Extendicare Homes, Inc. d/b/a Bon Harbor Nursing and Rehabilitation Center *and* United Steelworkers of America, AFL–CIO, CLC. Cases 25–CA–28991, 25–CA–29088, and 25–CA–29119

November 3, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On March 3, 2005, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order as modified[2] and set forth in full below.

I. INTRODUCTION

The Respondent operates a nursing home facility in Owensboro, Kentucky. The present case arose when, on January 14, 2004,[3] seven of the Respondent's employees—Licensed Practical Nurses (LPNs) Norma Lemon and Rita Adkisson, Certified Nursing Assistants (CNAs) Sheila Kelley, Stacy Kjelsen, Misty Paulin, and Tammy Snyder, and Certified Medication Aide (CMA) Tammy Hamilton—coordinated their breaks and met with representatives of the media in the Respondent's parking lot to protest staffing conditions at the facility. The judge found that the employees' concerted protest was protected by Section 7 of the Act, and that the Respondent violated Section 8(a)(1) of the Act by discharging the employees because of their protest and by conditioning each employee's return to work on a promise that she would not walk out in protest of future short-staffing issues. In so finding, the judge rejected the Respondent's argument that no violations could be found with respect to LPNs Lemon and Adkisson because they are 2(11) supervisors.

For the reasons discussed below, we affirm the judge's findings as to employees Kelley, Kjelsen, Paulin, Snyder, and Hamilton. However, we reverse the judge's unfair labor practice findings as to LPNs Lemon and Adkisson because, in agreement with the Respondent, we find that they are statutory supervisors.[4]

II. EMPLOYEES KELLEY, KJELSEN, PAULIN, SNYDER, AND HAMILTON

The record fully supports the judge's finding that the Respondent unlawfully discharged employees Kelley, Kjelsen, Paulin, Snyder, and Hamilton because of their concerted protest over staffing levels and unlawfully conditioned their return to work on their promise to refrain from similar protests in the future. As to the unlawful discharges, we rely in particular on the credited testimony that, when Director of Nursing (DON) Carolyn Davis escorted the employees back into the facility, LPN Lemon asked twice if the employees were being fired, and Davis responded, "Yes." Given this testimony, and the fact that the Respondent has not asserted any other basis for the discharges, we find it unnecessary to rely on the judge's discussion of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), in footnote 8 of his decision. See *Chromalloy Gas Turbine Corp.*, 331 NLRB 858, 864 (2000)("where protected concerted activity is the basis for an employee's discipline, the normal *Wright Line* analysis is not required"), enfd. 262 F.3d 184 (2d Cir. 2001).

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

[2] We have modified the judge's recommended Order to conform to the violations found, and we have substituted a new notice in accordance with the Order as modified.

[3] All dates are 2004, unless otherwise indicated.

[4] We affirm the judge's separate finding that the Respondent violated Sec. 8(a)(1) when, 1 week following the employees' protest, Unit Manager Della Boehman removed union literature from a bulletin board in the employee breakroom while continuing to allow employees to post nonwork-related material on the same bulletin board. In doing so, we additionally rely on the fact that the Respondent did not enforce its handbook rule prohibiting the posting of material without prior approval until the advent of the Union's organizing campaign, and that, even then, it enforced the rule only against union material. See *Bon Marche*, 308 NLRB 184, 185 (1992) (finding violation where employer changed its bulletin board policy in response to a union organizing campaign). Indeed, Unit Manager Boehman admitted that she had never before been directed by the Respondent to remove any material from the bulletin board.

We also affirm the judge's finding that the Respondent violated Sec. 8(a)(1) and (3) when Boehman orally warned CNA Paulin for assisting the Union by making a written record of Boehman's removal of union literature from the employee bulletin board. We emphasize that the credited testimony establishes that Boehman issued Paulin a warning for "threatening a supervisor," and that when Paulin inquired what Boehman meant by that, Boehman told Paulin it was because Paulin had recorded Boehman's conduct of removing union literature from the breakroom bulletin board in a notebook provided to Paulin by the Union. Paulin told Boehman that the Union had given her the notebook "to write things down that happened." This testimony establishes that Boehman warned Paulin for assisting the Union and to discourage employees from engaging in such activity in violation of the Act.

III. LPNS LEMON AND ADKISSON

We find, contrary to the judge and our dissenting colleague, that the Respondent's actions taken against LPNs Lemon and Adkisson did not violate the Act because they are statutory supervisors. As such, their participation in the employees' protest was not protected, and the Respondent was free to discipline them. See, e.g., *Armored Transfer Service*, 287 NLRB 1244, 1254–1255 (1988).[5]

A. The Judge's Supervisory Determination

The judge's finding that LPNs Lemon and Adkisson are not statutory supervisors is based exclusively on the Regional Director's finding in a prior representation proceeding involving this same facility. In that proceeding, the Union petitioned for certification as the representative of a unit of employees at the facility that included LPNs. The Respondent argued for the exclusion of LPNs, contending that they were 2(11) supervisors based on, among other things, their supervisory authority to discipline employees. The Regional Director, however, concluded that the Respondent had failed to carry its burden to establish the LPNs' claimed 2(11) status. The Respondent filed a request for review, which the Board (Chairman Battista dissenting) denied.

In the present case, the parties did not introduce any new evidence regarding the supervisory status of the Respondent's LPNs, but stipulated to the introduction of the representation case hearing transcript and exhibits into the record. The judge adopted without discussion the Regional Director's conclusion that the Respondent's LPNs are not supervisors. The Respondent has excepted to the judge's conclusion, again arguing, among other things, that its LPNs, including Lemon and Adkisson, possess the supervisory authority to discipline employees.

B. The Respondent Established that LPNs Lemon and Adkisson are Supervisors

Before addressing the merits of the Respondent's exceptions, we point out, as the judge and the parties have acknowledged, that a finding in a representation case regarding supervisory status is not binding in a subsequent unfair labor practice proceeding involving, as here, allegations of independent violations of Section 8(a)(1). *JAMCO*, 294 NLRB 896, 899 (1989). We have thus reviewed de novo the evidence concerning Lemon's and Adkisson's alleged supervisory authority.[6] Based on that review, we find merit in the Respondent's argument that Lemon and Adkisson are 2(11) supervisors based on their authority to discipline employees.[7]

The pertinent facts relating to the authority of Lemon and Adkisson to discipline the CNAs and CMAs who report to them are as follows. Pursuant to the Respondent's employee handbook, the Respondent's disciplinary system divides work rule violations into three classes (class I, II, and III), depending on the severity of the offense. According to the handbook and the testimony of DON Davis, the disciplinary system is progressive. That is, an employee will automatically receive increasingly severe punishment for rule infractions based on the class of infraction committed and the employee's prior disciplinary record.

The Respondent documents rule violations on disciplinary action report forms (DARs), which are placed in employees' personnel files. DON Davis testified, and corroborating evidence showed, that LPNs exercise discretion in deciding whether to complete DARs for violations committed by CNAs and CMAs. Specifically, Davis' uncontradicted testimony was that if an LPN observes a CNA or CMA performing her work incorrectly or not performing it at all, the LPN is expected to handle the situation by exercising, at her discretion, one of four options: (1) issuing an oral warning; (2) providing "in-servicing," i.e., giving the employee direction and corrective action; (3) issuing a DAR; or (4) doing nothing. Davis further testified that, although the fourth option is disfavored, "it does happen," and that the LPN is neither required nor expected to seek counsel from a superior before acting or not. LPN Donna Brown's testimony and various DARs issued by Brown introduced at the representation case hearing generally corroborate Davis' testimony.

Should an LPN decide after witnessing an infraction that a DAR is warranted, the LPN is responsible for stating on the preprinted DAR form the specific work rule that was violated and describing the incident that prompted the writeup. The form also contains a section where the LPN may indicate any record of prior disciplinary action in the employee's file in the preceding 18 months. Because LPNs do not have access to employ-

[5] The General Counsel does not argue that the Respondent's actions taken against LPNs Lemon and Adkisson would be unlawful even if they are statutory supervisors. See generally *Parker-Robb Chevrolet*, 262 NLRB 402 (1982), review denied sub nom. *Automobile Salesman's Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983).

[6] At the representation case hearing, the parties stipulated that all LPNs are vested with the same duties, responsibilities, and authorities.

[7] In light of this finding, we find it unnecessary to pass on the Respondent's remaining exceptions concerning other alleged indicia of LPNs' supervisory status. *Arlington Masonry Supply, Inc.*, 339 NLRB 817, 818 (2003) ("An individual need possess only one of the enumerated indicia of authority in order to be encompassed by Section 2(11), as long as the exercise of such authority is carried out in the interest of the employer, and requires the exercise of independent judgment.").

ees' personnel files, however, they routinely leave this section blank.

In addition, the DAR form contains a section where the LPN may indicate the disciplinary action taken, i.e., first notice, second notice, final notice, discharge warning, or discharge from employment. Many, although not all, of the DARs in the record indicate the level of discipline being issued.[8] Davis testified that, even if an LPN indicates a level of discipline on the DAR that is incorrect under the Respondent's progressive discipline policy, the LPN's disciplinary determination will not be changed by the DON or unit manager, the DON's immediate subordinate.[9] Davis acknowledged that management retains the ultimate authority to review the disciplinary action and to override it, but she testified that this had never occurred. In accordance with the Respondent's progressive disciplinary system, DARs issued by the LPNs may form the basis for future disciplinary actions.

