retracted" and would not be used against her in any way. As things now stand, the 'corrective' action is incomplete. Furthermore, similar conduct continued to occur; the §8(a)(1) and (3) activity did not stop. Only 5 days later, Deanna Holm issued the not dissimilar illegal warning to Janet Thomas, discussed above. And, in October Respondent accelerated two announcements about improved benefits to the nurses simply to influence their choice in the representation election. Accordingly, Respondent's *Passavant* defense is rejected. See also the court's discussion in Ark Las Vegas Restaurant Corp. v. NLRB, 334 F.3d 99, 108 (D.C. Cir. 2003): "For an employer's repudiation to relieve him of liability for unlawful conduct, the repudiation, must be timely, specific, and unambiguous, and -- * * * --the employer must admit wrongdoing and refrain from committing future violations." (citing cases.)

IV. The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. As Respondent discriminatorily discharged Lynda Bredleau, it must offer her reinstatement to her previous job, or if that is not available, to a substantially similar job, and make her whole for any loss of earnings and other benefits she may have suffered. Respondent shall take this action without prejudice to Bredleau's seniority or any other rights or privileges she may have enjoyed. Backpay, if any, shall be computed on a quarterly basis from the date of the discharge to the date Respondent makes a proper offer of reinstatement, less any net interim earnings, as prescribed in F.W. Woolworth Co., 90 NLRB 289 (1950), plus interest as computed in New Horizons for the Retarded, 283 NLRB 1173 (1987). Furthermore, Respondent shall be required to expunge from Bredleau's personnel file any reference to her illegal discharge. Likewise, it shall expunge from Janet Thomas's personnel file any reference to the discriminatory warning given her in late August. It will also be ordered to advise each of them in writing of the expunction and that the discipline will not be used against them in any way. Sterling Sugars, 261 NLRB 472 (1982). Finally, it shall be directed to post a notice to employees advising them of their rights and describing the steps it will take to remedy the unfair

labor practices which have been found.

On the above findings of fact, I make the following

Conclusions of Law

1. Respondent violated §8(a)(1) of the Act when, acting through Satveer Dhaliwal and Beth Eichenberger, it barred employees from talking about union representation in circumstances where the talking did not interfere with the employees' work.
2. Respondent violated §8(a)(1) of the Act when, acting through Dhaliwal, it coercively interrogated an employee about her union activities.
3. Respondent violated §8(a)(1) of the Act when, acting through Dhaliwal and Eichenberger, it removed California Nurses Association flyers from its bulletin boards.
4. Respondent violated §8(a)(1) of the Act when, acting through Eichenberger, it told employees they could not possess or read union literature on the property during nonwork time and when it treated union reading material more strictly than it did other types of literature.
5. Respondent violated §8(a)(1) of the Act when, acting through Sue Micheletti, it barred employees from using company mailboxes to distribute union literature.
6. Respondent violated §8(a)(1) of the Act when, acting through Deanna Holm, it told an employee she could not distribute union literature in circumstances where it did not interfere with the work of the distributor or the work of the recipient.
7. Respondent violated §8(a)(1) of the Act when in August and October 2002, it timed the announcement of fringe benefit enhancements as a response to union organizing and in order to influence employees' votes in a representation election.
8. Respondent violated §8(a)(3) and (1) of the Act when on August 15, 2002, it discharged its employee Lynda Bredleau.
9. Respondent violated §8(a)(3) and (1) of the Act

when on August 21 or 22, 2002, it issued a warning to its employee Janet Thomas.

10. Respondent's "no access policy," set forth in section II. B., above, does not violate the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [FN28]

ORDER

Respondent, San Ramon Regional Medical Center, Inc. dba San Ramon Regional Medical Center, San Ramon, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - a. barring employees from talking about union representation in circumstances where the talking does not interfere with the employees' work.
 - b. coercively interrogating employees about their union activities.
 - c. removing California Nurses Association flyers from its bulletin boards.
 - d. telling employees they cannot possess union literature on the property or read union literature during nonwork time, or treating union reading material more harshly than other types of literature.
 - e. barring employees from using company mailboxes to distribute union literature.
 - f. telling employees they cannot distribute union literature in circumstances where the distribution does not interfere with the work of the distributor or the work of the recipient.
 - g. timing announcements of fringe benefit enhancements either in response to union organizing or to influence employees' votes in a representation election.
 - h. discharging or disciplining employees because of their activities protected by §7 of the Act, including activity on behalf of the California Nurses Association or any other union.
 - i. in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by §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 Lynda Bredleau immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of earnings and other benefits she may have suffered as a result of the discrimination against her, in the manner set forth in the Remedy section of the decision, plus interest.

b. Within 14 days from the date of this Order, remove from its files any reference to Lynda Bredleau's unlawful discharge and Janet Thomas's unlawful warning, and within 3 days thereafter, notify them in writing that this has been done and that the discharge and warning will not be used against them in any way.

c. 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.

d. Within 14 days after service by the Region, post at its medical center in San Ramon, California copies of the attached notice marked "Appendix." [FN29] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by 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 the Respondent at any time since May 6,

2002.

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

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

Dated: November 12, 2003

James M. Kennedy
Administrative Law Judge

"Appendix"

Notice to Employees

Posted By Order of the National Labor Relations
Board

An Agency Of The United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT bar employees from talking about union representation in circumstances where the talking does not interfere with the employees' work.

WE WILL NOT coercively interrogate employees about their union activities.

WE WILL NOT remove California Nurses Association flyers from our bulletin boards.

WE WILL NOT tell employees they cannot possess

union literature on the property or read union literature during nonwork time and **WE WILL NOT** treat union reading material more strictly than we do other types of literature.

WE WILL NOT bar employees from using company mailboxes to distribute union literature.

WE WILL NOT tell employees they cannot distribute union literature in circumstances where the distribution does not interfere with the work of either the distributor or the recipient.

WE WILL NOT time announcements of fringe benefit improvements either in response to union organizing or to influence employees' votes in a representation election.

WE WILL NOT discharge or discipline employees when their activities are protected by §7 of the Act, including activity on behalf of the **California Nurses Association** or any other union.

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

WE WILL offer **Lynda Bredleau** immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges and **WE WILL** make her whole for any earnings and other benefits she may have lost as a result of our discrimination against her, plus interest.

WE WILL, within 14 days, remove from our files any reference to **Lynda Bredleau's unlawful discharge** and **Janet Thomas's unlawful warning**, and within 3 days thereafter, notify them in writing that we have done so and that the discharge and warning will not be used against them in any way.

SAN RAMON REGIONAL MEDICAL CENTER, INC. dba SAN RAMON REGIONAL MEDICAL CENTER

(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.

1301 Clay Street, Federal Building, Room 300N,
Oakland, CA 94612-5211

(510) 637-3300, Hours: 8:30 a.m. to 5 p.m.

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, (510) 637-3270.

FN1. All dates are 2002 unless otherwise indicated.

FN2. The first charge, Case 32-CA-19917, was amended on March 24, 2003.

FN3. A third case, 32-CA-20036, was severed by the Regional Director prior to the hearing and the caption has been ordered changed to reflect the removal.

FN4. The operative complaint has been amended in two principal ways: First, paragraph 6(b)(iii) has been withdrawn; Second, additional allegations have been added concerning conduct by supervisor Deanna Holm.

FN5. So-named as an expression of local geography, including nearby Mt. Diablo.

FN6. It also observes that Administrative Law Judge Lana H. Parke sustained the validity of the rule at a sister Tenet hospital in a case which the Board adopted in the absence of exceptions. *Garfield Medical Center*, Case 21-CA-34307-1, JD(SF)-81-02 (2002).

FN7. [Witness DHALIWAL] I initiated the conversation regarding the union giving Lynda the indication that she was not to talk about union activities in what time and in what environment.

Q [By Mr. BOWLES] What words did you use to the best of your recollection? What did you say to Lynda Bredleau?

A I basically advised her that it was not appropriate to talk about union in the work area during work hours.

Q Did you talk about -- was anything said about the nursing station?

A That is considered a work area, yes.

Q Did you discuss that with her?

A Yes.

Q What did you say about that?

A It cannot be done at the nursing station.

FN8. Bracketed material indicates judge's correction and/or clarification.

FN9. The exhibit is a chart of salary ranges for RNs at Bay Area hospitals under CNA contract. It is a copy of the same document which Bredleau posted on the Diablo unit bulletin board on August 15.

FN10. Presumably nurses who work in a maternity recovery area would be aware that nursing mothers might need such lotions. A commercial advertisement for the Mustela product would not be of professional interest to them, only the fact that such products are on the market. If Respondent wished to remind its birth-

ing center RNs that such lotions might help a patient, break room advertising for a specific brand would hardly be the optimal way to do it; training classes would be better. More likely, the need for skin cream would be core information known to every birthing center nurse. Advertising by one nursing lotion manufacturer, approved or not, would be entirely superfluous.

FN11. The form used here permits a range of discipline from "correction" to "discharge," depending on the box being checked. Holm did not check any box, and it is unclear what level of discipline was being levied. Presumably it was the lowest level, "correction," as nothing further occurred.

FN12. See G.C.Exh. 10, R.Exhs. 12 and 18, the "7% Great News" announcement and connected computer records.

FN13. Case heard by the Supreme Court on other issues. 517 U.S. 392 (1996).

FN14. The draft memo, the second page of R.Exh. 14, bears a March 22, 2003 date. That date is inaccurate for it is the result of a date field in the computer-generated document. It reflects the date that particular copy was printed, perhaps as counsel prepared the matter for one of the earlier hearing dates.

FN15. Various versions are in the record. G.C.Exh. 10; R.Exhs 12 and 18 (with printscreens).

FN16. In the record as G.C.Exh. 13, R.Exhs. 16 and 20 (with printscreen).

FN17. Tenet later used Respondent's flyer as a model for the national flyer which it sent out a shortly thereafter.

FN18. Actually, there are four documents now in evidence found in that folder relating to the CNA's efforts at Respondent. The fourth was the sheet used during the October 1 and 2 'education' meetings conducted by Bond and Andone to compare the 401(k) plan with the CNA's retirement plan. R.Exh. 19. Its computer file (401vsRETIRE.PUB) had been created locally by Yonenaka on September 26.

FN19. G.C.Exh. 14; R.Exhs. 15, 21

FN20. R.Exh. 21 (second page).

FN21. Section 8(a)(1) of the Act provides: “It shall be an unfair labor practice for an employer -- to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;....”

FN22. Section 7 of the Act states: “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except[ions not relevant here].”

FN23. Accord, *Volkswagen South Atlantic*, 202 NLRB 485, 491 (1973), *enfd. mem.* 487 F.2d 1398 (4th Cir. 1973); *Pioneer Finishing Corporation*, 247 NLRB 1299 (1980); *Mohawk Industries, Inc.*, 334 NLRB No. 135 (2001).

FN24. Had Dhaliwal taken these steps she would still have violated §8(a)(1) because of the disparate application of the rule. However, she would have avoided threatening an employee with an adverse personnel action, which hunting implies. The two are qualitatively different.

FN25. Inexplicably, Black thought he was enforcing the no-solicitation/no-distribution rule.

FN26. Micheletti's nor Lowder's private apologies met the *Passavant* requirement of a broad publication; nor was either an admission of wrongdoing.

FN27. Tenure is a specific concern of 8(a)(3) of the Act. That statute states in pertinent part: “It shall be an unfair labor practice for an employer -- by discrimination in regard to *hire or tenure* of employment or any term and condition of employment to encourage or discourage union membership in any labor organization....” (Italics supplied)

FN28. 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.

FN29. If this Order is enforced by a Judgment of the 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.”

2003 WL 22763700 (N.L.R.B. Div. of Judges)
END OF DOCUMENT

Exhibit 4

Fort Hood shooting

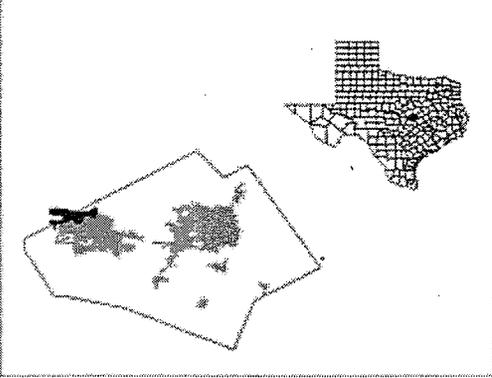
From Wikipedia, the free encyclopedia

The **Fort Hood shooting** was a mass shooting that took place on November 5, 2009, at Fort Hood—the most populous US military installation in the world, located just outside Killeen, Texas—in which a gunman killed 13 people and wounded 29 others.^[2]

The sole suspect is Nidal Malik Hasan, a U.S. Army major serving as a psychiatrist. He was shot by Department of the Army Civilian Police officers,^[3] and is now paralyzed from the chest down.^[4] Hasan has been charged with 13 counts of premeditated murder and 32 counts of attempted murder under the Uniform Code of Military Justice; he may face additional charges at court-martial.^{[5][6]}

Hasan is an American-born Muslim of Palestinian descent. Internal Army reports indicate officers within the Army were aware of Hasan's tendencies toward radical Islam since 2005. Additionally, investigations before and after the shooting discovered e-mail communications between Hasan and Yemen-based cleric Anwar al-Awlaki, who quickly declared Hasan a hero, as "fighting against the U.S. army is an Islamic duty". After communications between the two were forwarded to FBI terrorism task forces in 2008, they determined that Hasan was not a threat prior to the shooting and that his questions to al-Awlaki were consistent with medical research.