Based on the above facts, we find, contrary to the judge, that the Respondent's LPNs, including Lemon and Adkisson, possess supervisory authority to discipline within the meaning of Section 2(11) of the Act. In a recent case, *Wilshire at Lakewood*, 345 NLRB 1050 (2005), the Board found that an RN possessed supervisory authority in similar circumstances. The RN had the authority to issue, at her discretion, a disciplinary writeup if she determined that an employee committed a "gross infraction" of residential care. These writeups were placed in employees' personnel files and constituted the first step in the disciplinary process. Id., slip op. at 1–2. Although the writeups did not necessarily lead to further discipline in every instance, the Board emphasized that they played "a significant role in the disciplinary process" and were initiated by the RN's "independent determination that the committed infraction [was] egregious enough to warrant the writeup." Id., slip op. at 2. In these circumstances, the Board concluded that "the writeups clearly evince[d] . . . supervisory status." Id.

Similar to the authority exercised by the RN in *Wilshire*, supra, here the evidence shows that LPNs are vested with the authority to decide whether to write up employees for rule infractions. Further, as in *Wilshire*, the writeups (or DARs) are placed in the employees' personnel files and "play a significant role in the disciplinary process." Id. Thus, the record shows that LPNs may indicate a level of discipline on the DAR and that their disciplinary determinations have never been independently reviewed or overruled by higher management. In this respect, the disciplinary authority of the Respondent's LPNs exceeds that of the RN in *Wilshire*, where the evidence showed that her writeups were subject to further review by management officials. Id., slip op. at 1. In addition, in accordance with the Respondent's progressive discipline policy, DARs issued by LPNs are relied on by the DON when administering subsequent discipline.

Reprising an argument he made in *Progressive Transportation Services*, 340 NLRB 1044, 1048 (2003), our dissenting colleague asserts that purported disciplinary warnings that do not have a "consistent or predictable" relationship to consequences affecting employment are merely reportorial, and do not demonstrate supervisory authority. We rejected that contention in *Progressive Transportation*, and we do so again today. Under extant Board law as explicated in *Progressive Transportation*, "it is sufficient that the discipline has the real potential to lead to an impact on employment." Id. at 1046. The record in this case leaves no room for doubt that the DARs have such a potential.

On these facts, we conclude, contrary to the judge and our dissenting colleague, that the Respondent has met its burden to show that Lemon and Adkisson are 2(11) supervisors. Consequently, Lemon and Adkisson did not enjoy the protections of the Act, and the Respondent's actions taken against them did not violate Section 8(a)(1). We therefore shall dismiss the complaint to that extent.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Extendicare Homes, Inc. d/b/a Bon Harbor Nursing and Rehabilitation Center, Owensboro, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging its employees because they engaged in concerted activities with each other for the purposes of mutual aid and protection by gathering together at the Respondent's facility during their breaks to protest staffing conditions and complain to the news media about their terms and conditions of employment, and to discourage employees from engaging in these or other protected concerted activities.

(b) Refusing to reinstate employees unless they agree not to engage in the activity described in (a) above or

[8] Because, as previously mentioned, LPNs do not have access to employee personnel files, they do not necessarily know whether an employee has been previously disciplined, and thus may leave this section blank. Davis testified that a unit manager will enter the appropriate level of discipline on the form after checking the employee's personnel file for any previously recorded discipline, in accordance with the Respondent's progressive disciplinary policy.

[9] Davis also testified that she does not conduct independent investigations of the misconduct recorded in the DARs.

other concerted activity for the purposes of mutual aid and protection.

(c) Removing union literature from a bulletin board at the Respondent's facility despite allowing employees to post other types of nonwork-related literature on the same bulletin board.

(d) Orally warning employees for assisting the Union or any other labor organization.

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

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

(a) Within 14 days from the date of this Order, offer Sheila Kelley, Stacy Kjelsen, Misty Paulin, Tammy Hamilton, and Tammy Snyder full reinstatement to their former positions, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Sheila Kelley, Stacy Kjelsen, Misty Paulin, Tammy Hamilton, and Tammy Snyder whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Sheila Kelley, Stacy Kjelsen, Misty Paulin, Tammy Hamilton, and Tammy Snyder, and within 3 days thereafter, notify each of them in writing that this has been done and that the unlawful discharges will not be used against them in any way.

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

(e) 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.

(f) Within 14 days after service by the Region, post at its facility in Owensboro, Kentucky, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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 14, 2004.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges unfair labor practices not found.

MEMBER WALSH, dissenting in part.

Contrary to the majority, I agree with the judge that the Respondent failed to carry its burden of showing that Licensed Practical Nurses (LPNs) Norma Lemon and Rita Adkisson are supervisors within the meaning of Section 2(11) of the Act. Consequently, I would adopt the judge's finding that the Respondent violated Section 8(a)(1) by discharging them for joining their fellow employees in a concerted protest over staffing levels and by conditioning their reinstatement on a promise that they would not engage in a similar protest in the future. I agree with the majority opinion in all other respects.

The majority finds that Lemon and Adkisson are statutory supervisors based on evidence that LPNs are authorized to decide whether to document employee rule violations on disciplinary action report forms (DARs) that are placed in the employees' personnel files. For the majority, this evidence is sufficient to show that Lemon and Adkisson possess the supervisory authority to discipline employees. I disagree.

The majority's finding is in error for two interrelated reasons. First, the Respondent has not established that the DARs actually constitute disciplinary action or that they bear any consistent or predictable relationship to discipline under the Respondent's progressive disciplinary process. Second, by basing the LPNs' supervisory

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

authority to discipline on their discretion to issue DARs that have no demonstrable effect on employees' terms of employment, the majority blurs the distinction between being vested with the authority to discipline employees within the meaning of Section 2(11), and having authority that is merely reportorial and thus nonsupervisory in nature.

I.

The Respondent has failed to show that the DARs themselves constitute discipline, or that they predictably lead to discipline or even to further management review for disciplinary purposes. In fact, there is no evidence that any employee has been terminated, denied a raise, or adversely affected with respect to a term or condition of employment because of an LPN's issuance of a DAR. Therefore, the authority to issue a DAR does not, standing alone, evidence supervisory authority. *Passavant Health Center*, 284 NLRB 887, 889 (1987) ("the issuance of written warnings that do not alone affect job status or tenure do not constitute supervisory authority").

Moreover, although the Respondent has a progressive disciplinary system, it failed to show any actual relationship between the DARs issued by the LPNs and increased discipline under that system. For example, while several of the DARs in evidence describe an employee's alleged misconduct and the work rule that was allegedly violated, the section of the form that should reflect the appropriate discipline, i.e., whether a first notice, second notice, final notice, discharge warning, or discharge, is blank. Director of Nursing (DON) Carolyn Davis testified that, because the LPNs do not have access to employees' personnel files, they routinely leave this section to be completed by a unit manager, once she has had the opportunity to check the employee's file for any prior discipline. Although this might explain why the LPNs did not themselves designate the appropriate discipline on the DARs, it still does not explain why the reports ultimately remained blank and were placed in employees' personnel files in an incomplete state. On this record, I would find that the Respondent has failed to demonstrate that the DARs play any role in the Respondent's progressive disciplinary system.

Further, even in instances where an LPN has indicated on a DAR that it is the employee's "first notice" for a particular offense, this designation may very well be in error. This is because the LPNs do not have access to employee personnel files and thus have no way of knowing whether an employee has been disciplined for the same rule infraction in the past. DON Davis testified that, in the event that an LPN has recorded the wrong level of discipline for an employee, the unit manager will not increase (or decrease) it. According to Davis, in such instances, the incorrect determination would simply stand.[1] Thus, once again, the Respondent has failed to establish that the DARs play any discernible role in the Respondent's progressive disciplinary policy.

Other examples of the apparent disconnect between the DARs issued by the LPNs and the Respondent's progressive disciplinary policy can be found in three DARs in evidence showing employees who have been written up for "class II" violations. In one, the employee purportedly received a "first notice" of discipline, and in another, the employee purportedly received a "second notice" of discipline. According to the Respondent's handbook, however, there is no first or second notice that corresponds to a class II infraction. In fact, the handbook expressly states: "Because class II infractions are more serious, the first and second notice steps are skipped," and what should result from a second offense for a class II infraction is a discharge warning.[2] Furthermore, a third DAR in evidence shows that an employee was written up for a class II infraction for which no disciplinary determination was recorded. This, too, is contrary to the Respondent's mandate in the employee handbook that class II violations "necessitate immediate disciplinary action in the form of a final written notice for the first offense." In short, the Respondent has not demonstrated any meaningful relationship between the issuance of DARs and the Respondent's written disciplinary policy.

Where, as here, an employer follows a progressive discipline system and individuals alleged to be supervisors have issued warnings, the Board has refused to find supervisory authority where there is no persuasive evidence of a relationship between those warnings and increased discipline. See *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1139 (1999) (even though employer followed progressive discipline system, registered nurses' written reports of oral warnings did not establish supervisory authority; there was no evidence that reports necessarily led to suspension or termination or otherwise affected job status).

The majority nevertheless maintains that the LPNs' authority to issue DARs makes them supervisors, relying on the Board's recent decision in *Wilshire at Lakewood*, 345 NLRB No. 80 (2005). In *Wilshire*, the Board found that a registered nurse possessed 2(11) supervisory authority to discipline employees based on her authority to

[1] On cross-examination by the Respondent's counsel, Davis retreated from this testimony. As the majority notes, she ultimately testified that higher management could override an LPN's incorrect disciplinary determination. Nevertheless, she could not recall a single instance in which management had done so.

[2] Tellingly, there is not a single DAR in evidence in which an LPN has authorized this higher level of discipline.

issue, at her discretion, disciplinary writeups of employee infractions, which were then placed in employees' personnel files. The Board found that this exercise of discretionary authority "constituted the first step in the process for possible discipline." Id., slip op. at 2. Although the evidence showed that the writeups did not necessarily lead to further disciplinary action, the Board found that they played a "significant role in the disciplinary process." Id.

Accordingly, in *Wilshire*, supra, there was at least some evidence that the writeups "would initiate further review by managerial officials, as well as a determination of whether further disciplinary action against the employee was warranted," id., slip op. at 1. Here, in contrast, the evidence shows that DARs, even incomplete or erroneous ones, are routinely placed in employee files without further investigation or review by anyone, and that these reports do not give rise to actual disciplinary action. Thus, the asserted "disciplinary authority" of the Respondent's LPNs actually falls well short of the supposed disciplinary authority of the RN in *Wilshire*; indeed, the LPNs' authority is not disciplinary at all. The obvious conclusion to be drawn—the one drawn by the Regional Director in the representation proceeding and adopted by the judge—is that the Respondent has failed to prove that the LPNs' discretionary authority to issue DARs establishes their supervisory status.

II.

For the majority to nevertheless find that the LPNs are supervisors based on their issuance of these reports blurs the distinction between the statutory authority to discipline within the meaning of Section 2(11) and the mere reporting of information. As discussed above, what the Respondent has shown is, at most, that LPNs have the discretion to submit reports of minor rule infractions, which are then placed in employees' personnel files with no demonstrable effect on the employees' terms and conditions of employment. See *Hospital General Menonita v. NLRB*, 393 F.3d 263, 267 (1st Cir. 2004) ("Filling out forms related to performance issues, without more, does not qualify employees for supervisory status."); *Waverly-Cedar Falls Health Care*, 297 NLRB 390, 391–392 (1989), enfd. 933 F.2d 626 (8th Cir. 1991) (although LPNs "play a role in the employer's disciplinary system" by issuing warnings that are placed in employees' personnel files, LPNs are not statutory supervisors where evidence showed, inter alia, that the warnings do not necessarily lead to any further review or adverse action).

In *Wilshire*, supra, this same Board majority insisted that it was not saying "that the authority to decide whether to report an infraction makes a person a supervisor," but rather "that a person who is responsible for deciding whether to report an infraction, *which report will initiate a disciplinary process*, has supervisory authority." *Wilshire*, slip op. at 3 fn. 8 (emphasis added). Taking the majority at its word, it reaches the wrong result today. The mere authority to report employee misconduct remains just that, and does not amount to supervisory authority.

III.

In sum, the Respondent has failed to prove that an LPN's decision to write up an employee in a DAR automatically triggers anything more than the filing away of an inconsequential piece of paper. Accordingly, I respectfully dissent from the majority's finding that LPNs Lemon and Adkisson are 2(11) supervisors on the evidence in this case.

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge you because you engage in concerted activities with each other for the purposes of mutual aid and protection by gathering together at our Owensboro, Kentucky facility during your breaks to protest staffing conditions and complain to the news media about your terms and conditions of employment.

WE WILL NOT refuse to reinstate you unless you agree not to engage in the activity described above or other concerted activity for the purposes of mutual aid and protection.

WE WILL NOT remove union literature from a bulletin board at our Owensboro, Kentucky facility when we allow you, without prior approval, to post other types of nonwork-related literature on the same bulletin board.

WE WILL NOT orally warn you for assisting the United Steelworkers of America, AFL–CIO, CLC, or any other labor organization.

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

WE WILL, within 14 days from the date of the Board's Order, offer Sheila Kelley, Stacy Kjelsen, Misty Paulin, Tammy Hamilton, and Tammy Snyder full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Sheila Kelley, Stacy Kjelsen, Misty Paulin, Tammy Hamilton, and Tammy Snyder whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Sheila Kelley, Stacy Kjelsen, Misty Paulin, Tammy Hamilton, and Tammy Snyder, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the unlawful discharges will not be used against them in any way.

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

EXTENDICARE HOMES, INC. D/B/A BON HARBOR NURSING AND REHABILITATION CENTER

Michael T. Beck, Esq. and *Fredric D. Roberson, Esq.,* for the General Counsel.

Todd M. Nierman, Esq. and *Dustin D. Stohler, Esq. (Baker & Daniels),* of Indianapolis, Indiana, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. Upon charges and an amended charge filed by United Steelworkers of America, AFL–CIO–CLC (the Union) against Extendicare Homes, Inc. d/b/a Bon Harbor Nursing and Rehabilitation Center (Respondent or Bon Harbor), a consolidated complaint was issued on July 16, 2004,[1] alleging that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act), by (a) discharging seven named employees[2] on January 14 because they engaged in concerted activities with each other for the purposes of mutual aid and protection by gathering together at Respondent's facility during their break to protest staffing conditions and complain to the news media about their terms and conditions of employment; (b) since January 15 refusing to reinstate these seven employees unless they agree not to engage in the activity described in (a) above or other protected concerted activity; and (c) removing union literature from a bulletin board at Respondent's facility on March 13 despite allowing employees to post other types of nonwork-related literature on the same bulletin board; and that Respondent violated Section 8(a)(1) and (3) of the Act by verbally warning its employee Paulin on March 13 because she assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities. In its answer, Respondent claims that the named employees walked off the job on January 14, and it nondiscriminatorily removed from its bulletin boards solicitations on behalf of outside organizations, including the Union. Respondent admits that on March 13 it verbally warned Paulin. Respondent denies violating the Act as alleged.

A hearing was held on September 14 in Owensboro, Kentucky. The record was not closed at the time because an additional unfair labor practice charge had been filed by the Union against the Respondent. By motion filed January 4, 2005, counsel for the General Counsel indicated that the additional charges filed by the Union against the Respondent had been resolved. He requested that the record be closed and a brief date be set. Upon the entire record in this proceeding, including my observation of the demeanor of the witnesses and consideration of the briefs filed by the General Counsel and the Respondent on February 7, 2005, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, with a place of business in Owensboro, has been engaged in the operation of a nursing home. The complaint alleges, the Respondent admits, and I find that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Facts

When called by counsel for the General Counsel, Respondent's director of nursing (DON) at its Owensboro facility, Carolyn Ann Davis, testified that Bon Harbor provides skilled nursing care and therapy; that the facility has a total of 132 beds on four units [skilled (44), north (30), west (28), and south (30)], a large therapy department, and a dining room; that it employs about 100 nurses plus employees in activities, therapy, dietary, housekeeping, maintenance, and laundry; that she is second in the chain of command at the facility, and when the administrator of the facility, then Jennifer Hurt, is not present at the facility, she is the top management official at the facility; that she directly oversees the registered nurses (RNs) supervisors, unit managers, licensed practical nurses (LPNs), certified nursing assistants (CNAs), and certified medication aides (CMAs); that in January 2004 there were 2 unit managers, 3 RNs, 1 weekend RN supervisor, about 32 CNAs, 4 CMAs, and about 20 LPNs; that in January 2004 the LPNs were responsible for overseeing the CNAs and the CMAs to make sure that

[1] All dates are in 2004, unless otherwise indicated.

[2] Sheila Kelley, Stacy Kjelsen, Misty Paulin, Norma Lemon, Rita Adkisson, Tammy Hamilton, and Tammy Snyder.

they are doing their jobs, directing their nursing assistants, providing medications, treatment, assisting in meals, and setting up doctor's appointments; that all LPNs are charge nurses except one who works on skin related problems; that one LPN, Donna Renfro, is responsible for making out the schedule; that CMAs pass out medication and render treatment; that CNAs are involved in direct patient care like bathing, grooming, ambulating, feeding, turning and repositioning, and assisting with activities; that in January 2004 one RN, Kim Steward, oversaw two of the units (skilled and west) and an LPN, Della Boehman, oversaw the other two units (north and south); that there were three shifts in January 2004, namely 7 a.m. to 3 p.m., 3 to 11 p.m., and 11 p.m. to 7 a.m.; and that in January 2004 two LPNs and between four and five CNAs were assigned to a shift in the skilled unit, one LPN and two or three CNAs to the north unit, one LPN and two or three CNAs to the west unit, and one LPN and two or three CNAs to the south unit.