In November 2009, after examining the e-mails and previous terrorism investigations, the FBI had found no information to indicate he had any co-conspirators or was part of a broader terrorist plot. The U.S. has since classified Anwar al-Awlaki as a Specially Designated Global Terrorist, and the UN considers Awlaki to be associated with al-Qaeda.^[7] Yet a year after the attack, questions lingered of whether the incident was caused by mental health issues or Hasan was a terrorist, as government agencies have still not officially linked Major Hassan to any radical groups.^[8]

Fort Hood Shooting	
	
Location of the main cantonment of Fort Hood in Bell County, Texas	
Location	Fort Hood, Texas, United States
Coordinates	31°8′33″N 97°47′47″W﻿ / ﻿31.14250°N 97.79639°W﻿ / 31.14250; -97.79639
Date	November 5, 2009 ca. 1:34 p.m. (CST)
Attack type	Mass murder, Spree shooting
Weapon(s)	FN Five-seven semi-automatic pistol, .357 Magnum revolver
Death(s)	13 ^[1]
Injured	30 ^[1]
Suspected belligerent	Major Nidal Malik Hasan

Contents

- 1 Shootings
- 2 Casualties
 - 2.1 Fatalities

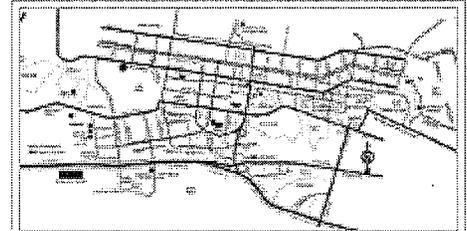
- 3 Suspect
 - 3.1 Possible motivation
- 4 Reaction
 - 4.1 President Obama
 - 4.2 Fort Hood personnel
 - 4.3 U.S. government
 - 4.4 Veteran groups
 - 4.5 Gun control advocates
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 - 4.7 Anwar al-Awlaki
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- 5 Investigation and prosecution
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Shootings



An FN Five-seven similar to that which the attacker used.^[9]

At approximately 1:34 p.m. local time, Hasan entered his workplace, the Soldier Readiness Center, where personnel receive routine medical treatment immediately prior to and on return from deployment. According to eyewitnesses, he took a seat at an empty table, bowed his head for several seconds,^[10] and then stood up and opened fire. Initially,



Map of Fort Hood with red dot marking the Soldier Readiness Processing Center

Hasan reportedly jumped onto a desk and shouted: "*Allahu Akbar!*"^{[11][12]} before firing at soldiers processing through cubicles in the center, and on a crowd gathered for a college graduation ceremony scheduled for 2 p.m. in a nearby theater.^[13] Witnesses reported that Hasan appeared to focus on soldiers in uniform.^[14] He had two handguns: a FN Five-seven semi-automatic pistol, which he had purchased at a civilian gun store,^[15] and a .357 Magnum revolver which he may not have fired.^[9]

Unarmed army reserve Captain John Gaffaney attempted to stop Hasan, either by charging the shooter or throwing a chair at him, but was mortally wounded in the process.^[16] According to witnesses, civilian physician assistant Michael Cahill also tried to charge Hasan with a chair before being shot and killed.^[17] Army reserve Specialist Logan Burnette tried to stop Hasan by throwing a folding table at him, but Burnette was shot in the left hip, fell down, and crawled to a nearby cubicle.^[18]



A team of SWAT officers approaches a building with the gunman inside

Base civilian police Sergeant Kimberly Munley, who had arrived on the scene in response to the report of an emergency at the center, encountered Hasan exiting the building in pursuit of a wounded soldier. Hasan turned and shot Munley, while witnesses say Munley also fired at Hasan. Munley was hit two times: once in her thigh and once in her knee, knocking her to the ground.^[19] Hasan then walked up to Munley and kicked her pistol out of reach.^[20] As the shooting continued outside, nurses and medics entered the building, secured the doors with a belt and began helping the wounded.^[21] In the meantime, civilian police officer Sergeant Mark Todd arrived and fired at Hasan. Todd said: "He was firing at people as they were trying to run and hide. Then he turned and fired a couple of rounds at me. I didn't hear him say a word, he just turned and fired."^[22] Hasan was felled by shots from Todd,^{[3][23]} who then kicked a pistol out of Hasan's hand, and placed him in handcuffs as he fell unconscious.^[24]

An investigator later testified that 146 spent shell casings were recovered inside the building.^[20] Another 68 were collected outside, for a total of 214.^[20] A medic who treated Hasan said his pockets were full of pistol magazines.^[25] When the shooting ended, he was still carrying 177 rounds of unfired ammunition in his pockets, contained in both 20- and 30-round magazines.^[20] The incident, which lasted about 10 minutes,^[26] resulted in 30 people wounded, and 13 killed — 12 soldiers and one civilian; 11 died at the scene, and two died later in a hospital.^{[27][28]}

Initially, three soldiers were believed to have been involved in the shooting,^[29] two other soldiers were detained, but subsequently released. The Fort Hood website posted a notice indicating that the shooting was not a drill. Immediately after the shooting, the base and surrounding areas were locked down by military police and U.S. Army Criminal Investigation Command (CID) until around 7 p.m. local time.^[30] In addition, Texas Rangers, Texas DPS troopers,^[31] deputies from the Bell County Sheriff's Office, and FBI agents from Austin and Waco were dispatched.^[32] President Obama was briefed on the incident and later made a statement about the shooting.^[1]

Casualties

There were 43 shooting casualties. Among the 13 killed were 12 soldiers, one of whom was pregnant, and a single Army civilian employee. Thirty others were wounded and required hospitalization. [1][2] Hasan, the alleged gunman, was taken to Scott & White hospital, a trauma center in Temple, Texas, and later moved to Brooke Army Medical Center in Fort Sam Houston, Texas, where he was held under heavy guard. [4] Hasan was hit by at least four shots, [33] and is said to be quadriplegic. [4] He is currently being held at the Bell County jail in Belton Texas.

Ten of the injured were treated at a trauma center in Temple, Texas. [34] Seven more wounded victims were taken to Metroplex Adventist Hospital in Killeen. [34] Eight others received hospital treatment for shock. [2] Of those wounded at least 17 were service-members, and at least seven were civilians. [35] On November 20 it was announced that eight of the wounded service-members will still deploy overseas. [36]

Fatalities

The 13 killed were:

Name	Age	Hometown	Rank or occupation
Michael Grant Cahill ^[37]	62	Spokane, Washington	Civilian Physician Assistant
Libardo Eduardo Caraveo ^[38]	52	Woodbridge, Virginia	Major
Justin Michael DeCrow ^[39]	32	Plymouth, Indiana	Staff Sergeant
John P. Gaffaney ^[40]	56	Serra Mesa, California	Captain ^[41]
Frederick Greene ^[37]	29	Mountain City, Tennessee	Specialist
Jason Dean Hunt ^[37]	22	Tipton, Oklahoma	Specialist
Amy Sue Krueger ^[37]	29	Kiel, Wisconsin	Staff Sergeant
Aaron Thomas Nemelka ^[37]	19	West Jordan, Utah	Private First Class
Michael S. Pearson ^[42]	22	Bolingbrook, Illinois	Private First Class



Shooting victim being transported to a waiting ambulance



Coffins of soldiers killed in the shooting being loaded aboard an aircraft for flight to Dover Air Force Base

Russell Gilbert Seager ^[35]	51	Racine, Wisconsin	Captain ^[43]
Francheska Velez ‡ ^[44]	21	Chicago, Illinois	Private First Class
Juanita L. Warman ^[35]	55	Pittsburgh, Pennsylvania	Lieutenant Colonel ^[45]
Kham See Xiong ^[37]	23	Saint Paul, Minnesota	Private First Class

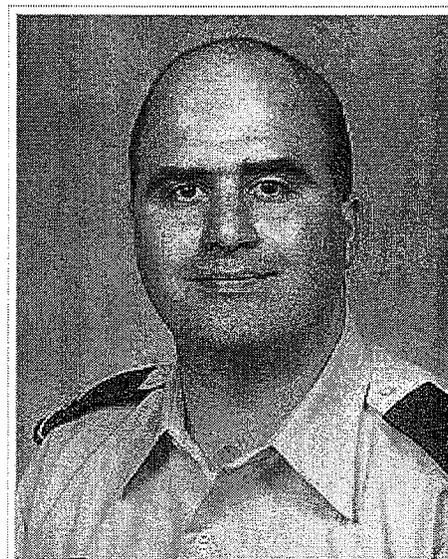
‡ Francheska Velez was pregnant at the time of her death.^[46]

Suspect

Main article: Nidal Malik Hasan

Major Nidal Malik Hasan, MD, a 39-year-old U.S. Army psychiatrist of Palestinian descent, is the sole suspect in the shootings. Hasan is a practicing Muslim who, according to one of his cousins, became more devout after the deaths of his parents in 1998 and 2001.^[47] His cousin did not recall him ever expressing radical or anti-American views.^[47] Another cousin, Nader Hasan, a lawyer in Virginia, said that Nidal Hasan's opinion turned against the wars after he heard stories from people who returned from Afghanistan and Iraq.^[48]

Hasan attended the Dar Al-Hijrah mosque in Falls Church, Virginia, in 2001, at the same time as Nawaf al-Hazmi and Hani Hanjour, two of the hijackers in the September 11 attacks.^{[49][50]} A law enforcement official said that the FBI will probably look into whether Hasan associated with the hijackers.^[51] A review of Hasan's computer and his multiple e-mail accounts has revealed visits to websites espousing radical Islamist ideas, a senior law enforcement official said.^[52]

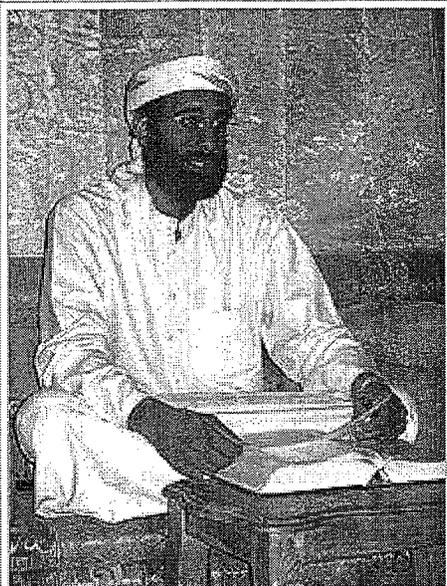


Major Nidal Malik Hasan

Once, while presenting what was supposed to be a medical lecture to other psychiatrists, Hasan instead talked about Islam, and stated that non-believers would be sent to hell, decapitated, set on fire, and have burning oil poured down their throats. A Muslim psychiatrist in the audience raised his hand, and challenged Hasan's claims.^[53] According to Associated Press, Hasan's lecture also "justified suicide bombings."^[54]

According to National Public Radio (NPR), officials at Walter Reed Medical Center repeatedly expressed concern about Hasan's behavior during the entire six years he was there; Hasan's supervisors gave him poor evaluations and warned him that he was doing substandard work. In the spring of 2008 (and on later occasions) several key officials met to discuss what to do about Hasan. Attendees of these meetings reportedly included the Walter Reed chief of psychiatry, the chairman of the USUHS Psychiatry

Department, two assistant chairs of the USUHS Psychiatry Department (one of whom was the director of Hasan's psychiatry fellowship), another psychiatrist, and the director of the Walter Reed psychiatric residency program. According to NPR, fellow students and faculty were strongly troubled by Hasan's behavior, which they described as "disconnected," "aloof," "paranoid," "belligerent," and "schizoid."^[55]



Anwar al-Awlaki, Hasan's former imam, with whom Hasan communicated in the months prior to the shootings

Hasan has expressed admiration for the teachings of Anwar al-Awlaki, imam at the Dar al-Hijrah mosque between 2000 and 2002.^[56] As Al-Awkali was under surveillance, Hasan was investigated by the FBI after intelligence agencies intercepted 18 emails between them between December 2008 and June 2009. In one, Hasan wrote: "I can't wait to join you" in the afterlife. Lt. Col. Tony Shaffer, a military analyst at the Center for Advanced Defense Studies, suggested that Hasan was "either offering himself up or [had] already crossed that line in his own mind." Hasan also asked al-Awlaki when jihad is appropriate, and whether it is permissible if innocents are killed in a suicide attack.^[57]

Army employees were informed of the contacts, but no threat was perceived; the emails were judged to be consistent with mental health research about Muslims in the armed services.^[58] A DC-based joint terrorism task force operating under the FBI was notified, and the information reviewed by one of its Defense Criminal Investigative Service employees, who concluded there was not sufficient information for a larger investigation.^[59] Despite two Defense Department investigators on two joint task forces having looked into Hasan's communications, higher-ups at the Department of Defense stated they were not notified before the incident of such investigations.^[60]

In March 2010, Al-Awlaki alleged that the Obama administration attempted to portray Hasan's actions as an individual act of violence from an estranged individual, and that it attempted to suppress information to cushion the reaction of the American public. He said:

Until this moment the administration is refusing to release the e-mails exchanged between myself and Nidal. And after the operation of our brother Umar Farouk the initial comments coming from the administration were looking the same – another attempt at covering up the truth. But Al Qaeda cut off Obama from deceiving the world again by issuing their statement claiming responsibility for the operation.^[61]

In July 2009 he was transferred from Washington's Walter Reed Medical to Fort Hood. Hasan gave away furniture from his home on the morning of the shooting, saying he was going to be deployed.^{[62][63]} He also handed out copies of the Qur'an, along with his business cards which listed a Maryland phone number and read "Behavioral Health [*sic*] – Mental Health – Life Skills | Nidal Hasan, MD, MPH | SoA (Subhanahu wa ta'ala) | Psychiatrist".^{[62][63]} According to investigators, the acronym "SoA" is commonly used on jihadist websites as an acronym for "Soldier of Allah" or "Servant of Allah", and SWT is commonly used by Muslims to mean "*subhanahu wa ta'ala*" (Glory to God).^[64] The cards did not reflect his military rank.

Possible motivation

Immediately after the shooting, analysts and public officials openly debated Hasan's motive and preceding psychological state: A military activist, Selena Coppa, remarked that Hasan's psychiatrist colleagues "failed to notice how deeply disturbed someone right in their midst was."^[22] A spokesperson for U.S. Senator Kay Bailey Hutchison, one of the first officials to comment on Hasan's background,^[65] told reporters that Hasan was upset about his deployment to Afghanistan on November 28.^{[66][67]} Noel Hamad, Hasan's aunt,^[68] said that the family was not aware he was being sent to Afghanistan.^[69]

The Dallas Morning News reported on November 17 that ABC News, citing anonymous sources, reported that investigators suspect that the shootings were triggered by superiors' refusal to process Hasan's requests that some of his patients be prosecuted for war crimes based on statements they made during psychiatric sessions with him. Dallas attorney Patrick McLain, a former Marine, opined that Hasan may have been legally justified in reporting what patients disclosed, but that it was impossible to be sure without knowing exactly what was said, while fellow psychiatrists complained to superiors that Hasan's actions violated doctor-patient confidentiality.^[70]

Senator Joe Lieberman called for a probe by the Senate Committee on Homeland Security and Governmental Affairs, which he chairs. Lieberman said "it's premature to reach conclusions about what motivated Hasan ... I think it's very important to let the Army and the FBI go forward with this investigation before we reach any conclusions."^{[71][72]} Two weeks later, Lieberman labeled the shooting "the most destructive terrorist attack on America since September 11, 2001."^[73]

Michael Welner, M.D., a leading forensic psychiatrist with experience examining mass shooters, said that the shooting had elements common to both ideological and workplace mass shootings.^[74] Welner, who believed the motivation was to create a "spectacle", said that a trauma care worker, even one afflicted with stress, would not be expected to be homicidal toward his patients unless his ideology trumped his Hippocratic oath—and this was borne out in his shouting "*Allahu Akhbar*" as he killed the unarmed.^[74] An analyst of terror investigations, Carl Tobias, opined that the attack did not fit the profile of terrorism, and was more reminiscent of the Virginia Tech massacre.^[75]

However, Michael Scheuer, the retired former head of the Bin Laden Issue Station, and former U.S. Attorney General Michael Mukasey^[76] have called the event a terrorist attack,^[75] as has terrorism expert Walid Phares.^[77] Retired General Barry McCaffrey said on *Anderson Cooper 360°* that "it's starting to appear as if this was a domestic terrorist attack on fellow soldiers by a major in the Army who we educated for six years while he was giving off these vibes of disloyalty to his own force."^[78]

Some of Hasan's former colleagues have said he performed substandard work and occasionally unnerved them by expressing fervent Islamic views and deep opposition to the U.S.-led wars in Iraq and Afghanistan.^[79]

Brian Levin of the Center for the Study of Hate and Extremism wrote that the case sits at the crossroads of crime, terrorism and mental distress.^[80] He compared the possible role of religion to the beliefs of Scott Roeder, a Christian who murdered Dr. George Tiller, who practiced abortion. Such offenders "often self-radicalize from a volatile mix of personal distress, psychological issues, and an ideology that can be sculpted to justify and explain their anti-social leanings."^[80]

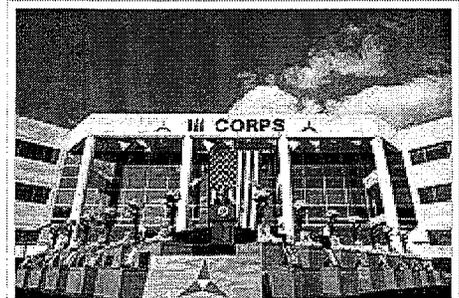
Hasan had shared his beliefs with associate Duane Reasoner Jr that "you're not supposed to have alliances with Jews or Christian or others, and if you are killed in the military fighting against Muslims, you will go to

hell." Reasoner further refused to condemn the attack as Hasan's brother, explaining "they were troops who were going to Afghanistan and Iraq to kill Muslims. I honestly have no pity for them."^[81]

Reaction

President Obama

The U.S. President's initial response to the attack came during a scheduled speech at the Tribal Nations Conference for America's 564 federally recognized Native American tribes. Obama was criticized by the media for being "insensitive", as he addressed the shooting only three minutes into his prepared speech, and then for not according it sufficient gravitas.^{[82][83][84]} Later, the President delivered the memorial eulogy for the victims. Reaction to his memorial speech was largely positive with some deeming it as one of his best.^{[85][86]} While others found the speech largely absent of emotion, delivered in workmanlike manner, and mostly a series of anecdotes describing the families and aspirations of each of the victims.^[87]



U.S. President Barack Obama at the memorial for the victims of the shootings at Fort Hood

Fort Hood personnel

Lt. Gen. Robert W. Cone, commander of III Corps at Fort Hood, said on the day of the shooting that terrorism was not being ruled out, but preliminary evidence did not suggest that the shooting was terrorism.^[88] Retired Army colonel, Terry Lee, who had worked with Hasan said he had indicated that he hoped Obama would withdraw U.S. troops from Iraq and Afghanistan, and had argued with military colleagues who supported the wars.^[88]

U.S. government

A spokesman for the Defense Department called the shooting an "isolated and tragic case",^[89] and Defense Secretary Robert Gates pledged that his department would do "everything in its power to help the Fort Hood community get through these difficult times."^[90] The chair of the Senate Armed Services Committee, Carl Levin, and numerous politicians, expressed condolences to the victims and their families.^{[1][90][91][92]}

Homeland Security Secretary Janet Napolitano stated "we object to—and do not believe—that anti-Muslim sentiment should emanate from this ... This was an individual who does not, obviously, represent the Muslim faith."^[93] Chief of Staff Gen. George W.

Casey, Jr. said "I'm concerned that this increased speculation could cause a backlash against some of our Muslim soldiers ... Our diversity, not only in our Army, but in our country, is a strength. And as horrific as this tragedy was, if our diversity becomes a casualty, I think that's worse."^[94]



Army Secretary John McHugh and Chief of Staff Gen. George W. Casey, Jr., discuss shootings at a press conference at Fort Hood the day after the shootings.

Veteran groups

In an open letter to President Obama, the Fort Hood Iraq Veterans Against the War chapter in part demanded that the military radically overhaul its mental health care system and halt the practice of repeated deployment of the same troops.^[95]

Gun control advocates

President of the Brady Campaign to Prevent Gun Violence, Paul Helmke, said that "This latest tragedy, at a heavily fortified army base, ought to convince more Americans to reject the argument that the solution to gun violence is to arm more people with more guns in more places."^[96] However, Lt. General Cone stated: "As a matter of practice, we do not carry weapons on Fort Hood. This is our home."^[97] Military weapons are only used for training or by base security, and personal weapons must be kept locked away by the provost marshal.^[98] Specialist Jerry Richard, a soldier working at the Readiness Center, expressed the opinion that this policy had left them unnecessarily vulnerable to violent assaults: "Overseas you are ready for it. But here you can't even defend yourself."^[99]

American Muslim groups

The Council on American-Islamic Relations condemned the shooting,^{[100][101]} Salman al-Ouda,^[102] a dissident Saudi cleric and former inspiration to Osama bin Laden, condemned the shooting saying the incident would have bad consequences: "...undoubtedly this man might have a psychological problem; he may be a psychiatrist but he [also] might have had psychological distress, as he was being commissioned to go to Iraq or Afghanistan, and he was capable of refusing to work whatever the consequences were." The senior analyst at the NEFA Foundation described Ouda's comments as "a good indication of how far on a tangent Anwar al-Awlaki is."^[103]

Anwar al-Awlaki

Main article: Anwar al-Awlaki

Soon after the attack, Anwar al-Awlaki posted praise for Hasan for the shooting on his website, and encouraged other Muslims serving in the military to "follow in the footsteps of men like Nidal."^[56] "Nidal Hasan is a hero, the fact that fighting against the U.S. army is an Islamic duty today cannot be disputed. Nidal has killed soldiers who were about to be deployed to Iraq and Afghanistan in order to kill Muslims."^[104] On April 6, 2010, *The New York Times* reported that President Obama had authorized the targeted killing of al-Awlaki.^[105] Adam Yahiyeh Gadahn, the American-born al-Qaeda spokesman, declared Hasan a "pioneer" whose actions at Fort Hood should be followed by other Muslims.^[106]

Hasan's family

Hasan's family has called the shooting "despicable and deplorable." They are currently working with Virginia law enforcement.^[107]

Investigation and prosecution

The criminal investigation is being conducted jointly by the FBI, the U.S. Army Criminal Investigation Command, and the Texas Rangers Division.^[108] As a member of the military, Hasan is subject to the jurisdiction of the Uniform Code of Military Justice (military law). He is being represented by Belton, Texas-based John P. Galligan, a criminal defense attorney and retired US Army Colonel.^[109] Hasan regained consciousness on November 9, but refused to talk to investigators.^[110] The investigative officer in charge of his article 32 hearing is Colonel James L. Pohl, who had previously lead the Abu Ghraib abuses, and is the Chief Presiding Officer of the Guantanamo military commissions.^[111]

On November 9, the FBI said that investigators believed Hasan had apparently acted alone. They disclosed that they had reviewed evidence which included 2008 conversations with an individual that an official identified as Anwar al-Awlaki, but said they did not find any evidence that Hasan had direct help or outside orders in the shootings.^[112] According to a November 11 press release, after preliminary examination of Hasan's computers and internet activity, they had found no information to indicate he had any co-conspirators or was part of a broader terrorist plot "at this point" of what they stressed were the "early stages" of the review.^[108] Though Hasan had frequented jihadist web sites promoting radical Islamic views, they said no e-mail communications with outside facilitators or known terrorists were found. Investigators were evaluating reports that, in 2001, Hasan had attended a mosque in Virginia once attended by two of the 9/11 hijackers and headed by Anwar al-Awlaki, who had been accused of aiding the 9/11 plot. Investigators were looking at potential inspiration, to determine if al-Awlaki's teachings could have radicalized Hasan.^[113]

Army officials stated "Right now we're operating on the belief that he acted alone and had no help". No motive for the shootings was offered, but they believed Hasan had authored an Internet posting that appeared to support suicide bombings.^[114] Sen. Lieberman opined that Hasan was clearly under personal stress and may have turned to Islamic extremism. Unofficially, Rep. John Carter remarked "When he shouted 'Allahu Akbar,' he gave a clear indication that his faith or Muslim view of the world had something to do with it."^[114]

In pressing charges on Hasan, the Department of Defense and the DoJ agreed that Hasan would be prosecuted in a military court, which observers noted was consistent with investigators concluding he had acted alone.^[115] During a November 21 hearing in Hasan's hospital room, a magistrate ruled that there was probable cause that Hasan committed the November 5 shooting, and ordered that he be held in pre-trial confinement after he is released from hospital care.^[93] On November 12 and December 2, respectively, Hasan was charged with 13 counts of premeditated murder and 32 counts of attempted murder by the Army; he may face additional charges at court-martial.^{[5][6]}

A 14th count of murder for the death of the unborn child of Francheska Velez has not been filed.^[116] Such charge is available to prosecutors under the Unborn Victims of Violence Act and Article 119a of the Uniform Code of Military Justice.^[117] If civilian prosecutors indict him for being part of a terrorist plot, it could justify moving all or part of his case into federal criminal courts under U.S. anti-terrorism laws.^{[118][119]} The military justice system rarely carries out capital punishment—and no executions have been carried out since 1961,^{[119][120]} although, no incidents involving mass murder have been prosecuted by the military since then. (From 1916 to 1961, the U.S. Army executed 135 people.)^[121] A Rasmussen national survey found that 65% of Americans favored the death penalty in Hasan's case, and that 60% want the case investigated as an act of terrorism.^[122]

Internal investigations

Main article: Joint Terrorism Task Force

The FBI noted that Hasan had first been brought to their attention in December 2008 by a Joint Terrorism Task Force (JTTF). Communications between Hasan and al-Awlaki, and other similar communications, were reviewed and considered to be consistent with Hasan's research on radical beliefs at the Walter Reed Medical Center. "Because the content of the communications was explainable by his research and nothing else derogatory was found, the JTTF concluded that Major Hasan was not involved in terrorist activities or terrorist planning." However, both the FBI and the Department of Defense plan to review if this assessment was handled correctly.^[115]

FBI Director Robert Mueller appointed William Webster, a former director of the FBI, to conduct an independent FBI review of the bureau's handling of possible warning signs from Hasan. The review is expected to be long-term and in-depth, with Webster selected for the job due to being, as Mueller put it, "uniquely qualified" for such a review.^[123]

On January 15, 2010, the Department of Defense released the findings of the departmental investigation, which found that the Department was unprepared to defend against internal threats. Secretary Robert Gates said that previous incidents had not drawn enough attention to workplace violence and "self-radicalization" within the military. He also suggested that some officials may be held responsible for not drawing attention to Hasan prior to the shooting.^[124] The Department report did not touch upon Hasan's motivations, including his multiple contacts with Anwar al-Awlaki, and his yelling "*Allahu Akhbar*" as he began the attack.^[125]

James Corum, a retired Army Reserve Lieutenant Colonel and Dean at the Baltic Defence College in Estonia, called the Defense Department report "a travesty", for failing to mention Hasan's devotion to Islam and his radicalization prior to the attack.^[126] Texas Representative John Carter was also critical of the report, saying he felt the government was "afraid to be accused of profiling somebody".^[127] John Lehman, a member of the 9/11 Commission and Secretary of the Navy under Ronald Reagan, said he felt that the report "shows you how deeply entrenched the values of political correctness have become."^[125] Similarly, columnist Debra Saunders of the *San Francisco Chronicle* wrote: "Even ... if the report's purpose was to craft lessons to prevent future attacks, how could they leave out radical Islam?"^[128] The leaders of the investigation, former Secretary of the Army Togo West and retired Admiral Vernon Clark, responded to criticism by saying their "concern is with actions and effects, not necessarily with motivations", and that they did not want to conflict with the criminal investigation on Hasan that was under way.^[125]

In February 2010 the *Boston Globe* obtained a confidential internal report detailing results of the Army's investigation. According to the *Globe*, the report concluded officers within the Army were aware of Hasan's tendencies toward radical Islam since 2005, and adduced one incident in 2007 in which Hasan gave a classroom presentation titled "Is the War on Terrorism a War on Islam: An Islamic Perspective". The instructor interrupted Hasan's presentation as it appeared he was justifying terrorism, according to the *Globe*. Despite receiving complaints about this presentation, and other statements suggestive of his conflicted loyalties, Hasan's superior officers took no action, believing Hasan's comments were protected under the First Amendment and that having a Muslim psychiatrist contributed to diversity. However, the investigation noted Hasan's statements might have been grounds for removing him from service as the First Amendment did not apply to soldiers the same way as for civilians.^[129]

Reports on terrorism

On September 10, 2010, the Bipartisan Policy Center released the report "Assessing the Terrorist Threat" which concluded that "in 2009 at least 43 American citizens or residents aligned with Sunni militant groups or their ideology were charged or convicted of terrorism crimes in the U.S. or elsewhere, the highest number in any year since 9/11". They included Fort Hood and the 2009 Little Rock recruiting office shooting as the two successful terrorist attacks, even though neither case has been prosecuted as such.^[130]

See also

- 1995 William Kreutzer, Jr. case – convicted of killing an officer and wounding 17 other soldiers at Fort Bragg, North Carolina.
- 2003 Hasan Akbar case – convicted of murder of two officers at Camp Pennsylvania, Kuwait.
- 2007 Fort Dix attack plot – six radical Islamist men convicted of plotting an attack on Fort Dix, New Jersey.
- 2009 Little Rock recruiting office shooting - Islamist shooter of two recruiters had returned from Yemen; stated he shot soldiers on behalf of Al-Qaeda in the Arabian Peninsula.
- 2009 Camp Liberty killings – Sgt. John M. Russell charged with five counts of murder and one count of aggravated assault for attack at Camp Liberty, Iraq.
- 2009 Lloyd R. Woodson case—Arrested with military-grade illegal weapons he intended to use in a violent crime, and a detailed map of the Fort Drum military installation
- Department of the Army Civilian Police