When called by counsel for the General Counsel, Davis testified that she arrived at the facility at 8 a.m. on January 14. About 10 a.m., Renfro paged her while she was at the skilled unit nurses station speaking with Adkisson. Davis testified that Renfro told her that several staff members and the media were out in the Respondent's parking lot; that she went to the parking lot going out the lobby door and asked Lemon, Kjelsen, Kelley, Paulin, Hamilton, and Tammy Snyder to come back in the facility; that there were television cameras present; that the employees proceeded to follow her back to the facility; that she held the door open as the employees came into the facility and Lemon asked, "You're saying we're fired. You're saying we're fired" (Tr. 24); that she then said, "Clock out and go home" (Id.); that she had a page that her corporate office had telephoned and she went to the office to speak with the corporate office; that while she told the employees to clock out and go home they were still employed at Bon Harbor; that she telephoned Respondent's regional offices in Louisville, Kentucky, and Milwaukee, Wisconsin, and licensing and regulations, which is a Kentucky State agency which oversees long-term care, since there was a staffing shortage after the seven employees left; that there have been individuals who have walked off the job before but Respondent never had an entire unit walk off the job before; that the normal discipline for an employee walking off the job is termination; that she did not go home that night and she was told the news on television that night indicated that she had fired the employees; that there were four CNAs assigned to the skilled unit, and two to the south unit on January 14; that Lemon tore up weight records of residents, which are legal documents, on the day of the walkout; that LPNs and CNAs do not report to her when they are going to take their break; and that she did not tell the employees who were outside on January 14 to go back in the facility and go to work but rather she told them to clock out and go home.

In response to questions of the Respondent's counsel, Davis testified that she saw seven employees outside Bon Harbor's facility on January 14, namely Lemon, who was the LPN supervisor on the skilled unit; Adkisson, who is the LPN supervisor on the skilled unit; Paulin and Tammy Snyder, who are CNAs on the skilled unit; Kelley and Kjelsen, who are CNAs on the south unit; and Hamilton, who is a CMA on the west unit; that while Adkisson was not outside when the group of employees first went out, Adkisson went out after Davis told the employees to clock out; that Adkisson told her "I have to" (Tr. 46); that Lemon came to work late that morning; that Hamilton had been pulled from Lemon's unit to work on another unit; that when she went into the parking lot channel 25 representatives were there and Chris O'Nan, who is a reporter for the Messenger Inquirer—the local newspaper, was there; that she asked the media to leave Bon Harbor's parking lot; that she asked the employees to come back into the facility and clock out; that she did not tell the employees that they were discharged or fired; that it was her opinion that the employees should have been working when they were in the parking lot; that if an employee leaves the building, they are supposed to clock out; that Lemon said, "So you're saying we're fired" (Tr. 52); that Lemon asked the media, "Are you getting this on camera" (Id.); that she then said, "[C]lock out and go home" (Id.) while she was standing, holding the front door open; and that the movement of Hamilton and the perceived short staffing on the units on January 14 was not anything out of the ordinary.

The following appears on pages 62 and 63 of the transcript:

> MR. NIERMAN: Respondent is willing to stipulate that the job action was a response or was motivated by short staffing or at the point of short staffing.
>
> MR. BECK: We'll enter into that stipulation.
>
> MR. NIERMAN: We'll stipulate that *the employees walked out* on the day in question to protest short staffing.
>
> MR. BECK: That's fine.
>
> JUDGE WEST: Accepted. [Emphasis added.]

Kjelsen, who is a CNA at Bon Harbor, testified that she was fired on January 14; that on January 14 "[a] group of girls were going to talk about 10 o'clock and get together on our breaks" (Tr. 66); that they were going to discuss short staffing in the facility; that when they went out the front of the facility she noticed Lemon speaking with a camera crew; that Davis came out of the facility and told the camera crew to get off the property; that Davis told the employees who were outside to "get our things and clock out and go home" (Tr. 68); that Lemon asked Davis, "Did you say that we were fired" and Davis said, "Yes" (Id.); that she got her things, clocked out and went home; that she had not clocked out before she went outside on her break; that she had not taken a break that morning before she went outside and this was her first break; and that she was wearing her jacket because it was cold outside but her other things were inside. On cross-examination, Kjelsen testified that before going outside on January 14 she did not know that the media was there; that they had "discussed something about it, but . . . [she] didn't expect it to be our there" (Tr. 73); that when she went outside she took her jacket and purse (Tr. 73 and 74); that the discussion about short staffing began inside where units connected and then the involved employees went outside to discuss short staffing; that on January 14 she worked on the west unit and reported to Lisa Brown; that she told Lisa Brown that she was going on break; that she has taken a break in the parking lot before either eating in her car or standing in the parking lot talking to people; that what looks like a purse hanging over her right arm in the picture in the newspaper article (R.

Exh. 2), is her lunch bag; that the newspaper article is not accurate in indicating that the employees walked off the job in that she did not walk off the job but rather she was fired; that when she left the building she was on a break; and that she intended to come back to work at the end of her break. Subsequently, Kjelsen testified that when she takes 15-minute breaks in Bon Harbor's parking lot she does not clock out; that she was not aware of any policy requiring an employee to clock out in this situation; and that if an employee leaves the facility and the property for a 30-minute lunch break they are required to clock out.

Adkisson, who was an LPN charge nurse, testified that on January 14 after she arrived at work at 6:45 a.m. she and some of the employees were discussing how short staffed they were; that this discussion occurred on the west unit in the hallway; that some of the employees wanted to have a sit-in in the breakroom; that Lemon and Norma Young, who is the 11 p.m. to 7 a.m. charge nurse, were discussing the fact that the 3 to 11 p.m. and the 11 p.m. to 7 a.m. nurses were getting paid more than the 7 a.m. to 3 p.m. nurses because of the shift difference; that Young got upset and she and Lemon had words; that Lemon locked her med cart and went up front to talk with Steward and Boehman in their office; that she was present during this discussion and Steward and Boehman told Lemon, who was crying, to take an hour break and get herself together; that she and Lemon went back on the floor; that Lemon and some other employees telephoned the media and it was agreed that at 10 a.m. the employees would meet out front and talk to the media in the parking lot; that the media was contacted because the employees thought someone needed to know how short staffed they were and the care that the residents were receiving; that 10 a.m. was chosen because the employees were going to take their break after the first bed check and breakfast; that she had just received her yearly evaluation and she was discussing it with Davis at the nurses station on the skilled unit when Davis received a telephone call from Renfro, who told Davis that she needed to get up front because there were people out front; that Davis asked her if she knew anything about this; that Davis then left the nurses station; that she then continued to look at her evaluation for a few minutes; that after a few minutes she went to the front door and looked out; that she punched the code and Steward opened the front door; that she heard Davis (1) telling the media that they had to leave because it was private property, and (2) asking the employees if they were still on the clock; that Davis told the employees to clock out and go home; that Lemon asked Davis, "Are you firing us," Davis' head moved up and down, and Lemon said, "Are you all still getting this on tape" (Tr. 93); that Davis told Steward and Boehman to take the involved employees' key and go out on the floor; that she was still standing at the door and she asked Steward, "Are you talking about me" to which Steward replied, "You heard what . . . [Davis] said" (Tr. 93 and 94); that she took her keys out of her pocket and Steward took them out of her hand; that the involved employees asked Steward and Boehman if they wanted help counting meds and with the report, which is a state regulation, but Steward and Boehman said no and to get out of the building; and that she got her purse and jacket and left. On cross-examination, Adkisson testified that Hamilton was with Lemon when Lemon contacted the media; that she and Lemon were the two LPNs; that it was not unusual for the two LPNs to take a break at the same time; that she had noticed in talking with Davis on any routine subject that Davis tends to nod her head a lot; and that she did not witness Lemon tear weight records on January 14, and it is not possible that she told Steward this. Subsequently, Adkisson testified that Steward was aware that she remained inside throughout the entire incident in the parking lot on January 14.

Lemon, who as noted above was an LPN charge nurse at Bon Harbor, testified that she had followed the chain of command several times to try to complain about short staffing, nothing was getting done, and it was decided to contact the media; that on January 14 when she arrived at work the CNAs were short; that she started working, she became overwhelmed, and she spoke with Adkisson; that she then went to the office to tell a supervisor that she needed to leave; that she told Steward and Boehman that she only had two CNAs, she could not take it anymore, and Steward needed to come with her to count meds because she was leaving; that she usually has three CNAs, two nurses, and one CMA, and, on a good day, there are four CNAs; that Steward asked her if she could leave for 1 hour and come back because if she left for the day it would make the unit short; that she told Steward that she had already taken her nerve pill, she was crying, and she went back to the floor with Adkisson; that six or seven of the employees met in the hallway between the west and skilled units, they discussed short staffing, and decided to contact the media and speak to them at 10 a.m. when they took their break; that when Davis came to the nurses station and was speaking with Adkisson, she went outside and talked to the media; that Davis asked the employees who were outside if they were on the clock, and they told her yes they were on their break; that Davis told the media that they needed to leave the premises and the police had been called; that Davis told the employees that they needed to come in and clock out; that she then asked Davis, "So are we fired," and Davis said, "Yes, you're fired. Go clock out" (Tr. 108); that Davis told the supervisors to take the keys and "hit the floors" (Id.); that the involved employees went back to the floor to get their purses and coats; that she asked Steward to help her count the narcotics and make a report but Steward refused and told her to go; that she got her purse and went with Adkisson to Davis and told her that Steward refused to count drugs and get a report; that she asked Davis if she was going to be charged with abandonment and Davis said no but she needed to go; and that she then went outside and talked to the media across the street. On cross-examination, Lemon testified that when she first walked out she did not have her purse with her and she did not recall whether she was wearing her lab jacket; that she did not have her purse because she was not leaving the facility but rather she went outside to talk with the media; that she was not walking out and staying out until such time as Bon Harbor fixed staffing; that between 9 and 9:30 a.m. she decided to contact the media and she telephoned newspaper reporter Chris O'Nan and a television station, channel 25 News; that she told the newspaper person who answered the telephone that "we were having short staffing issues and that we were wanting to talk to the media about it" (Tr. 115); that she explained to the person who

answered the telephone at the newspaper that the employees had been complaining for 3 months straight; that she said the same thing to channel 25; that she did not tell anybody that the employees were going to walk out; that she told the media that the employees were going to be taking a break at 10 a.m.; that it is not a normal practice for the two LPNs on the skilled unit together to leave the floor to go on break; that she and Adkisson did not leave the floor together; that after Davis told the involved employees to clock out and go home, she asked Davis twice if she was saying that the involved employees were fired and Davis said, "Yes, you're fired. Go" (Tr. 122); that when Davis said this she was holding the door open for the employees as they were walking in; that she did say at the front door to the media, "Are you getting this" when she and Davis were speaking; that the January 15 newspaper article is inaccurate when it indicates (1) "left their patients and walked off their job . . . "; (2) "After returning to the nursing facility to clock out, the nurses were fired, said Norma Lemon . . . "; (3) Jennifer Hurt said she was not made aware of it [short staffing]; and (4) her discussion with the media on January 14 had nothing to do with low pay, "I was paid enough" (Tr. 125); that the employees left the floor on their breaktime to talk to the media and the employees were fired as they walked in the door; that she anticipated that she might be fired for talking to the media; and that she was sure that on January 14 she did not tear the resident/patient weight records. On redirect, Lemon testified that Bon Harbor did not have a set policy or schedule for when CNAs take breaks; that she gets two 15-minute breaks and one 30-minute lunchbreak; and that on January 14 prior to going outside and meeting with the media she had not taken her break.

Kelley, who is a CNA at Bon Harbor, testified that on January 14 she arrived at work at 6 a.m. and she worked on the south unit, which had two CNAs assigned to it, namely her and JoAnn Morreman; that Donna Brown was on the unit as the LPN; that normally three CNAs work on the south unit and, therefore, they were one CNA short on the morning of January 14; that for the past couple of months there were just two CNAs on the unit; that she had complained to Donna Brown; that she discussed short staffing on the morning of January 14 with Paulin and Kjelsen; that Paulin said that they were going to go out and talk with the newspaper reporters and the TV people about 10 a.m.; that she agreed to join in; that normally she took lunch at 10:30 a.m.; that she was going on her lunchbreak when she went out front at 10 a.m.; that she already had taken her 15-minute morning break before 10 a.m.; that the reporters were there when she went outside; that Davis came to the door and the only thing that she heard Davis say was "for us to go get our belongings, clock out, and get off the premises" (Tr. 141 and 142); that she was away from the main group, she had been smoking, and she was putting out her cigarette; that they were saying that Davis said that they were fired but she never heard Davis say this; that she went inside, got her stuff, and left; and that she went outside, talked to the reporters, and went home. On cross-examination, Kelley testified, with respect to Respondent's Exhibit 2, that the five employees in the picture are herself, Kjelsen, Tammy Snyder, Paulin, and Lemon; that the normal practice is to clock out for lunch but she did not clock out at 10 a.m. on January 14; and that she did not recall any conversation with Donna Brown before she left.

Hamilton, who is a CMA at Bon Harbor, testified that on January 14 she arrived at work at 6:45 a.m.; that she was assigned to the west unit, along with two nursing assistants; that no LPN was assigned to that unit; that several times in the past she has been on a unit where there was no nurse assigned to that unit; that for about 6 months before January 14 there had been an issue with staffing at Bon Harbor; that she had complained about the staffing issues to Hurt a month or two before January 14; that her conversations with Hurt took place in Hurt's office and Hurt said, "She could run that unit back there with one CNA if she wanted to" (Tr. 150); that on January 14 the CNAs on her hall, Kjelsen and Dorothy Simmons, asked her to see if she could get them some more assistance; that she also discussed staffing that morning with the nurses on skilled and the CNA on skilled; that they discussed speaking with the administrator; that at about 9 a.m. Paulin told her that the media was going to be there about 10 a.m.; that she takes lunch at 10:30 a.m. every day so that she can go to see her husband who works at Field Packing Company; that at 10 a.m. she went to the south unit and gave her keys to nurse Donna Brown and told her that she was going to lunch; that she clocked out and went out to the parking lot; that she heard Lemon make a few statements in the parking lot; that as she was saying, "[I]t's about my time to go" (Tr. 152) and was walking to her car and unlocking the door, she heard Davis ask if the involved employees were on their time, and they needed to come in, clock out, and get off the premises, and Lemon ask, "Did you say we were fired" (Tr. 153); that she did not hear Davis' reply; that she hollered that she would be right back, she met her husband, and returned with him, apparently in separate vehicles, to Bon Harbor; that she was gone not even 5 minutes since her husband was waiting for her at the gate to change vehicles; that she went into Bon Harbor since her husband had told her that it was against the law to be fired like that and she should go in; that she was stopped by Steward and Renfro and one of them told her that if she had talked to the media, she would be fired; that she said, "[T]hey said that we were fired. I heard Norma Lemon. I'm just trying to figure out what's going on" (Tr. 154); that she was still on her lunchbreak and she decided to go outside and talk to the media; and that she left the facility and spoke with the media. On cross-examination, Hamilton testified that she did not recall whether it was Steward or Renfro who said that if she had been out there talking to the media, she would be fired; and that while the affidavit she gave to the Board in February 2004 indicates that Steward made this statement, she was upset at the time and she could not say for sure that it was Steward.

Paulin, who is a CNA at Bon Harbor, testified that she worked on the 6 a.m. to 2 p.m. shift on January 14 on the skilled B hall unit; that at 7 a.m. CNA Amanda Morris came in to her unit, and at 8:45 a.m. CNA Tammy Snyder came to her unit; that from 7 to 9 a.m. she and Morris were the only CNAs on the unit; that LPN Adkisson was on the back hall and LPN Lemon was on the front hall; that usually there are four or five CNAs on the skilled unit; that there had been a problem with short staffing prior to this and she had complained about it to

Hurt on numerous occasions; that she discussed the short staffing problem with employees on January 14 and before that; that on January 14 the employees discussed talking about the problem with Hurt but then it was concluded that they would get nowhere discussing it with Hurt; that she was present when Lemon contacted the newspaper and a TV station; that it was decided to talk to the media at 10 a.m. because everybody would be ready to take a break or lunch; that the plan was communicated to Hamilton, Tammy Snyder, Adkisson, Kelley, Dorothy Simmons, Morreman, and pretty much almost everybody that was in the building; that at about 10:15 a.m. she and Lemon, Adkisson, Tammy Snyder, Kelley, and Kjelsen went outside; that she did not bring her purse or her coat with her when she went outside; that the camera crew was set up in the lobby and Davis told them that they needed to get off the premises, get out of the inside; that she followed the camera crew outside; that Davis then came outside and asked the employees if they were on the clock and most of the employees responded they were; that Davis said that the involved employees needed to clock out and get off the property; that Lemon then asked, "Are you firing us" (Tr. 168); that Davis said, "Yes, you're fired. Clock out and get off the premises" (Id.); and that she went into the facility, got her belongings, clocked out at 10:22 a.m., and went outside and spoke with the media. On cross-examination, Paulin testified that when Lemon asked Davis if the involved employees were fired Davis replied, "Yes, you're fired. Clock out and leave" (Tr. 178); and that she did not have any of her belongings with her when she first went outside.

When called by Respondent, Davis testified that Lemon asked on January 14 if the involved employees were fired, she told the employees to clock out and go home, and she did not tell anyone that they were fired or discharged from employment; that media is not allowed at the facility because of resident's rights; that by telling the involved employees to leave she did not intend to terminate them; that she had never had this happen before; that she has told employees to go home while the Respondent investigates allegations of abuse or neglect but in those instances she would suspend the employee for 5 days pending investigation; that after she told the involved employees to leave on January 14 she called her corporate office; that she regarded the involved employees who were sent home as active employees who were not working; that she contacted channel 25 in Evansville, Indiana, and obtained a copy videotape of the coverage of the January 14 incident, inter alia (R. Exh. 8); that regarding the involved employees, she would not think that amount of staff would be on break at that one time on January 14; that it is not common for that many people from the involved units to leave the facility at the same time; that it is unusual that both LPNs would leave the skilled unit at the same time; and that based on her investigation she never concluded that the involved employees were all on break. On cross-examination, Davis testified that while she responded to Lemon's question as to whether she was saying they were fired, she only said, "To clock out and go home" (Tr. 197) and did not say, "Yes. Get your things and go" (Id.); that she did not say anything to let the involved employees know that they were not fired when Lemon asked more than once if the involved employees were fired; that while it was not her intent to terminate these employees on January 14, she did not explain to these employees why they were sent home, and she did not communicate to the involved employees in any way on January 14 that they were not fired; that she did not explain to the involved employees what their job status was when she told them to clock out, get their things, and go home; that it is against company policy to have the involved employees on break at the same time in view of the staffing that would be available; that the policy is not memorialized in any of the Company's employee handbooks; and that such policy has not been communicated to employees but it is directed by their charge nurse. Subsequently, Davis testified that after she asked the TV crew to leave the parking lot they were in the lobby of the facility in that "she came into the lobby." (Tr. 201.)