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External links

- Fort Hood (<http://www.hood.army.mil/>) official U.S. Army website
- Fort Hood Sentinel (<http://www.forthoodsentinel.com/story.php?id=2426>) Fort Hood newspaper
- Fort Hood Shootings (<http://www.cnn.com/SPECIALS/2009/fort.hood.shootings/>) ongoing coverage from *CNN*
- Fort Hood Army Base (Texas) (http://topics.nytimes.com/topics/reference/timestopics/subjects/f/fort_hood_texas/index.html) and Nidal Malik Hasan (http://topics.nytimes.com/top/reference/timestopics/people/h/nidal_malik_hasan/index.html) ongoing coverage from *The New York Times*
- Shootings at Fort Hood (<http://www.washingtonpost.com/wp-srv/special/nation/fort-hood.html>) ongoing coverage from *The Washington Post*
- Presentation on Islam by Nidal Malik Hasan (<http://www.washingtonpost.com/wp-dyn/content/gallery/2009/11/10/GA2009111000920.html?hpid=topnews>) (*Washington Post* website)
- Shooting Spree at Fort Hood (<http://www.life.com/image/first/in-gallery/36142/shooting-spree-at-fort-hood>) – image slideshow by *Life magazine*

Retrieved from "http://en.wikipedia.org/wiki/Fort_Hood_shooting"

Categories: 2009 murders in the United States | Anwar al-Awlaki | Deaths by firearm in Texas | History of the United States Army | Islam-related violence in the United States | Massacres in the United States | Military in Texas | Murder in Texas | Spree shootings in the United States

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Exhibit 5



Occupational
Safety and Health
Administration

www.osha.gov

Guidelines for
**Preventing Workplace
Violence for Health Care &
Social Service Workers**

OSHA 3148-01R 2004

This informational booklet provides a general overview of a particular topic related to OSHA standards. It does not alter or determine compliance responsibilities in OSHA standards or the *Occupational Safety and Health Act of 1970*. Because interpretations and enforcement policy may change over time, you should consult current OSHA administrative interpretations and decisions by the Occupational Safety and Health Review Commission and the Courts for additional guidance on OSHA compliance requirements.

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Guidelines for Preventing Workplace Violence for Health Care & Social Service Workers



U.S. Department of Labor

Occupational Safety and Health Administration

OSHA 3148-01R

2004

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Notice

These guidelines are not a new standard or regulation. They are advisory in nature, informational in content and intended to help employers establish effective workplace violence prevention programs adapted to their specific worksites. The guidelines do not address issues related to patient care. They are performance-oriented, and how employers implement them will vary based on the site's hazard analysis.

Violence inflicted on employees may come from many sources—external parties such as robbers or muggers and internal parties such as coworkers and patients. These guidelines address only the violence inflicted by patients or clients against staff. However, OSHA suggests that workplace violence policies indicate a zero-tolerance for all forms of violence from all sources.

The *Occupational Safety and Health Act of 1970 (OSH Act)*¹ mandates that, in addition to compliance with hazard-specific standards, all employers have a general duty to provide their employees with a workplace free from recognized hazards likely to cause death or serious physical harm. OSHA will rely on Section 5(a)(1) of the *OSH Act*, the "General Duty Clause,"² for enforcement authority. Failure to implement these guidelines is not in itself a violation of the General Duty Clause. However, employers can be cited for violating the General Duty Clause if there is a recognized hazard of workplace violence in their establishments and they do nothing to prevent or abate it.

When Congress passed the *OSH Act*, it recognized that workers' compensation systems provided state-specific remedies for job-related injuries and illnesses. Determining what constitutes a compensable claim and the rate of compensation were left to the states, their legislatures and their courts. Congress acknowledged this point in Section 4(b)(4) of the *OSH Act*, when it stated categorically: "Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law. . ."³ Therefore,

¹ Public Law 91-596, December 29, 1970; and as amended by P.L. 101-552, Section 3101, November 5, 1990.

² "Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

³ 29 U.S.C. 653(b)(4).

these non-mandatory guidelines should not be viewed as enlarging or diminishing the scope of work-related injuries. The guidelines are intended for use in any state and without regard to whether any injuries or fatalities are later determined to be compensable.

Acknowledgments

Many people have contributed to these guidelines. They include health care, social service and employee assistance experts; researchers; educators; unions and other stakeholders; OSHA professionals; and the National Institute for Occupational Safety and Health (NIOSH).

Also, several states have developed relevant standards or recommendations, such as California OSHA's *CAL/OSHA Guidelines for Workplace Security and Guidelines for Security and Safety of Health Care and Community Service Workers*; New Jersey Public Employees Occupational Safety and Health's *Guidelines on Measures and Safeguards in Dealing with Violent or Aggressive Behavior in Public Sector Health Care Facilities*; and the State of Washington Department of Labor and Industries' *Violence in Washington Workplaces and Study of Assaults on Staff in Washington State Psychiatric Hospitals*. Other organizations with relevant recommendations include the Joint Commission on Accreditation of Health Care Organizations' *Comprehensive Accreditation Manuals for Hospitals*, the Metropolitan Chicago Healthcare Council's *Guidelines for Dealing with Violence in Health Care*, and the American Nurses Association's *Promoting Safe Work Environments for Nurses*. These and other agencies have information available to assist employers.

Introduction

Workplace violence affects health care and social service workers.

The National Institute for Occupational Safety and Health (NIOSH) defines workplace violence as "violent acts (including physical assaults and threats of assaults) directed toward persons at work or on duty."⁴ This includes terrorism as illustrated by the

⁴CDC/NIOSH. Violence. Occupational Hazards in Hospitals. 2002.

terrorist acts of September 11, 2001 that resulted in the deaths of 2,886 workers in New York, Virginia and Pennsylvania. Although these guidelines do not address terrorism specifically, this type of violence remains a threat to U.S. workplaces.

For many years, health care and social service workers have faced a significant risk of job-related violence. Assaults represent a serious safety and health hazard within these industries. OSHA's violence prevention guidelines provide the agency's recommendations for reducing workplace violence, developed following a careful review of workplace violence studies, public and private violence prevention programs and input from stakeholders. OSHA encourages employers to establish violence prevention programs and to track their progress in reducing work-related assaults. Although not every incident can be prevented, many can, and the severity of injuries sustained by employees can be reduced. Adopting practical measures such as those outlined here can significantly reduce this serious threat to worker safety.

Extent of the problem

The Bureau of Labor Statistics (BLS) reports that there were 69 homicides in the health services from 1996 to 2000. Although workplace homicides may attract more attention, the vast majority of workplace violence consists of non-fatal assaults. BLS data shows that in 2000, 48 percent of all non-fatal injuries from occupational assaults and violent acts occurred in health care and social services. Most of these occurred in hospitals, nursing and personal care facilities, and residential care services. Nurses, aides, orderlies and attendants suffered the most non-fatal assaults resulting in injury.

Injury rates also reveal that health care and social service workers are at high risk of violent assault at work. BLS rates measure the number of events per 10,000 full-time workers—in this case, assaults resulting in injury. In 2000, health service workers overall had an incidence rate of 9.3 for injuries resulting from assaults and violent acts. The rate for social service workers was 15, and for nursing and personal care facility workers, 25. This compares to an overall private sector injury rate of 2.

The Department of Justice's (DOJ) National Crime Victimization Survey for 1993 to 1999 lists average annual rates of non-fatal violent crime by occupation. The average annual rate for non-fatal

violent crime for all occupations is 12.6 per 1,000 workers. The average annual rate for physicians is 16.2; for nurses, 21.9; for mental health professionals, 68.2; and for mental health custodial workers, 69. (Note: These data do not compare directly to the BLS figures because DOJ presents violent incidents per 1,000 workers and BLS displays injuries involving days away from work per 10,000 workers. Both sources, however, reveal the same high risk for health care and social service workers.)

As significant as these numbers are, the actual number of incidents is probably much higher. Incidents of violence are likely to be underreported, perhaps due in part to the persistent perception within the health care industry that assaults are part of the job. Underreporting may reflect a lack of institutional reporting policies, employee beliefs that reporting will not benefit them or employee fears that employers may deem assaults the result of employee negligence or poor job performance.

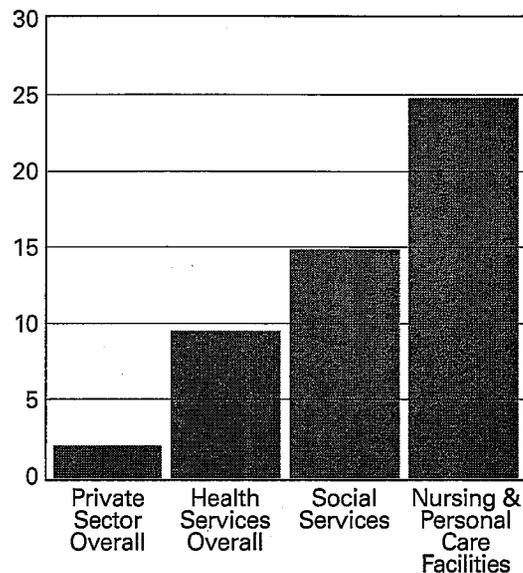
The risk factors

Health care and social service workers face an increased risk of work-related assaults stemming from several factors. These include:

- The prevalence of handguns and other weapons among patients, their families or friends;
- The increasing use of hospitals by police and the criminal justice system for criminal holds and the care of acutely disturbed, violent individuals;
- The increasing number of acute and chronic mentally ill patients being released from hospitals without follow-up care (these

Incidence rates for nonfatal assaults and violent acts by industry, 2000

Incidence rate per 10,000 full-time workers



Source: U.S. Department of Labor, Bureau of Labor Statistics. (2001). *Survey of Occupational Injuries and Illnesses, 2000*.

patients have the right to refuse medicine and can no longer be hospitalized involuntarily unless they pose an immediate threat to themselves or others);

- The availability of drugs or money at hospitals, clinics and pharmacies, making them likely robbery targets;
- Factors such as the unrestricted movement of the public in clinics and hospitals and long waits in emergency or clinic areas that lead to client frustration over an inability to obtain needed services promptly;
- The increasing presence of gang members, drug or alcohol abusers, trauma patients or distraught family members;
- Low staffing levels during times of increased activity such as mealtimes, visiting times and when staff are transporting patients;
- Isolated work with clients during examinations or treatment;
- Solo work, often in remote locations with no backup or way to get assistance, such as communication devices or alarm systems (this is particularly true in high-crime settings);
- Lack of staff training in recognizing and managing escalating hostile and assaultive behavior; and
- Poorly lit parking areas.

Overview of Guidelines

In January 1989, OSHA published voluntary, generic safety and health program management guidelines for all employers to use as a foundation for their safety and health programs, which can include workplace violence prevention programs.⁵ OSHA's violence prevention guidelines build on these generic guidelines by identifying common risk factors and describing some feasible solutions. Although not exhaustive, the workplace violence guidelines include policy recommendations and practical corrective methods to help prevent and mitigate the effects of workplace violence.

⁵OSHA's Safety and Health Program Management Guidelines (54 *Federal Register* (16):3904-3916, January 26, 1989).

The goal is to eliminate or reduce worker exposure to conditions that lead to death or injury from violence by implementing effective security devices and administrative work practices, among other control measures.

The guidelines cover a broad spectrum of workers who provide health care and social services in psychiatric facilities, hospital emergency departments, community mental health clinics, drug abuse treatment clinics, pharmacies, community-care facilities and long-term care facilities. They include physicians, registered nurses, pharmacists, nurse practitioners, physicians' assistants, nurses' aides, therapists, technicians, public health nurses, home health care workers, social workers, welfare workers and emergency medical care personnel. The guidelines may also be useful in reducing risks for ancillary personnel such as maintenance, dietary, clerical and security staff in the health care and social service industries.

Violence Prevention Programs

A written program for job safety and security, incorporated into the organization's overall safety and health program, offers an effective approach for larger organizations. In smaller establishments, the program does not need to be written or heavily documented to be satisfactory.

What is needed are clear goals and objectives to prevent workplace violence suitable for the size and complexity of the workplace operation and adaptable to specific situations in each establishment. Employers should communicate information about the prevention program and startup date to all employees.

At a minimum, workplace violence prevention programs should:

- Create and disseminate a clear policy of zero tolerance for workplace violence, verbal and nonverbal threats and related actions. Ensure that managers, supervisors, coworkers, clients, patients and visitors know about this policy.

-
- Ensure that no employee who reports or experiences workplace violence faces reprisals.⁶
 - Encourage employees to promptly report incidents and suggest ways to reduce or eliminate risks. Require records of incidents to assess risk and measure progress.
 - Outline a comprehensive plan for maintaining security in the workplace. This includes establishing a liaison with law enforcement representatives and others who can help identify ways to prevent and mitigate workplace violence.
 - Assign responsibility and authority for the program to individuals or teams with appropriate training and skills. Ensure that adequate resources are available for this effort and that the team or responsible individuals develop expertise on workplace violence prevention in health care and social services.
 - Affirm management commitment to a worker-supportive environment that places as much importance on employee safety and health as on serving the patient or client.
 - Set up a company briefing as part of the initial effort to address issues such as preserving safety, supporting affected employees and facilitating recovery.

Elements of an effective violence prevention program

The five main components of any effective safety and health program also apply to the prevention of workplace violence:

- Management commitment and employee involvement;
- Worksite analysis;
- Hazard prevention and control;
- Safety and health training; and
- Recordkeeping and program evaluation.

⁶Section 11 (c)(1) of the OSH Act applies to protected activity involving the hazard of workplace violence as it does for other health and safety matters:

"No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act."

Management Commitment and Employee Involvement

Management commitment and employee involvement are complementary and essential elements of an effective safety and health program. To ensure an effective program, management and frontline employees must work together, perhaps through a team or committee approach. If employers opt for this strategy, they must be careful to comply with the applicable provisions of the *National Labor Relations Act*.⁷

Management commitment, including the endorsement and visible involvement of top management, provides the motivation and resources to deal effectively with workplace violence. This commitment should include:

- Demonstrating organizational concern for employee emotional and physical safety and health;
- Exhibiting equal commitment to the safety and health of workers and patients/clients;
- Assigning responsibility for the various aspects of the workplace violence prevention program to ensure that all managers, supervisors and employees understand their obligations;
- Allocating appropriate authority and resources to all responsible parties;
- Maintaining a system of accountability for involved managers, supervisors and employees;
- Establishing a comprehensive program of medical and psychological counseling and debriefing for employees experiencing or witnessing assaults and other violent incidents; and
- Supporting and implementing appropriate recommendations from safety and health committees.