Steward, who is a registered nurse and the nurse manager on skilled and west hall, testified that on January 14 while she was standing in the front lobby of Bon Harbor she heard Davis tell the involved employees to come back in, clock out, and go home; that she heard Lemon say to get this on tape; that she did not recall having a conversation with Hamilton on January 14 where Hamilton was inquiring about her job status; that she did not say to Hamilton that "if she had talked to the media or her face was on the media, she would be fired" (Tr. 203); that Respondent's Exhibit 4 are ripped weight records which she found at Lemon's desk on January 14 right after Lemon walked out; that it was not after Lemon came back to get her belongings and leave for good but rather it was when Lemon first walked out about 10:15 a.m.; and that she did not see who ripped the records. Subsequently, Steward testified that she found the ripped documents before Lemon came back into the facility at Davis' behest; that she was in the lobby when Lemon came back into the facility at Davis' behest; that she heard what Davis told the employees when they were coming back in; that while ripping such documents is a very serious matter, she did not say anything to her in the lobby when Davis was bringing the involved employees back into the facility because of the commotion; and that she bought it to the attention of Davis shortly thereafter.

Boehman testified that on January 14 she was in the lobby when the involved employees were returning back from being outside; that she could not hear what the employees were asking Davis but she did hear Davis say, "No. I said to clock out and go home." (Tr. 212); and that she never heard Davis say, "[Y]ou're fired" (Id.). Subsequently, Boehman testified that employees were asking questions as they came back into the facility and while she could not hear the questions, she is sure that Davis said, "No. I said to clock out and go home" (Tr. 214); and that she heard Davis say, "No" (Tr. 215).

When called by counsel for the General Counsel, Davis testified that while the seven above-described employees were scheduled to work on January 15, none of them came to work or called in; that an article in the local newspaper that morning indicated that these employees stated that they had been fired; that after two no-call/no-shows, an employee could be terminated; that Respondent sent letters to all of these employees to let them know that they were not fired; that she discussed the letter with Respondent's regional people and the human resources department; that she believed that the incident, along

with the employees' belief that they were fired, was covered on the television news on the night of January 14; that the first discussions she had with anyone about sending the employees a letter telling them that they had not been fired occurred on January 15; that she, Hurt, Respondent's regional director of operations, and a human resources person, along with Respondent's legal department, made the decision to send the letter; that conditions were place and on the employees coming back in that they had to come back unconditionally and also agree not to walk out in the event of some future short staffing; that if the employees did not agree to these conditions, they would not come back to work, they would still be considered employees of Bon Harbor, but they would not be scheduled any hours; that Bon Harbor's legal department made the decision to place these conditions on the employees returning to work; that the discussions with the legal department about the conditions for returning to work occurred later on the day the letter was sent out; and that despite the fact that Lemon allegedly tore up weight records on the day of the walkout, she would have been put back to work if she had agreed to the conditions.

Respondent's Exhibit 3 is a copy of a newspaper article. As here pertinent, it reads as follows:

> Bon Harbor nurses fired after walkout
>
> Six leave nursing facility over pay and staffing complaints
>
> 01/15/04
>
> By Chris O'Nan
> Messenger-Inquirer
>
> Citing understaffing and low pay, six members of the nursing staff at Bon Harbor Nursing and Rehabilitation Center left their patients and walked off the job Wednesday.
>
> The walkout resulted in their firing by Director of Nurses Carolyn A. Davis, who followed the women to the parking lot and told them to clock out before leaving. After returning to the nursing facility to clock out, the nurses were fired, said Norma Lemon, a licensed practical nurse and one of those fired.

Hamilton testified that she returned to Bon Harbor on January 15 with Lemon to pick up her check stub; that Davis asked them to come into her office, told them that they were not fired, and that they could come back if they came back unconditionally and agreed not to walk out again if Bon Harbor was short staffed; that she and Lemon could not answer the questions with just a yes, and they left Bon Harbor; and that she could not answer the question with a yes because she did not walk out the first time.

When called by counsel for the General Counsel, Davis testified that while the seven above-described employees were scheduled to work on January 16, none of them came to work; that she did not know if any of the seven employees called in on January 16; and that none of the employees were disciplined for not showing up for work or calling in on January 15 and 16.

By letter dated January 16 (R. Exh. 1), Davis advised Tammy Snyder as follows:

> I saw in the newspaper a report that you have been terminated. This is not correct.
>
> On Wednesday, January 14, you and several other employees walked off the job complaining about staffing. My concern was that you were not working while you remained on the clock. It was never my intention to suggest that you were terminated.
>
> If you intend to return to work, please contact me.

Hamilton testified that she and Paulin went to Bon Harbor on January 16 because apparently a newspaper article indicated that the involved employees were not fired and they were still employed by Bon Harbor; that there was a full-staff meeting that Friday and when they attempted to go to it Davis would not allow them to attend that meeting; that Davis asked them to come to her office and asked them if they could answer the two questions; that this time she said yes to the two questions, namely that she would come back unconditionally and that she agreed not to walk out if Bon Harbor was short staffed, "but I did not walk out the first time" (Tr. 156); and that she returned to work at Bon Harbor the following Tuesday.

Paulin testified that on Friday morning, January 16, the involved employees met at Shoney's and O'Nan, who was present, told them that she had talked with Davis and the employees would be getting a letter indicating that they were not fired; that later that day she went to Bon Harbor with Hamilton because there was a full staff meeting; that Davis saw them in the facility and told them they were not allowed to attend the full-staff meeting; that she asked Davis why they could not attend the staff meeting if they were not fired; that Davis took them to her office where Ann Snyder asked them if they would come back unconditionally and not walk out the next time Bon Harbor was short staffed; that she answered yes to both questions and added that Davis fired them; that Hurt, who was present for this meeting, told her that she would call her after she called Extendicare to see if she was able to return to work; and that she returned to work the next day. On cross-examination, Paulin testified that Lemon was at the meeting at Shoney's.

Kjelsen testified that she did not receive a letter from Bon Harbor but Kelley, who is a CNA, told her about the letter and she went with Kelley to Bon Harbor to meet with the Acting Administrator Hurt; that Hurt asked Kelley if she would come back unconditionally and whether she would walk out "if any conditions were as they were and would . . . [she] walk out on any conditions" (Tr. 71) and Kelley answered, "[Y]es"; and that when Hurt asked her these questions she believed she said, "[N]o." On cross-examination, Kjelsen testified that Cathy Head, a corporate human resources person, may have been present at this meeting; and that when she was asked if she would leave under the same conditions it meant the staffing situation.

Kelley testified that she received a certified letter from Davis indicating that the involved employees were not terminated and she should set up an appointment to talk with Davis and Hurt; that she went to Bon Harbor with Kjelsen; that Hurt and Davis asked them two questions, namely would they walk out if they were short staffed again, and would they come back with no demands; that she answered yes to both questions indicating

that she wanted to be able to go back on the same floor and still have all her benefits and stuff; and that they told her to return to work.

Kjelsen testified that 1 week after meeting with Hurt, she telephoned Acting Administrator Ann Snyder and asked her if she could come in and talk with her; that Snyder asked her the same two questions and this time she replied, "[Y]es"; and that she was then told to come back to work the next day on south wing.

Adkisson testified that on January 20 she received a certified letter from Bon Harbor indicating that she was not fired; that she went to Bon Harbor to pick up her paycheck and asked two ladies from corporate who were standing there if it was convenient to speak with Davis; that she was told that it was not convenient since Davis was in a meeting; that she went to Bon Harbor twice and telephoned once but "never once was I talked to" (Tr. 96); and that she did not attempt any other contact after these efforts. On cross-examination, Adkisson testified that she took employment elsewhere 2 days after January 14.

Lemon testified that she received a certified letter from Davis indicating that the involved employees were not terminated and she should set up an appointment to talk with Davis; that the following week she returned to the facility and met with Davis, Ann Snyder, who is one of the corporate ladies, and Hurt; that Ann Snyder asked her if she would not walk off the job again if they were short staffed and would she come back unconditionally; that when she tried to answer the questions she was told it had to be a simple yes or no, and she told them she could not answer because that would make her guilty of abandoning her patients; that she was told that she had to leave the facility and she could return when she could answer the questions; that subsequently she tried to visit patients that she had taken care of at Bon Harbor and she was escorted out; and that when she went to visit with one patient she was taken to the office and she heatedly spoke with the administrator about staffing and patient care.

Paulin testified that about 1 week after January 14 the United Steel Workers of America contacted Lemon; that she attended a meeting at the Union's hall; that a decision was made to attempt to organize the Bon Harbor employees; that she attended weekly meetings, wore a union button to work every day, and passed out flyers in front of Bon Harbor's building; that Ann Snyder told her to move to the street; and that she posted union material on the bulletin board inside the employee breakroom.

When called by counsel for the General Counsel, Davis testified that Lemon was terminated because she was called on two separate occasions to come into the facility, Lemon came in, but her behavior was disruptive; that on one particular incident Lemon went into a patient's room, took his arm, cursed, and was out of control; that during the two meetings Lemon refused to accept the two above-described conditions and therefore she was not put back to work; that she and corporate human resources decided to terminate Lemon; that she calls human resources before she terminates any employee; that, in addition to the two times Lemon came in to discuss coming back to work, Lemon came to the facility two times; that there were written reports about Lemon coming into the facility, throwing paper into the air and cursing on a unit with residents present; that Lemon's conduct was not reported to licensing and regulation but she escorted Lemon out of the building; that she did not feel Lemon's conduct was serious enough to report to licensing and regulation; and that the first time Lemon came to the facility to discuss the conditions was within a week of January 14, and the second was probably a few days after that.