Employee involvement and feedback enable workers to develop and express their own commitment to safety and health and provide useful information to design, implement and evaluate the program.

⁷29 U.S.C. 158(a)(2).

Employee involvement should include:

- Understanding and complying with the workplace violence prevention program and other safety and security measures;
- Participating in employee complaint or suggestion procedures covering safety and security concerns;
- Reporting violent incidents promptly and accurately;
- Participating in safety and health committees or teams that receive reports of violent incidents or security problems, make facility inspections and respond with recommendations for corrective strategies; and
- Taking part in a continuing education program that covers techniques to recognize escalating agitation, assaultive behavior or criminal intent and discusses appropriate responses.

Worksite Analysis

Value of a worksite analysis

A worksite analysis involves a step-by-step, commonsense look at the workplace to find existing or potential hazards for workplace violence. This entails reviewing specific procedures or operations that contribute to hazards and specific areas where hazards may develop. A threat assessment team, patient assault team, similar task force or coordinator may assess the vulnerability to workplace violence and determine the appropriate preventive actions to be taken. This group may also be responsible for implementing the workplace violence prevention program. The team should include representatives from senior management, operations, employee assistance, security, occupational safety and health, legal and human resources staff.

The team or coordinator can review injury and illness records and workers' compensation claims to identify patterns of assaults that could be prevented by workplace adaptation, procedural changes or employee training. As the team or coordinator identifies appropriate controls, they should be instituted.

Focus of a worksite analysis

The recommended program for worksite analysis includes, but is not limited to:

- Analyzing and tracking records;
- Screening surveys; and
- Analyzing workplace security.

Records analysis and tracking

This activity should include reviewing medical, safety, workers' compensation and insurance records—including the OSHA Log of Work-Related Injury and Illness (OSHA Form 300), if the employer is required to maintain one—to pinpoint instances of workplace violence. Scan unit logs and employee and police reports of incidents or near-incidents of assaultive behavior to identify and analyze trends in assaults relative to particular:

- Departments;
- Units;
- Job titles;
- Unit activities;
- Workstations; and
- Time of day.

Tabulate these data to target the frequency and severity of incidents to establish a baseline for measuring improvement. Monitor trends and analyze incidents. Contacting similar local businesses, trade associations and community and civic groups is one way to learn about their experiences with workplace violence and to help identify trends. Use several years of data, if possible, to trace trends of injuries and incidents of actual or potential workplace violence.

Value of screening surveys

One important screening tool is an employee questionnaire or survey to get employees' ideas on the potential for violent incidents and to identify or confirm the need for improved security measures. Detailed baseline screening surveys can help pinpoint tasks that put

employees at risk. Periodic surveys—conducted at least annually or whenever operations change or incidents of workplace violence occur—help identify new or previously unnoticed risk factors and deficiencies or failures in work practices, procedures or controls. Also, the surveys help assess the effects of changes in the work processes. The periodic review process should also include feedback and follow-up.

Independent reviewers, such as safety and health professionals, law enforcement or security specialists and insurance safety auditors, may offer advice to strengthen programs. These experts can also provide fresh perspectives to improve a violence prevention program.

Conducting a workplace security analysis

The team or coordinator should periodically inspect the workplace and evaluate employee tasks to identify hazards, conditions, operations and situations that could lead to violence.

To find areas requiring further evaluation, the team or coordinator should:

- Analyze incidents, including the characteristics of assailants and victims, an account of what happened before and during the incident, and the relevant details of the situation and its outcome. When possible, obtain police reports and recommendations.
- Identify jobs or locations with the greatest risk of violence as well as processes and procedures that put employees at risk of assault, including how often and when.
- Note high-risk factors such as types of clients or patients (for example, those with psychiatric conditions or who are disoriented by drugs, alcohol or stress); physical risk factors related to building layout or design; isolated locations and job activities; lighting problems; lack of phones and other communication devices; areas of easy, unsecured access; and areas with previous security problems.
- Evaluate the effectiveness of existing security measures, including engineering controls. Determine if risk factors have been reduced or eliminated and take appropriate action.

Hazard Prevention and Control

After hazards are identified through the systematic worksite analysis, the next step is to design measures through engineering or administrative and work practices to prevent or control these hazards. If violence does occur, post-incident response can be an important tool in preventing future incidents.

Engineering controls and workplace adaptations to minimize risk

Engineering controls remove the hazard from the workplace or create a barrier between the worker and the hazard. There are several measures that can effectively prevent or control workplace hazards, such as those described in the following paragraphs. The selection of any measure, of course, should be based on the hazards identified in the workplace security analysis of each facility.

Among other options, employers may choose to:

- Assess any plans for new construction or physical changes to the facility or workplace to eliminate or reduce security hazards.
- Install and regularly maintain alarm systems and other security devices, panic buttons, hand-held alarms or noise devices, cellular phones and private channel radios where risk is apparent or may be anticipated. Arrange for a reliable response system when an alarm is triggered.
- Provide metal detectors—installed or hand-held, where appropriate—to detect guns, knives or other weapons, according to the recommendations of security consultants.
- Use a closed-circuit video recording for high-risk areas on a 24-hour basis. Public safety is a greater concern than privacy in these situations.
- Place curved mirrors at hallway intersections or concealed areas.
- Enclose nurses' stations and install deep service counters or bullet-resistant, shatter-proof glass in reception, triage and admitting areas or client service rooms.
- Provide employee "safe rooms" for use during emergencies.
- Establish "time-out" or seclusion areas with high ceilings with-

out grids for patients who “act out” and establish separate rooms for criminal patients.

- Provide comfortable client or patient waiting rooms designed to minimize stress.
- Ensure that counseling or patient care rooms have two exits.
- Lock doors to staff counseling rooms and treatment rooms to limit access.
- Arrange furniture to prevent entrapment of staff.
- Use minimal furniture in interview rooms or crisis treatment areas and ensure that it is lightweight, without sharp corners or edges and affixed to the floor, if possible. Limit the number of pictures, vases, ashtrays or other items that can be used as weapons.
- Provide lockable and secure bathrooms for staff members separate from patient/client and visitor facilities.
- Lock all unused doors to limit access, in accordance with local fire codes.
- Install bright, effective lighting, both indoors and outdoors.
- Replace burned-out lights and broken windows and locks.
- Keep automobiles well maintained if they are used in the field.
- Lock automobiles at all times.

Administrative and work practice controls to minimize risk

Administrative and work practice controls affect the way staff perform jobs or tasks. Changes in work practices and administrative procedures can help prevent violent incidents. Some options for employers are to:

- State clearly to patients, clients and employees that violence is not permitted or tolerated.
- Establish liaison with local police and state prosecutors. Report all incidents of violence. Give police physical layouts of facilities to expedite investigations.
- Require employees to report all assaults or threats to a supervisor or manager (for example, through a confidential interview). Keep log books and reports of such incidents to help determine any necessary actions to prevent recurrences.

- Advise employees of company procedures for requesting police assistance or filing charges when assaulted and help them do so, if necessary.
- Provide management support during emergencies. Respond promptly to all complaints.
- Set up a trained response team to respond to emergencies.
- Use properly trained security officers to deal with aggressive behavior. Follow written security procedures.
- Ensure that adequate and properly trained staff are available to restrain patients or clients, if necessary.
- Provide sensitive and timely information to people waiting in line or in waiting rooms. Adopt measures to decrease waiting time.
- Ensure that adequate and qualified staff are available at all times. The times of greatest risk occur during patient transfers, emergency responses, mealtimes and at night. Areas with the greatest risk include admission units and crisis or acute care units.
- Institute a sign-in procedure with passes for visitors, especially in a newborn nursery or pediatric department. Enforce visitor hours and procedures.
- Establish a list of "restricted visitors" for patients with a history of violence or gang activity. Make copies available at security checkpoints, nurses' stations and visitor sign-in areas.
- Review and revise visitor check systems, when necessary. Limit information given to outsiders about hospitalized victims of violence.
- Supervise the movement of psychiatric clients and patients throughout the facility.
- Control access to facilities other than waiting rooms, particularly drug storage or pharmacy areas.
- Prohibit employees from working alone in emergency areas or walk-in clinics, particularly at night or when assistance is unavailable. Do not allow employees to enter seclusion rooms alone.
- Establish policies and procedures for secured areas and emergency evacuations.

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- Determine the behavioral history of new and transferred patients to learn about any past violent or assaultive behaviors.
 - Establish a system—such as chart tags, log books or verbal census reports—to identify patients and clients with assaultive behavior problems. Keep in mind patient confidentiality and worker safety issues. Update as needed.
 - Treat and interview aggressive or agitated clients in relatively open areas that still maintain privacy and confidentiality (such as rooms with removable partitions).
 - Use case management conferences with coworkers and supervisors to discuss ways to effectively treat potentially violent patients.
 - Prepare contingency plans to treat clients who are “acting out” or making verbal or physical attacks or threats. Consider using certified employee assistance professionals or in-house social service or occupational health service staff to help diffuse patient or client anger.
 - Transfer assaultive clients to acute care units, criminal units or other more restrictive settings.
 - Ensure that nurses and physicians are not alone when performing intimate physical examinations of patients.
 - Discourage employees from wearing necklaces or chains to help prevent possible strangulation in confrontational situations. Urge community workers to carry only required identification and money.
 - Survey the facility periodically to remove tools or possessions left by visitors or maintenance staff that could be used inappropriately by patients.
 - Provide staff with identification badges, preferably without last names, to readily verify employment.
 - Discourage employees from carrying keys, pens or other items that could be used as weapons.
 - Provide staff members with security escorts to parking areas in evening or late hours. Ensure that parking areas are highly visible, well lit and safely accessible to the building.
 - Use the “buddy system,” especially when personal safety may be threatened. Encourage home health care providers, social service workers and others to avoid threatening situations.

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- Advise staff to exercise extra care in elevators, stairwells and unfamiliar residences; leave the premises immediately if there is a hazardous situation; or request police escort if needed.
 - Develop policies and procedures covering home health care providers, such as contracts on how visits will be conducted, the presence of others in the home during the visits and the refusal to provide services in a clearly hazardous situation.
 - Establish a daily work plan for field staff to keep a designated contact person informed about their whereabouts throughout the workday. Have the contact person follow up if an employee does not report in as expected.

Employer responses to incidents of violence

Post-incident response and evaluation are essential to an effective violence prevention program. All workplace violence programs should provide comprehensive treatment for employees who are victimized personally or may be traumatized by witnessing a workplace violence incident. Injured staff should receive prompt treatment and psychological evaluation whenever an assault takes place, regardless of its severity. Provide the injured transportation to medical care if it is not available onsite.

Victims of workplace violence suffer a variety of consequences in addition to their actual physical injuries. These may include:

- Short- and long-term psychological trauma;
- Fear of returning to work;
- Changes in relationships with coworkers and family;
- Feelings of incompetence, guilt, powerlessness; and
- Fear of criticism by supervisors or managers.

Consequently, a strong follow-up program for these employees will not only help them to deal with these problems but also help prepare them to confront or prevent future incidents of violence.

Several types of assistance can be incorporated into the post-incident response. For example, trauma-crisis counseling, critical-incident stress debriefing or employee assistance programs may be provided to assist victims. Certified employee assistance professionals, psychologists, psychiatrists, clinical nurse specialists

or social workers may provide this counseling or the employer may refer staff victims to an outside specialist. In addition, the employer may establish an employee counseling service, peer counseling or support groups.

Counselors should be well trained and have a good understanding of the issues and consequences of assaults and other aggressive, violent behavior. Appropriate and promptly rendered post-incident debriefings and counseling reduce acute psychological trauma and general stress levels among victims and witnesses. In addition, this type of counseling educates staff about workplace violence and positively influences workplace and organizational cultural norms to reduce trauma associated with future incidents.

Safety and Health Training

Training and education ensure that all staff are aware of potential security hazards and how to protect themselves and their coworkers through established policies and procedures.

Training for all employees

Every employee should understand the concept of “universal precautions for violence” — that is, that violence should be expected but can be avoided or mitigated through preparation. Frequent training also can reduce the likelihood of being assaulted.

Employees who may face safety and security hazards should receive formal instruction on the specific hazards associated with the unit or job and facility. This includes information on the types of injuries or problems identified in the facility and the methods to control the specific hazards. It also includes instructions to limit physical interventions in workplace altercations whenever possible, unless enough staff or emergency response teams and security personnel are available. In addition, all employees should be trained to behave compassionately toward coworkers when an incident occurs.

The training program should involve all employees, including supervisors and managers.

New and reassigned employees should receive an initial orientation before being assigned their job duties. Visiting staff, such as physicians, should receive the same training as permanent staff. Qualified trainers should instruct at the comprehension level

appropriate for the staff. Effective training programs should involve role playing, simulations and drills.

Topics may include management of assaultive behavior, professional assault-response training, police assault-avoidance programs or personal safety training such as how to prevent and avoid assaults. A combination of training programs may be used, depending on the severity of the risk.

Employees should receive required training annually. In large institutions, refresher programs may be needed more frequently, perhaps monthly or quarterly, to effectively reach and inform all employees.

What training should cover

The training should cover topics such as:

- The workplace violence prevention policy;
- Risk factors that cause or contribute to assaults;
- Early recognition of escalating behavior or recognition of warning signs or situations that may lead to assaults;
- Ways to prevent or diffuse volatile situations or aggressive behavior, manage anger and appropriately use medications as chemical restraints;
- A standard response action plan for violent situations, including the availability of assistance, response to alarm systems and communication procedures;
- Ways to deal with hostile people other than patients and clients, such as relatives and visitors;
- Progressive behavior control methods and safe methods to apply restraints;
- The location and operation of safety devices such as alarm systems, along with the required maintenance schedules and procedures;
- Ways to protect oneself and coworkers, including use of the "buddy system;"
- Policies and procedures for reporting and recordkeeping;
- Information on multicultural diversity to increase staff sensitivity to racial and ethnic issues and differences; and

- Policies and procedures for obtaining medical care, counseling, workers' compensation or legal assistance after a violent episode or injury.

Training for supervisors and managers

Supervisors and managers need to learn to recognize high-risk situations, so they can ensure that employees are not placed in assignments that compromise their safety. They also need training to ensure that they encourage employees to report incidents.