In response to questions of the Respondent's counsel, Davis testified that she was present at both meetings when Lemon refused to agree to the above-described conditions; that she viewed Lemon as a supervisor; and that she believed that Lemon lead the CNAs out of the facility and this was taken into consideration in the decision to terminate Lemon.

By undated letter (R. Exh. 3), Davis advised Lemon as follows:

> Extendicare holds itself and each of its employees, particularly its supervisory Charge Nurses, to the highest standards. It is an obligation we owe to our residents and the families who have entrusted Extendicare with their loved ones' care. When on duty, the Charge Nurse is accountable for the Nursing Assistants reporting to her, and the care of the residents on her unit.
>
> On January 14, 2004, when working as the supervisor on the skilled care unit, you consciously decided to walk off the job, and encouraged or instructed Nursing Assistants to walk off the job. You abandoned your residents. Over the past two weeks you were twice asked whether you would assure us that you would not do this again. Your refused to give us such an assurance on both occasions.
>
> We have reviewed the events of the past two weeks, including the events of January 14 and your employment history at Bon Harbor. We have determined as a supervisor you did not have a legal right to walk off the job, and that your continued employment is not consistent with Extendicare's policies and the obligations Extendicare owes to our residents and their family members. Effective Wednesday, January 28, 2004, your employment with Extendicare is hereby terminated.

Davis testified that she believed that this letter was sent on January 29. The employee separation form for Lemon, which was signed "2/2/04" and is page 2 of Respondent's Exhibit 3, indicates that Lemon quit and the primary reason was job abandonment.

When called by counsel for the General Counsel, Davis testified that Bon Harbor engaged in activity in order to make its opposition to unionization known to its employees in that it held mandatory employee educational meetings.

Hamilton testified that there is a bulletin board in the breakroom at Bon Harbor; that the breakroom is used by employees and not by the public; that the employees use the bulletin board to post ads regarding the sale of cars, uniforms, dogs and cats, and furniture, etc.; that she posted an ad of the sale of a uniform on the bulletin board and she did not clear it with management before putting it on the bulletin board; that her ad remained on the bulletin board until she took it down after 4 weeks; and that no one from management ever told her that she needed to have

items cleared before she could hang them up on the bulletin board.

Paulin testified that on March 18 she saw some of the union material that she posted being removed by Boehman from the bulletin board in the employee breakroom at Bon Harbor; that she told Boehman that it was against the law for her to remove the union material; that Boehman said that Ann Snyder said that she could remove the material because Bon Harbor was privately owned; that she told Boehman she was given a little notebook from the Union to write down things that happened and she was going to write this down in her book; that later that day she had a meeting with Boehman in her office; that Boehman had Donna Brown as a witness so she got Kim Stout, an LPN, as her witness; and that the following transpired:

> She told me that—she had the employee handbook out and she said it was against the rules to hang up stuff, unauthorized by the administrator, in the employee break room. And I told her . . . I've hung up stuff on there before. Just because we were in an organizing drive doesn't mean the rules can change. And then she told me that I was getting a verbal warning and I said what for. And she said for threatening a supervisor. [Tr. 174.]

Paulin further testified that she asked Boehman what she meant by threatening a supervisor because she was writing it down in her notebook; that she had posted material on the bulletin board before, namely a baby bed for sale and a garage sale, and she had not cleared either of these ads with management before posting them; that no one ever told her that she was supposed to have ads cleared by management before posting them on the employee bulletin board; that after this meeting she posted an ad for a car for sale with a fake telephone number to see if it was removed; that she did not clear the car ad with management; and that the car ad remained up on the employee bulletin board for over a month until she took it down. On cross-examination, Paulin testified that after March 18 she posted union related material on the employee bulletin board in the employee breakroom and some had been removed but lately it was not removed; that with respect to those materials which were removed after March 18, she did not know who removed them; and that she received a handbook (R. Exh. 5), as a new hire 5 years ago. As here pertinent, the handbook reads as follows:

> Bulletin boards are used by the company to provide information such as announcements, changes of programs, revised or additional personnel policies, and the posting of work schedules. If your facility allows employees to use the bulletin board, all material posted must be approved and initialed by the administrator before it is posted. You are responsible for checking the bulletin board regularly. Posted information will only be removed by the appropriate business office staff or supervisor. Unauthorized material will be removed.

Davis testified that Paulin was verbally warned for violating item 6 of class I offenses of the disciplinary action procedure (R. Exh. 6). The item reads as follows: "Minor disrespect to any employee, supervisor, or any other individual in the facility." Six examples of other employees disciplined under this item were received as Respondent's Exhibit 7.

Boehman, who is the LPN nurse manager, testified that on March 18 she entered the breakroom and began taking literature off the bulletin board; that Paulin asked her if she knew what she was doing was against the law; that she told Paulin that she did not believe that it was against the law and she was doing what her supervisors had told her to do; that Paulin told her that she could show her in some book where it was against the law, and she told Paulin that she was not going to debate this issue with her in the breakroom and if Paulin wanted her to come to her office she could; that Paulin chose not to instead "she stood up and put her hands on her hips and raised her tone of voice and said that, 'I hope you know that everything you're saying to me right now I'm writing down in my little white book'" (Tr. 210); that she told Paulin, "[t]hat is your choice. You can do that" (Id.); that she told Paulin that she needed to speak with her and they went back to her office; that Donna Brown was in the office and Paulin requested a witness, Stout; that she showed Paulin the handbook (a) requirement for preauthorization to post on the bulletin board, and (b) reference to disrespect to a supervisor; that she told Paulin that she was giving her a verbal warning, telling Paulin that she did not appreciate Paulin's attitude toward her in the breakroom; that Paulin was disrespectful because she argued in the breakroom in the presence of other employees, raised her tone of voice, and kind of snickered when she said that it was against the law; and that Paulin is not the only person that she has written up for disrespect to a supervisor. On cross-examination, Boehman testified that Davis told her to remove the union literature from the bulletin board after Davis discussed it with Ann Snyder; and that Davis did not instruct her to remove anything else from the bulletin board. Subsequently, Boehman testified that she is in the breakroom several times a week; that she has seen items for sale on the bulletin board; that she did not know whether the employee who posted the item for sale on the bulletin board received preauthorization from the administrator; and that this was the fist time she was asked to remove something from the bulletin board.

Donna Brown, who is an LPN on the skilled unit, testified that on March 18 she was in the breakroom when Boehman took down some union postings; that after Boehman took down the union postings Paulin stood up and said that was against the law to do that; that Boehman responded that she was only doing what she was told to do and Boehman told Paulin that they could talk about it in her office; that Paulin, who was sitting, stood up, put her hands on her hips and then folded her hands, her face got red, her tone of voice was loud but she was not yelling, and she repeated the statement that it was against the law what she was doing; and that "yes" (Tr. 217), based on her experience as a supervisor she felt Paulin was being disrespectful.

By Decision and Direction of Election dated April 27 in Case 25–RC–10230, Extendicare Homes, Inc. d/b/a Bon Harbor Nursing and Rehabilitation Center (Jt. Exh. 1), the Regional Director for Region 25 of the National Labor Relations Board (the Board) concluded that the Employer had not met its burden of proof that licensed practical nurses are supervisory employ-

ees within the meaning of Section 2(11) of the Act. Licensed practical nurses were included in the unit found appropriate in that Decision.[3] The Employer's Request for Review of the Regional Director's Decision and Direction of Election was denied by Order of the Board dated May 26, with Chairman Battista dissenting. (Jt. Exh. 2.) The request was denied for the following reason: "it raises no substantial issues warranting review." Counsel for the General Counsel and the Respondent also stipulated that during the relevant time period Adkisson and Lemon held the position of LPN charge nurses, and possessed the same duties and responsibilities as other LPN charge nurses.

Analysis

Paragraphs 5(a), (b), and (c) of the complaint collectively allege that about January 14, Respondent discharged employees Kelley, Kjelsen, Paulin, Lemon, Adkisson, Hamilton, and Tammy Snyder (1) for engaged in concerted activities with each other for the purposes of mutual aid and protection, by gathering together at Respondent's facility during their break to protest staffing conditions and complain to the news media about their terms and conditions of employment, and (2) to discourage employees from engaging in these or other concerted activities. Counsel for the General Counsel on brief contends that the six of the seven involved employees went outside of the Respondent's facility during the employees' normal breaktime to complain to the news media about Respondent's persistent failure to schedule adequate staff to handle the workload at Respondent's facility and the seventh was just in the area when the complaints were made; that contrary to Respondent's position, the evidence shows that these employees were discharged in that several employees were actually told they were discharged and all of the involved employees were told to go home and were not allowed to return to work until they agreed to the certain unlawful conditions; that an employer violates Section 8(a)(1) of the Act if it knew of the concerted nature of the employees' activity, the concerted activity was protected under the Act, and the adverse employment action at issue was motivated by the employees' protected activity, *Dearborn Big Boy No. 3, Inc.*, 328 NLRB 705, 709 (1999); that in *Hacienda de Salud-Espanola*, 317 NLRB 962 (1995), the Board found an employer violated the Act when it discharged a group of certified nurses aides who left their posts en masse in order to air their work-related grievances about staffing with a news reporter, even though some of the employees were not on break at the time; that all of the employees who testified that they intended to return to work at the end of their break, which was demonstrated by the fact that they left their personal items in Respondent's facility when they exited the building to speak with the media; that when she returned from her lunchbreak which was taken away from the facility, Hamilton was told by either Steward or Renfro that if she had talked to the media, she would be fired; that additionally, Davis' statements and conduct led the employees to believe that they had been discharged in that she told them to clock out and get off the premises, and she did not deny Lemon's statements made in Davis' presence that the employees had been discharged and Lemon's questioning as to whether the camera operators had seen it, *Accurate Wire Harness*, 335 NLRB 1096 (2001); and that Adkisson was discharged on the mistaken belief that she also had engaged in the protected activity which violates the Act, *Metropolitan Orthopedic Assn., P.C.*, 237 NLRB 427 (1978). Respondent on brief argues that the seven involved employees were not discharged on January 14; that Davis told the involved employees[4] who walked off the job without first clocking out, to come into the facility, clock out, and leave the premises; that Respondent's Exhibit 8, the videotape of the incident, does not show Davis saying, "yes"; that the Board has held that the fact of discharge does not depend on the use of formal words of firing, *Hale Mfg. Co.*, 228 NLRB 10, 13 (1977); that the determination of whether there was a discharge is judged from the perspective of the employees, and the issue is whether the employer's statements or conduct would reasonably lead employees to believe that they had been discharged, *Kolkka Tables*, 335 NLRB 844 (2001); that the employees could not have reasonably believed that they were discharged; and that on January 14, 15, and 16 the employees were treated as striking employees who had not unconditionally offered to return to work.