Supervisors and managers should learn how to reduce security hazards and ensure that employees receive appropriate training. Following training, supervisors and managers should be able to recognize a potentially hazardous situation and to make any necessary changes in the physical plant, patient care treatment program and staffing policy and procedures to reduce or eliminate the hazards.

Training for security personnel

Security personnel need specific training from the hospital or clinic, including the psychological components of handling aggressive and abusive clients, types of disorders and ways to handle aggression and defuse hostile situations.

The training program should also include an evaluation. At least annually, the team or coordinator responsible for the program should review its content, methods and the frequency of training. Program evaluation may involve supervisor and employee interviews, testing and observing and reviewing reports of behavior of individuals in threatening situations.

Recordkeeping and Program Evaluation

How employers can determine program effectiveness

Recordkeeping and evaluation of the violence prevention program are necessary to determine its overall effectiveness and identify any deficiencies or changes that should be made.

Records employers should keep

Recordkeeping is essential to the program's success. Good records help employers determine the severity of the problem,

evaluate methods of hazard control and identify training needs. Records can be especially useful to large organizations and for members of a business group or trade association who “pool” data. Records of injuries, illnesses, accidents, assaults, hazards, corrective actions, patient histories and training can help identify problems and solutions for an effective program.

Important Records:

- OSHA Log of Work-Related Injury and Illness (OSHA Form 300). Employers who are required to keep this log must record any new work-related injury that results in death, days away from work, days of restriction or job transfer, medical treatment beyond first aid, loss of consciousness or a significant injury diagnosed by a licensed health care professional. Injuries caused by assaults must be entered on the log if they meet the recording criteria. All employers must report, within 24 hours, a fatality or an incident that results in the hospitalization of three or more employees.⁸
- Medical reports of work injury and supervisors’ reports for each recorded assault. These records should describe the type of assault, such as an unprovoked sudden attack or patient-to-patient altercation; who was assaulted; and all other circumstances of the incident. The records should include a description of the environment or location, potential or actual cost, lost work time that resulted and the nature of injuries sustained. These medical records are confidential documents and should be kept in a locked location under the direct responsibility of a health care professional.
- Records of incidents of abuse, verbal attacks or aggressive behavior that may be threatening, such as pushing or shouting and acts of aggression toward other clients. This may be kept as part of an assaultive incident report. Ensure that the affected department evaluates these records routinely. (See sample violence incident forms in Appendix B.)
- Information on patients with a history of past violence, drug abuse or criminal activity recorded on the patient’s chart. All staff who care for a potentially aggressive, abusive or violent client

⁸29 CFR Part 1904, revised 2001.

should be aware of the person's background and history. Log the admission of violent patients to help determine potential risks.

- Documentation of minutes of safety meetings, records of hazard analyses and corrective actions recommended and taken.
- Records of all training programs, attendees and qualifications of trainers.

Elements of a program evaluation

As part of their overall program, employers should evaluate their safety and security measures. Top management should review the program regularly, and with each incident, to evaluate its success. Responsible parties (including managers, supervisors and employees) should reevaluate policies and procedures on a regular basis to identify deficiencies and take corrective action.

Management should share workplace violence prevention evaluation reports with all employees. Any changes in the program should be discussed at regular meetings of the safety committee, union representatives or other employee groups.

All reports should protect employee confidentiality either by presenting only aggregate data or by removing personal identifiers if individual data are used.

Processes involved in an evaluation include:

- Establishing a uniform violence reporting system and regular review of reports;
- Reviewing reports and minutes from staff meetings on safety and security issues;
- Analyzing trends and rates in illnesses, injuries or fatalities caused by violence relative to initial or "baseline" rates;
- Measuring improvement based on lowering the frequency and severity of workplace violence;
- Keeping up-to-date records of administrative and work practice changes to prevent workplace violence to evaluate how well they work;
- Surveying employees before and after making job or worksite changes or installing security measures or new systems to determine their effectiveness;

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- Keeping abreast of new strategies available to deal with violence in the health care and social service fields as they develop;
 - Surveying employees periodically to learn if they experience hostile situations concerning the medical treatment they provide;
 - Complying with OSHA and State requirements for recording and reporting deaths, injuries and illnesses; and
 - Requesting periodic law enforcement or outside consultant review of the worksite for recommendations on improving employee safety.

Sources of assistance for employers

Employers who would like help in implementing an appropriate workplace violence prevention program can turn to the OSHA Consultation Service provided in their State. To contact this service, see OSHA's website at www.osha.gov or call (800) 321-OSHA.

OSHA's efforts to help employers combat workplace violence are complemented by those of NIOSH, public safety officials, trade associations, unions, insurers and human resource and employee assistance professionals, as well as other interested groups. Employers and employees may contact these groups for additional advice and information. NIOSH can be reached toll-free at (800) 35-NIOSH.

Conclusion

OSHA recognizes the importance of effective safety and health program management in providing safe and healthful workplaces. Effective safety and health programs improve both morale and productivity and reduce workers' compensation costs.

OSHA's violence prevention guidelines are an essential component of workplace safety and health programs. OSHA believes the performance-oriented approach of these guidelines provides employers with flexibility in their efforts to maintain safe and healthful working conditions.

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OSHA assistance

OSHA can provide extensive help through a variety of programs, including technical assistance about effective safety and health programs, state plans, workplace consultations, voluntary protection programs, strategic partnerships, training and education and more. An overall commitment to workplace safety and health can add value to your business, to your workplace and to your life.

Safety and Health Program Management Guidelines

Effective management of worker safety and health protection is a decisive factor in reducing the extent and severity of work-related injuries and illnesses and their related costs. In fact, an effective safety and health program forms the basis of good worker protection and can save time and money (about \$4 for every dollar

spent) and increase productivity and reduce worker injuries, illnesses and related workers' compensation costs.

To assist employers and employees in developing effective safety and health programs, OSHA published recommended *Safety and Health Program Management Guidelines* (54 *Federal Register* (16): 3904-3916, January 26, 1989). These voluntary guidelines apply to all places of employment covered by OSHA.

The guidelines identify four general elements critical to the development of a successful safety and health management program:

- Management leadership and employee involvement.
- Work analysis.
- Hazard prevention and control.
- Safety and health training.

The guidelines recommend specific actions, under each of these general elements, to achieve an effective safety and health program. The *Federal Register* notice is available online at www.osha.gov.

State Programs

The Occupational Safety and Health Act of 1970 (OSH Act) encourages states to develop and operate their own job safety and health plans. OSHA approves and monitors these plans. There are currently 26 state plans: 23 cover both private and public (state and local government) employment; 3 states, Connecticut, New Jersey and New York, cover the public sector only. States and territories with their own OSHA-approved occupational safety and health plans must adopt standards identical to, or at least as effective as, the federal standards.

Consultation Services

Consultation assistance is available on request to employers who want help in establishing and maintaining a safe and healthful workplace. Largely funded by OSHA, the service is provided at no cost to the employer. Primarily developed for smaller employers with more hazardous operations, the consultation service is delivered by state governments employing professional safety and health consultants. Comprehensive assistance includes an appraisal of all-mechanical systems, work practices and occupational safety

and health hazards of the workplace and all aspects of the employer's present job safety and health program. In addition, the service offers assistance to employers in developing and implementing an effective safety and health program. No penalties are proposed or citations issued for hazards identified by the consultant. OSHA provides consultation assistance to the employer with the assurance that his or her name and firm and any information about the workplace will not be routinely reported to OSHA enforcement staff.

Under the consultation program, certain exemplary employers may request participation in OSHA's Safety and Health Achievement Recognition Program (SHARP). Eligibility for participation in SHARP includes receiving a comprehensive consultation visit, demonstrating exemplary achievements in workplace safety and health by abating all identified hazards and developing an excellent safety and health program.

Employers accepted into SHARP may receive an exemption from programmed inspections (not complaint or accident investigation inspections) for a period of one year. For more information concerning consultation assistance, see the OSHA website at www.osha.gov.

Voluntary Protection Programs (VPP)

Voluntary Protection Programs and onsite consultation services, when coupled with an effective enforcement program, expand worker protection to help meet the goals of the *OSH Act*. The three levels of VPP are Star, Merit, and Demonstration designed to recognize outstanding achievements by companies that have successfully incorporated comprehensive safety and health programs into their total management system. The VPPs motivate others to achieve excellent safety and health results in the same outstanding way as they establish a cooperative relationship between employers, employees and OSHA.

For additional information on VPP and how to apply, contact the OSHA regional offices listed at the end of this publication.

Strategic Partnership Program

OSHA's Strategic Partnership Program, the newest member of OSHA's cooperative programs, helps encourage, assist and recognize the efforts of partners to eliminate serious workplace

hazards and achieve a high level of worker safety and health. Whereas OSHA's Consultation Program and VPP entail one-on-one relationships between OSHA and individual worksites, most strategic partnerships seek to have a broader impact by building cooperative relationships with groups of employers and employees. These partnerships are voluntary, cooperative relationships between OSHA, employers, employee representatives and others (e.g., trade unions, trade and professional associations, universities and other government agencies).

For more information on this and other cooperative programs, contact your nearest OSHA office, or visit OSHA's website at www.osha.gov.

Alliance Programs

The Alliances Program enables organizations committed to workplace safety and health to collaborate with OSHA to prevent injuries and illnesses in the workplace. OSHA and the Alliance participants work together to reach out to, educate and lead the nation's employers and their employees in improving and advancing workplace safety and health.

Alliances are open to all groups, including trade or professional organizations, businesses, labor organizations, educational institutions and government agencies. In some cases, organizations may be building on existing relationships with OSHA that were developed through other cooperative programs.

There are few formal program requirements for Alliances and the agreements do not include an enforcement component. However, OSHA and the participating organizations must define, implement and meet a set of short- and long-term goals that fall into three categories: training and education; outreach and communication; and promoting the national dialogue on workplace safety and health.

OSHA Training and Education

OSHA area offices offer a variety of information services, such as compliance assistance, technical advice, publications, audiovisual aids and speakers for special engagements. OSHA's Training Institute in Arlington Heights, Ill., provides basic and advanced courses in safety and health for federal and state compliance officers, state consultants, federal agency personnel, and private

sector employers, employees and their representatives.

The OSHA Training Institute also has established OSHA Training Institute Education Centers to address the increased demand for its courses from the private sector and from other federal agencies. These centers are nonprofit colleges, universities and other organizations that have been selected after a competition for participation in the program.

OSHA also provides funds to nonprofit organizations, through grants, to conduct workplace training and education in subjects where OSHA believes there is a lack of workplace training. Grants are awarded annually. Grant recipients are expected to contribute 20 percent of the total grant cost.

For more information on grants, training and education, contact the OSHA Training Institute, Office of Training and Education, 2020 South Arlington Heights Road, Arlington Heights, IL 60005, (847) 297-4810 or see "Outreach" on OSHA's website at www.osha.gov. For further information on any OSHA program, contact your nearest OSHA area or regional office listed at the end of this publication.

Information Available Electronically

OSHA has a variety of materials and tools available on its website at www.osha.gov. These include *e-Tools* such as *Expert Advisors*, *Electronic Compliance Assistance Tools (e-cats)*, *Technical Links*; regulations, directives and publications; videos and other information for employers and employees. OSHA's software programs and compliance assistance tools walk you through challenging safety and health issues and common problems to find the best solutions for your workplace.

OSHA's CD-ROM includes standards, interpretations, directives and more, and can be purchased on CD-ROM from the U.S. Government Printing Office. To order, write to the Superintendent of Documents, P.O. Box 371954, Pittsburgh, PA 15250-7954 or phone (202) 512-1800, or order online at <http://bookstore.gpo.gov>.

OSHA Publications

OSHA has an extensive publications program. For a listing of free or sales items, visit OSHA's website at www.osha.gov or contact the OSHA Publications Office, U.S. Department of Labor, 200 Constitution Avenue, NW, N-3101, Washington, DC 20210. Telephone (202) 693-1888 or fax to (202) 693-2498.



Contacting OSHA

To report an emergency, file a complaint or seek OSHA advice, assistance or products, call (800) 321-OSHA or contact your nearest OSHA regional or area office listed at the end of this publication. The teletypewriter (TTY) number is (877) 889-5627.

You can also file a complaint online and obtain more information on OSHA federal and state programs by visiting OSHA's website at www.osha.gov.

OSHA Regional Offices

Region I

(CT,* ME, MA, NH, RI, VT*)
JFK Federal Building, Room E340
Boston, MA 02203
(617) 565-9860

Region II

(NJ,* NY,* PR,* VI*)
201 Varick Street, Room 670
New York, NY 10014
(212) 337-2378

Region III

(DE, DC, MD,* PA,* VA,* WV)
The Curtis Center
170 S. Independence Mall West
Suite 740 West
Philadelphia, PA 19106-3309
(215) 861-4900

Region IV

(AL, FL, GA, KY,* MS, NC,* SC,* TN*)
61 Forsyth Street, SW
Atlanta, GA 30303
(404) 562-2300

Region V

(IL, IN,* MI,* MN,* OH, WI)
230 South Dearborn Street, Room 3244
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Region VI

(AR, LA, NM,* OK,TX)
525 Griffin Street, Room 602
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Region VII

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Region IX

(American Samoa, AZ,* CA,* HI, NV,* Northern Mariana Islands)
71 Stevenson Street, Room 420
San Francisco, CA 94105
(415) 975-4310

Region X

(AK,* ID, OR,* WA*)
1111 Third Avenue, Suite 715
Seattle, WA 98101-3212
(206) 553-5930

*These states and territories operate their own OSHA-approved job safety and health programs (Connecticut, New Jersey and New York plans cover public employees only). States with approved programs must have a standard that is identical to, or at least as effective as, the federal standard.

Note: To get contact information for OSHA Area Offices, OSHA-approved State Plans and OSHA Consultation Projects, please visit us online at www.osha.gov or call us at 1-800-321-OSHA.

Appendix A: Workplace Violence Program Checklists

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Checklist 1:

Organizational Assessment Questions Regarding Management Commitment and Employee Involvement

- Is there demonstrated organizational concern for employee emotional and physical safety and health as well as that of the patients?
- Is there a written workplace violence prevention program in your facility?
- Did front-line workers as well as management participate in developing the plan?
- Is there someone clearly responsible for the violence prevention program to ensure that all managers, supervisors, and employees understand their obligations?
- Do those responsible have sufficient authority and resources to take all action necessary to ensure worker safety?
- Does the violence prevention program address the kinds of violent incidents that are occurring in your facility?
- Does the program provide for post-assault medical treatment and psychological counseling for health-care workers who experience or witness assaults or violence incidents?
- Is there a system to notify employees promptly about specific workplace security hazards or threats that are made? Are employees aware of this system?
- Is there a system for employees to inform management about workplace security hazards or threats without fear of reprisal? Are employees aware of this system?
- Is there a system for employees to promptly report violent incidents, "near misses," threats, and verbal assaults without fear of reprisal?
- Is there tracking, trending, and regular reporting on violent incidents through the safety committee?

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- Are front-line workers included as regular members and participants in the safety committee as well as violence tracking activities?
 - Does the tracking and reporting capture all types of violence—fatalities, physical assaults, harassment, aggressive behavior, threats, verbal abuse, and sexual assaults?
 - Does the tracking and reporting system use the latest categories of violence so data can be compared?
 - Have the high-risk locations or jobs with the greatest risk of violence as well as the processes and procedures that put employees at risk been identified?
 - Is there a root-cause analysis of the risk factors associated with individual violent incidents so that current response systems can be addressed and hazards can be eliminated and corrected?
 - Are employees consulted about what corrective actions need to be taken for single incidents or surveyed about violence concerns in general?
 - Is there follow-up of employees involved in or witnessing violent incidents to assure that appropriate medical treatment and counseling have been provided?
 - Has a process for reporting violent incidents within the facility to the police or requesting police assistance been established?

Identifying Risks for Violence by Unit/Work Area

Perform a step-by-step review of each work area to identify specific places and times that violent incidents are occurring and the risk factors that are present. To ensure multiple perspectives, it is best for a team to perform this worksite analysis. Key members of the analysis team should be front-line health care workers, including nurses from each specialty unit, as well as the facility's safety and security professionals.

Find Out What's Happening on Paper

The first step in this worksite analysis is to obtain and review data that tells the "who, what, when, where and why" about violent incidents. These sources include:

- Incident report forms
- Workers' compensation reports of injury

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- OSHA 300 injury and illness logs
 - Security logs
 - Reports to police
 - Safety committee reports
 - Hazard inspection reports
 - Staff termination records
 - Union complaints

Using this information, attempt to answer the questions in Checklist 2.

Checklist 2:

Analyze Workplace Violence Records

- How many incidents occurred in the last 2 years?
- What kinds of incidents occurred most often (assault, threats, robbery, vandalism, etc.)?
- Where did incidents most often occur?
- When did incidents most often occur (day of week, shift, time, etc.)?
- What job task was usually being performed when an incident occurred?
- Which workers were victimized most often (gender, age, job classification, etc.)?
- What type of weapon was used most often?
- Are there any similarities among the assailants?
- What other incidents, if any, are you aware of that are not included in the records?
- Of those incidents you reviewed, which one or two were most serious?

Use the data collected to stimulate the following discussions:

- Are there any important patterns or trends among the incidents?
- What do you believe were the main factors contributing to violence in your workplace?

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- What additional corrective measures would you recommend to reduce or eliminate the problems you identified?

Conduct a Walkthrough

It is important to keep in mind that injuries from violence are often not reported. One of the best ways to observe what is really going on is to conduct a workplace walkthrough.

A walkthrough, which is really a workplace inspection, is the first step in identifying violence risk factors and serves several important functions. While on a walkthrough, hazards can be recognized and often corrected before anyone's health and safety is affected.

While inspecting for workplace violence risk factors, review the physical facility and note the presence or absence of security measures. Local police may also be able to conduct a security audit or provide information about experience with crime in the area.

Ask the Workers

A simple survey can provide valuable information often not found in department walkthroughs and injury logs. Some staff may not report violent acts or threatening situations formally but will share the experiences and suggestions anonymously. This can provide information about previously unnoticed deficiencies or failures in work practices or administrative controls. It also can help increase employee awareness about dangerous conditions and encourage them to become involved in prevention activities.

Types of questions that employees should be asked include:

- What do they see as risk factors for violence?
 - The most important risk factors in their work areas
 - Aspects of the physical environment that contribute to violence
 - Dangerous situations or "near misses" experienced
 - Assault experiences—past year, entire time at facility
 - Staffing adequacy

- How are current control measures working?
 - Hospital practices for handling conflict among staff and patients
 - Effectiveness of response to violent incidents

-
- How safe they feel in the current environment

 - What ideas do employees have to protect workers?
 - Highest priorities in violence prevention
 - Ideas for improvements and prevention measures

 - How satisfied are they in their jobs?
 - With managers/fellow workers
 - Adequacy of rewards and praise
 - Impact on health

Checklist 3:

Identifying Environmental Risk Factors for Violence

Use the following checklist to assist in your workplace walkthrough.

General questions about approach:

- Are safety and security issues specifically considered in the early stages of facility design, construction, and renovation?
- Does the current violence prevention program provide a way to select and implement controls based on the specific risks identified in the workplace security analysis? How does this process occur?

Specific questions about the environment:

- Do crime patterns in the neighborhood influence safety in the facility?
- Do workers feel safe walking to and from the workplace?
- Are entrances visible to security personnel and are they well lit and free of hiding places?
- Is there adequate security in parking or public transit waiting areas?
- Is public access to the building controlled, and is this system effective?
- Can exit doors be opened only from the inside to prevent unauthorized entry?

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- Is there an internal phone system to activate emergency assistance?
 - Have alarm systems or panic buttons been installed in high-risk areas?
 - Given the history of violence at the facility, is a metal detector appropriate in some entry areas? Closed-circuit TV in high-risk areas?
 - Is there good lighting?
 - Are fire exits and escape routes clearly marked?
 - Are reception and work areas designed to prevent unauthorized entry? Do they provide staff good visibility of patients and visitors? If not, are there other provisions such as security cameras or mirrors?
 - Are patient or client areas designed to minimize stress, including minimizing noise?
 - Are drugs, equipment, and supplies adequately secured?
 - Is there a secure place for employees to store their belongings?
 - Are “safe rooms” available for staff use during emergencies?
 - Are door locks in patient rooms appropriate? Can they be opened during an emergency?
 - Do counseling or patient care rooms have two exits, and is furniture arranged to prevent employees from becoming trapped?
 - Are lockable and secure bathrooms that are separate from patient-client and visitor facilities available for staff members?

Checklist 4:

Assessing the Influence of Day-to-Day Work Practices on Occurrences of Violence

- Are identification tags required for both employees and visitors to the building?
- Is there a way to identify patients with a history of violence? Are contingency plans put in place for these patients—such as restricting visitors and supervising their movement through the facility?
- Are emergency phone numbers and procedures posted or readily available?

-
- Are there trained security personnel accessible to workers in a timely manner?
 - Are waiting times for patients kept as short as possible to avoid frustration?
 - Is there adequate and qualified staffing at all times, particularly during patient transfers, emergency responses, mealtimes, and at night?
 - Are employees prohibited from entering seclusion rooms alone or working alone in emergency areas of walk-in clinics, particularly at night or when assistance is unavailable?
 - Are broken windows, doors, locks, and lights replaced promptly?
 - Are security alarms and devices tested regularly?

Checklist 5:

Post-Incident Response

- Is comprehensive treatment provided to victimized employees as well as those who may be traumatized by witnessing a workplace violence incident? Required services may include trauma-crisis counseling, critical incident stress debriefing, psychological counseling services, peer counseling, and support groups.

Checklist 6:

Assessing Employee and Supervisor Training

- Does the violence prevention program require training for all employees and supervisors when they are hired and when job responsibilities change?
- Do agency workers or contract physicians and house staff receive the same training that permanent staff receive?
- Are workers trained in how to handle difficult clients or patients?
- Does the security staff receive specialized training for the health-care environment?
- Is the training tailored to specific units, patient populations, and job tasks, including any tasks done in the field?
- Do employees learn progressive behavior control methods and safe methods to apply restraints?

-
- Do workers believe that the training is effective in handling escalating violence or violent incidents?
 - Are drills conducted to test the response of health-care facility personnel?
 - Are workers trained in how to report violent incidents, threats, or abuse and obtain medical care, counseling, workers' compensation, or legal assistance after a violent episode or injury?
 - Are employees and supervisors trained to behave compassionately toward coworkers when an incident occurs?
 - Does the training include instruction about the location and operation of safety devices such as alarm systems, along with the required maintenance schedules and procedures?

Checklist 7:

Recordkeeping and Evaluation

Does the violence prevention program provide for:

- Up-to-date recording in the OSHA Log of Work-Related Injury and Illness (OSHA 300)?
- Records of all incidents involving assault, harassment, aggressive behavior, abuse, and verbal attack with attention to maintaining appropriate confidentiality of the records?
- Training records?
- Workplace walkthrough and security inspection records?
- Keeping records of control measures instituted in response to inspections, complaints, or violent incidents?
- A system for regular evaluation of engineering, administrative, and work practice controls to see if they are working well?
- A system for regular review of individual reports and trending and analysis of all incidents?
- Employee surveys regarding the effectiveness of control measures instituted?
- Discussions with employees who are involved in hostile situations to ask about the quality of post-incident treatment they received?
- A provision for an outside audit or consultation of the violence programs for recommendations on improving safety?

Appendix B Violence Incident Report Forms

Sample 1

The following items serve merely as an example of what might be used or modified by employers in these industries to help prevent workplace violence. (Sample/Draft—Adapt to your own location and business circumstances.)

Confidential Incident Report

To: _____ Date of Incident: _____

Location of Incident (Map/sketch on reverse side or attached): _____

From: _____ Phone: _____ Time of Incident: _____

Nature of the Incident ("X" all applicable boxes):

Assaults or Violent Acts: _____ Type "1" _____ Type "2" _____ Type "3" _____ Other

Preventative or Warning Report

Bomb or Terrorist Type Threat Yes No

Transportation Accident Contacts with Objects or Equipment

Falls Exposures Fires or Explosions Other

Legal Counsel Advised of Incident? Yes No EAP Advised? Yes No

Warning or Preventative Measures? Yes No

Number of Persons Affected: _____

(For each person, complete a report; however, to the extent facts are duplicative, any person's report may incorporate another person's report.)

Name of Affected Person(s): _____ Service Date: _____

Position: _____ Member of Labor Organization? Yes No

Supervisor: _____ Has Supervisor Been Notified? Yes No

Family: _____ Has Been Notified by: _____? Yes No

Lost Work Time? Yes No Anticipated Return to Work: _____

Third parties or non-employee involvement (include contractor and lease employees, visitors, vendors, customers)? Yes No

Nature of the Incident

Briefly describe: (1) event(s); (2) witnesses with addresses and status included; (3) location details; (4) equipment/weapon details; (5) weather; (6) other records of the incident (e.g., police report, recordings, videos); (7) the ability to observe and reliability of witnesses; (8) were the parties possibly impaired because of illness, injury, drugs or alcohol? (were tests taken to verify same?); (9) parties notified internally (employee relations, medical, legal, operations, etc.) and externally (police, fire, ambulance, EAP, family, etc.).

Previous or Related Incidents of This Type? Yes No

Or by This Person? Yes No Preventative Steps? Yes No

OSHA Log or Other OSHA Action Required? Yes No

Incident Response Team: _____

Team Leader: _____

Signature

Date

Source: Reprinted with permission of Karen Smith Keinbaum, Esq., Counsel to the Law Firm of Abbott, Nicholson, Quilter, Eshaki & Youngblood, P. C., Detroit, MI.

Sample 2

The following items serve merely as an example of what might be used or modified by employers in these industries to help prevent workplace violence.

A reportable violent incident should be defined as any threatening remark or overt act of physical violence against a person(s) or property whether reported or observed.

1. **Date:** _____ Day of Week: _____ Time: _____ Assailant: Female Male

2. **Specific Location:** _____

3. **Violence Directed Toward:** Patient Staff Visitor Other

Assailant: Patient Staff Visitor Other

Assailant's Name: _____

Assailant: Unarmed Armed (weapon)

4. **Predisposing Factors:**

Intoxication Dissatisfied with Care/Waiting Time

Grief Reaction Prior History of Violence

Gang Related Other (Describe) _____

5. **Description of Incident:** Physical Abuse Verbal Abuse Other

6. **Injuries:** Yes No

7. **Extent of Injuries:** _____

8. **Detailed Description of the Incident:** _____

9. **Did Any Person Leave the Area because of Incident?**

Yes No Unable to Determine

10. **Present at Time of Incident:**

Police Name of Department: _____

Hospital Security Officer

11. **Needed to Call:**

Police Name of Department: _____

Hospital Security

12. **Termination of Incident:**

Incident Diffused Yes No Police Notified Yes No

Assailant Arrested Yes No

13. **Disposition of Assailant:**

Stayed on Premises Escorted off Premises Left on Own Other

14. **Restraints Used:** Yes No Type: _____

15. **Report Completed By:** _____ Title: _____

Witnesses: _____

Supervisor Notified: _____ Time: _____

Please put additional comments, according to numbered section, on reverse side of form.

Source: Reprinted with permission of the Metropolitan Chicago Healthcare Council, *Guidelines for Dealing with Violence in Health Care*, Chicago, IL, 1995.

Appendix C

Suggested Readings

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**Occupational Safety
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Exhibit 6



WORKPLACE VIOLENCE IN HEALTHCARE

Workplace violence is now recognized as a specific category of violent crime that calls for distinct responses from employers, law enforcement and the community. In the healthcare industry, the prevention of workplace violence is especially important. The healthcare workplace encompasses acute care, long-term care, mental health care, preventive care and emergency services. The Bureau of Labor Statistics (BLS) reports that, as many as, 14 homicides occur in health services each year. However, the vast majority of workplace violence consists of non-fatal assaults. BLS data shows that on average, 48 percent of all non-fatal injuries from occupational assaults and violent acts occurred in healthcare and social services. Most of these occurred in hospitals, nursing and personal care facilities, and residential care services. Nurses, aides, orderlies and attendants suffered the most non-fatal assaults resulting in injury. In general, these violent acts can range from harassment, threats, disruptive behavior, and intimidation to verbal and/or physical abuse and homicide.

PREVENTION

Preventive strategies include, but are not limited to: zero tolerance; panic buttons/alarms; cameras/lighting and security patrols; and education to recognize the early signs of violent behavior and to learn proper intervention techniques to de-escalate situations.

RESPONSE

1. Awareness – Note person's verbal anger, body language, and distrust.
2. Utilize appropriate behavior to diffuse the situation – be calm and caring and acknowledge feelings.
3. Respect personal space.
4. Be aware of surroundings and potential exit routes from the situation.
5. Set clear and simple limits – convey that the individual has a choice. It is important to not lose a professional hold of the situation.
6. Get help early – Contact security, a co-worker, supervisor, and employee assistance program (EAP).

RECOVERY

Employee Role:

Remove yourself quickly from the situation.

Report immediately to supervisor.

Seek medical treatment if needed.

If others are present, discuss/debrief with them.

If you are alone, call a support person (family or friend).

Be aware of any symptoms of **Acute Stress Disorder (ASD)** – irritability, sleep disturbance, increased alcohol intake. **Symptoms of ASD persisting longer than 30 days should be evaluated by a mental health provider.** In most cases, these symptoms should subside within 4-6 weeks. Seek counseling services (EAP) as needed.

Supervisor Role:

Get employee to safe, quiet place and allow her/him to rest.

Notify police as necessary.

Encourage communication between the employee and her/his family.

Provide appropriate medical and psychological treatment and refer to EAP as needed.

Through OSHA's Alliance Program this Quick Tip Card was developed as a product of the OSHA and American Association of Occupational Health Nurses Alliance for informational purposes only. It does not necessarily reflect the official views of OSHA or the U.S. Department of Labor. (06/2008)

Exhibit 7

Workplace Violence News

Resources for preventing workplace violence & bullying

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Hospital shootings rare, violence not

Posted by [Ross Arrowsmith](#) on Wednesday, December 15th 2010 under [Workplace violence](#)
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By [Brendon Nafziger](#), [DOTmed News](#)

A shooting at Johns Hopkins Hospital in September, where a distraught man wounded a surgeon and killed his cancer-stricken 84-year-old mother before turning the gun on himself, grabbed headlines around the world. But hospital gunplay remains rare, say researchers, even though workplace assaults in health care settings are four times more common than in many other industries.

Two Johns Hopkins doctors, prompted in part by the attack, examined hospital violence in a commentary published in the Journal of the American Medical Association last week.

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The doctors said from 1997 to 2009, less than 1 percent of workplace killings happened in health care settings. According to figures reported by the Centers for Disease Control and Prevention, 73 of the 8,127 occupational killings tracked were at a medical facility, with 20 of them happening in hospitals.

Of these victims, 12 were doctors and 15 nurses. To put that in perspective, in the same period, 282 cab drivers and 307 cashiers were slain on the job.

Even if killings are rare, assaults are surprisingly more common than in many other industries. For most private-sector jobs, there are two assaults per 10,000 workers, say the researchers. In health care, it's

eight assaults per 10,000.

Information on shootings was less formal. Using data gathered from an Internet search, the doctors said since 2008, there have been at least 18 shootings at or nearby hospitals. In about half of all cases, the motivation was revenge, or the shooter committed suicide. One-third of cases involved blasting sick relatives, and two shootings were between coworkers.

The doctors said contrary to general perception, most hospital shootings are not at facilities in high-crime areas. Rather, they happen at random, often at smaller hospitals.

They also suggest little should be done. The rarity of shootings and the fact that deterring a determined shooter is “nearly impossible” mean prevention efforts should focus on other kinds of violence, they said. They had little use for metal detectors.

“Magnetometers may also create a false sense of security,” write study authors Drs. Gabor D. Kelen and Christina L. Catlett. “They do not detect nonmetal weapons and have no effect on preventing nonweapon assaults.”

The violence in health care settings is a reflection of the violence in society as a whole, the doctors said (the U.S. leads other developed nations in violent crime rankings). But they also noted the decline in the public’s perception of medicine.

“There was a time when physicians were viewed with reverence and hospitals were considered sanctuaries,” they write.

As an example, they cite a study looking at television portrayals of doctors. In the 1950s TV show *City Hospital*, doctors were omnipotent healers. But in today’s *Grey’s Anatomy*, they’re bickering and self-absorbed.

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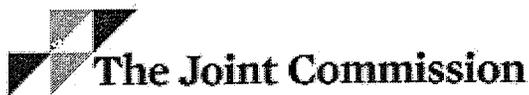
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Exhibit 8



Sentinel Event Alert

June 03, 2010

Issue 45, June 3, 2010

Preventing violence in the health care setting

Once considered safe havens, health care institutions today are confronting steadily increasing rates of crime, including violent crimes such as assault, rape and homicide. As criminal activity spills over from the streets onto the campuses and through the doors, providing for the safety and security of all patients, visitors and staff within the walls of a health care institution, as well as on the grounds, requires increasing vigilant attention and action by safety and security personnel as well as all health care staff and providers.

While there are many different types of crimes and instances of violence that take place in the health care setting, this *Sentinel Event Alert* specifically addresses assault, rape or homicide of patients and visitors perpetrated by staff, visitors, other patients, and intruders to the institution. The Joint Commission's Sentinel Event Database includes a category of assault, rape and homicide (combined) with 256 reports since 1995 – numbers that are believed to be significantly below the actual number of incidents due to the belief that there is significant under-reporting of violent crimes in health care institutions. While not an accurate measure of incidence, it is noteworthy that the assault, rape and homicide category of sentinel events is consistently among the top 10 types of sentinel events reported to The Joint Commission. Since 2004, the Sentinel Event Database indicates significant increases in reports of assault, rape and homicide, with the greatest number of reports in the last three years: 36 incidents in 2007, 41 in 2008 and 33 in 2009.

Of the information in the Sentinel Event Database regarding criminal events, the following contributing causal factors were identified most frequently over the last five years:

- Leadership, noted in 62 percent of the events, most notably problems in the areas of policy and procedure development and implementation.
- Human resources-related factors, noted in 60 percent of the events, such as the increased need for staff education and competency assessment processes.
- Assessment, noted in 58 percent of the events, particularly in the areas of flawed patient observation protocols, inadequate assessment tools, and lack of psychiatric assessment.
- Communication failures, noted in 53 percent of the events, both among staff and with patients and family.
- Physical environment, noted in 36 percent of the events, in terms of deficiencies in general safety of the environment and security procedures and practices.
- Problems in care planning, information management and patient education were other causal factors identified less frequently.

Identifying high risk areas

Because hospitals are open to the public around the clock every day of the year, securing the building and grounds presents specific challenges since it would be difficult to thoroughly screen every person entering the facility. For many reasons – in particular, high-traffic areas coupled with high-stress levels – the Emergency Department is typically the hardest area to secure, followed by general medical/surgical patient rooms. "A key to providing protection to patients is controlling access," explains Russell L. Colling, M.S., CHPA, a health care security consultant based in Salida, Colo., and the founding president of the International Association for Healthcare Security and Safety. "Facilities must institute layered levels of control which includes securing the perimeter of the property through lighting, barriers, fencing; controlling access through entrances, exits, and stairwells; and positioning nurses stations, to name a few of the steps that organizations need to take."

Perpetrators of violence to patients

While controlling access to the facility is imperative and ongoing surveillance of the grounds is a necessity, administrators must be alert to the potential for violence to patients by health care staff members. The stressful environment together with failure to recognize and respond to warning signs such as behavioral changes, mental health issues, personal crises, drug or alcohol use, and disciplinary action or termination, can elevate the risk of a staff member becoming violent towards a patient. Though it is a less common scenario, health care workers who deliberately harm patients by either assaulting them or administering unprescribed medications or treatments, present a considerable threat to institutions, even when the patient is unable to identify the responsible person. These situations point directly to the critical role human resources departments have in developing and following through on hiring, firing and disciplinary practices (which should be supported by management), and in performing thorough criminal background checks on all new hires. Since criminal background checks are costly, at a minimum, organizations may want to conduct criminal background checks on job candidates who are to be placed in high risk areas, such as the ED, obstetrics, pediatrics, nursery, home care and senior care settings.

Prevention strategies

There are many steps that organizations can take to reduce the risk of violence and prevent situations from escalating. "Each

hospital or institution must determine for itself how to protect the environment, and that is accomplished by doing a risk assessment and identifying all the things that can go wrong and how to address them with the least inconvenience and resources," Russell Colling says. "The most important factor in protecting patients from harm is the caregiver – security is a people action and requires staff taking responsibility, asking questions, and reporting any and all threats or suspicious events." Colling recommends that organizations adopt a zero tolerance policy and establish strong policies mandating staff to report any real or perceived threats. "The roots of violence need to be investigated and evaluated beginning at the unit level. Nurses and other health care staff should question the presence of all visitors in patient rooms and not assume that someone is a family member or friend," says Colling.

ECRI Institute, an independent nonprofit organization that researches best practices to improve patient care, publishes a journal for health care risk managers called *Healthcare Risk Control (HRC)* (1). The September 2005 issue has a focus on "Violence in Healthcare Facilities" that discusses strategies for: preventing violent incidents; managing situations to prevent escalation; and enhancing the physical security of institutions through traditional measures (e.g., fences, locks, key inventory, strengthened windows and doors) and electronic measures (e.g., metal detectors, handheld security wands, video surveillance, alarms, access controls systems that require codes or cards). The publication also outlines:

- Techniques for identifying potentially violent individuals
- Violence de-escalation tools that health care workers can employ
- Violence management training
- Conducting a violence audit
- Conducting a violence assessment walk-through
- Responding in the wake of a violent event

In addition, the Occupational Safety and Health Administration offers advisory guidelines for preventing patient-to-staff workplace violence in the health care setting. (2) In January 2007, the International Association for Healthcare Security and Safety issued its first set of *Healthcare Security: Basic Industry Guidelines*, a resource for health care institutions in developing and managing a security management plan, addressing security training, conducting investigations, identifying areas of high risk, and more. (3)

Existing Joint Commission requirements

The Joint Commission's Environment of Care standards require health care facilities to address and maintain a written plan describing how an institution provides for the security of patients, staff and visitors. Institutions are also required to conduct risk assessments to determine the potential for violence, provide strategies for preventing instances of violence, and establish a response plan that is enacted when an incident occurs. The Rights and Responsibilities of the Individual standard RI.01.06.03 provides for the patient's right to be free from neglect; exploitation; and verbal, mental, physical, and sexual abuse.

Joint Commission suggested actions

The following are suggested actions that health care organizations can take to prevent assault, rape and homicide in the health care setting. Some of these recommendations are detailed in the *HRC* issue on "Violence in Healthcare Facilities."

1. Work with the security department to audit your facility's risk of violence. Evaluate environmental and administrative controls throughout the campus, review records and statistics of crime rates in the area surrounding the health care facility, and survey employees on their perceptions of risk.
2. Identify strengths and weaknesses and make improvements to the facility's violence-prevention program. (The *HRC* issue on "Violence in Healthcare Facilities" includes a self-assessment questionnaire that can help with this.)
3. Take extra security precautions in the Emergency Department, especially if the facility is in an area with a high crime rate or gang activity. These precautions can include posting uniformed security officers, and limiting or screening visitors (for example, wandering for weapons or conducting bag checks).
4. Work with the HR department to make sure it thoroughly prescreens job applicants, and establishes and follows procedures for conducting background checks of prospective employees and staff. For clinical staff, the HR department also verifies the clinician's record with appropriate boards of registration. If an organization has access to the National Practitioner Data Bank or the Healthcare Integrity and Protection Data Bank, check the clinician's information, which includes professional competence and conduct.
5. Confirm that the HR department ensures that procedures for disciplining and firing employees minimize the chance of provoking a violent reaction.
6. Require appropriate staff members to undergo training in responding to patients' family members who are agitated and potentially violent. Include education on procedures for notifying supervisors and security staff. (4)
7. Ensure that procedures for responding to incidents of workplace violence (e.g., notifying department managers or security, activating codes) are in place and that employees receive instruction on these procedures.
8. Encourage employees and other staff to report incidents of violent activity and any perceived threats of violence.
9. Educate supervisors that all reports of suspicious behavior or threats by another employee must be treated seriously and thoroughly investigated. Train supervisors to recognize when an employee or patient may be experiencing behaviors related to domestic violence issues.
10. Ensure that counseling programs for employees who become victims of workplace crime or violence are in place.

Should an act of violence occur at your facility – whether assault, rape, homicide or a lesser offense – follow-up with appropriate response that includes:

11. Reporting the crime to appropriate law enforcement officers.
12. Recommending counseling and other support to patients and visitors to your facility who were affected by the violent act.
13. Reviewing the event and making changes to prevent future occurrences.

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- 1 ECRI Institute: Violence in Healthcare Facilities. *Healthcare Risk Control*, September 2005, Plymouth Meeting, Pa. Available online at: https://www.ecri.org/Forms/Pages/Violence_in_Healthcare_Facilities.aspx (Accessed March 11, 2010)
- 2 Occupational Safety and Health Administration: Guidelines for Preventing Workplace Violence for Health Care and Social Service Workers. Available online at: <http://www.osha.gov/Publications/osh3148.pdf> (accessed March 10, 2010)
- 3 International Association for Healthcare Security and Safety: *Healthcare Security: Basic Industry Guidelines*, October 2009
- 4 American Society of Health-System Pharmacists: Policy Position on Education, Prevention, and Enforcement Concerning Workplace Violence (0810). Available online at: <http://www.ashp.org/DocLibrary/BestPractices/HRPositions09.aspx> (Accessed March 10, 2010)

Patient Safety Advisory Group

The Patient Safety Advisory Group informs The Joint Commission on patient safety issues and, with other sources, advises on topics and content for *Sentinel Event Alert*. Members: James P. Bagian, M.D., P.E. (chair); Michael Cohen, R.Ph., M.S., Sc.D. (vice chair); Jane H. Barnsteiner, R.N., Ph.D., FAAN; Jim B. Battles, Ph.D.; William H. Beeson, M.D.; Patrick J. Brennan, M.D.; Martin H. Diamond, FACHE; Cindy Dougherty, R.N., CPHQ; Frank Federico, B.S., R.Ph.; Steven S. Fountain, M.D.; Suzanne Graham, R.N., Ph.D.; Jerril W. Green, M.D.; Ezra E.H. Griffith, M.D.; Peter Gross, M.D.; Carol Haraden, Ph.D.; Martin J. Hatlie, Esq.; Jennifer Jackson, B.S.N., J.D.; Henri R. Manasse, Jr., Ph.D., Sc.D.; Jane McCaffrey, MHSA, DFASHRM; David Mechtenberg; Mark W. Milner, R.N., MBA, MHS; Jeanine Arden Ornt, J.D.; Grena Porto, R.N., M.S., ARM, CPHRM; Matthew Scanlon, M.D.; Carl A. Sirio, M.D.; Ronni P. Solomon, J.D.; Dana Swenson, P.E., MBA; Susan M. West, R.N.