For some time the employees had been complaining to management about the burdens that were being placed on them and the residents by short staffing, that is, not having a sufficient number of employees at the facility. Administrator Hurt did not testify to deny that employees complained to her about the short staffing and when Hamilton complained to her about short staffing Hurt said, "[s]he could run that unit back there with one CNA if she wanted to." Respondent's director of nursing at the involved facility, Davis, described the staffing on each of the units as of January 2004. None had just one CNA. Hamilton's testimony is credited. Respondent knew about the short staffing problem, employees complained about the short staffing problem, and the response they received from management was that even with the shortages, Respondent did not need as many CNAs as it was then using. In other words, the employees were being told that if they thought that the situation was bad, management could make it worse. On the morning of January 14 Lemon, who was crying at the time, went to Steward and Boehman to complain that she only had two CNAs, she could not take it anymore, and she was overwhelmed. Usually, Lemon had three CNAs, two nurses, one CMA, and on a good day there were four CNAs. Steward told Lemon to take an hour break and get herself together. Other employees were upset about the short staffing and management's refusal to do anything about it. The involved employees discussed the matter

[3] The Decision found that the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Sec. 9(b) of the Act:

> All full-time and regular part-time licensed practical nurses, certified medication assistants, certified nursing assistants, dietary, housekeeping, laundry, and activities employees employed by the Employer at its Owensboro, Kentucky facility; BUT EXCLUDING all office clerical employees, directors of nursing, unit managers, MDS coordinators, staff development coordinators and all guards and supervisors as defined in the Act.

[4] Respondent on brief describes the involved employees as "strikers."

and decided that during their break (a 15-minute break for some and 30-minute lunchbreak for others, depending on their hours) they would take their case to the media.[5] The employees did not take their personal belongings with them when they went outside to talk to the media.[6] The employees were not going out on strike. Obviously, they intended to return to work at the end of their break. They went outside as a group to present their case to the media. As pointed out by Judge Pannier in *Hacienda de Salud-Espanola*, supra, such activity is protected by Section 7 of the Act. On the one hand, of the employees who testified about what then occurred, four of the six testified that Davis indicated "[y]es" to Lemon's question whether Davis was firing the employees.[7] Of the two who testified that they did not hear the "yes," one, Hamilton, was not with the group of employees but was getting into her car to go to see her husband. The other, Kelley, testified that she was away from the main group, she had been smoking, and she was putting out her cigarette. Since Hamilton told her husband what occurred when she saw him shortly after leaving Respondent's facility the first time that day, what Davis did and said when she came out and spoke to the employees, as relayed by Hamilton to her husband, led Hamilton's husband to tell her that it was against the law to be fired like that, and she should go back to the facility. On the other hand, Davis, who testified that she did not answer "yes" to Lemon's question, testified that after Lemon asked, "You're saying we're fired . . . ." she, Davis, told the employees to clock out and go home. Davis concedes that she did not say anything to the employees on January 14 to let them know that they were not fired or to explain why they were being sent home. Davis also testified that the normal discipline for an employee walking off the job is termination, and that in the past she has told employees to go home while the Respondent investigates allegations of abuse or neglect. But in those instances Davis suspends the employee for 5 days pending investigation. Here, the seven employees were not suspended. Two other witnesses called by the Respondent testified about what occurred on January 14. One, Boehman testified that Davis said, "[n]o, I said to clock out and go home." Boehman is not a credible witness. Davis did not assert that she said, "[n]o, I said to clock out and go home." The second, Steward, testified that she heard Davis tell the employees to come back in, clock out, and go home. But Steward is the one who testified that she did not say to Hamilton that "if she had talked to the media *or her face was on the media*, she would be fired." (Emphasis added.) Hamilton, however, testified only that either Steward or Renfro said that if she talked to the media she would be fired. Renfro was with Steward. Renfro did not testify at the trial herein to deny that either she or Steward told Hamilton that if she had talked to the media she would be fired. Hamilton's testimony is credited. Either Renfro or Steward told Hamilton, when all three were together, that if Hamilton had talked to the media, she would be fired. Renfro and Steward had to get their understanding and appreciation of the situation from management. Any employee who spoke to the media was discharged. Steward did not deny Adkisson's testimony that Davis told Steward and Boehman to take the involved employee's drug cart keys, and she, Steward, then took Adkisson's key after Adkisson asked her if she was included. Steward was including Adkisson as an involved employee even though Adkisson did not go outside and talk to the media. Adkisson was in the lobby and not in her unit. I credit the testimony of the employees who testified that Davis indicated "yes" when Lemon asked, "You're saying we're fired . . . ." The camera angle, the distance from the subjects, and the fact that apparently more than one person is speaking at the same time preclude my making a definitive determination with respect to exactly what was said based solely on the videotape. The following appears in *North American Dismantling Corp.*, 331 NLRB 1557 (2000):

> The Board has held that the fact of discharge does not depend on the use of formal words of firing. *Hale Mfg. Co.,* 228 NLRB 10, 13 (1977), enfd. 570 F.2d 705 (8th Cir. 1978). It is sufficient if the words or action of the employer "would logically lead a prudent person to believe

[5] As Lemon testified, Respondent does not have a set policy or schedule for when employees can take breaks. The record in the representation case does have references to CNAs taking first break after breakfast and bed checks have been completed, and that it appears that break and meal periods for CNAs are designated on their assignment sheets. Respondent did not show that any of the CNAs were in violation of stated breaktimes when they took their break on January 14 to speak to the media. Lemon's testimony is credited. Also, Respondent does not preclude employees from taking their break in the parking lot, and they do not have to clock out to do this. It appears that employees are required to clock out if they are leaving the premises for their lunchbreak, as Hamilton did on January 14. Respondent's employee handbook, Emp. Exh. 9 in Jt. Exh. 1, indicates as follows on p. 15 thereof:

> MEAL PERIOD
>
> Full-time employees are allowed at least thirty (30) minutes for a meal period. The meal period is unpaid time. You must clock out for your meal period and clock in upon return to work. If you leave the facility, you must sign out with your supervisor. All meal periods will be scheduled by your supervisor. Meal time for employees working less than full time may be arranged with the supervisor.
>
> REST PERIODS
>
> You will be provided a paid break for every four (4) hours worked in accordance with the facility's policies. Breaks will be scheduled by your supervisor. You must take your breaks in the designated areas and may not leave *the premises* during break time. [Emphasis added.]

The dictionary definition of "premises" is the building and its land. Since Davis ordered the media out of the parking lot, Respondent obviously views the parking lot as a part of its land. Therefore, the involved employees did not leave Respondent's premises during their break, and the handbook does not contain a requirement that they clock out if they take their break in the parking lot, which appears to be a practice which—before the incident in question—was acceptable to the Respondent.

[6] It is noted that Hamilton, who clocked out, drove her automobile to her husband's place of employment. She took her keys and undoubtedly she also took her drivers license.

[7] Seven employees were discharged. Tammy Snyder did not testify at the trial herein. Three of the employees, namely Kjelsen, Lemon, and Paulin testified that Davis answered, "yes." Adkisson testified that Davis nodded her head up and down when she was asked this question.

> his [her] tenure has been terminated." *NLRB v. Trumbull Asphalt Co.*, 327 F.2d 841, 843 (8th Cir. 1964).

The employer's words and actions on January 14 logically lead the involved employees to believe that their tenure had been terminated.[8] Respondent violated the Act as alleged in paragraphs 5(a), (b), and (c) of the complaint.

Paragraph 5(d) of the complaint alleges that since about January 15, Respondent has refused to reinstate these seven employees unless they agreed not to engage in the activity described above in paragraph 5(a) or other protected concerted activity. Counsel for the General Counsel on brief contends that the rehire restrictions required a waiver of the right to engage in protected concerted activity and thus violate the Act, *Bethany Medical Center*, 328 NLRB 1094 (1999); that the conditions were clearly mandatory since Lemon was never reinstated because she refused to agree to those conditions; and that Respondent's conditioning reinstatement on a waiver of the right to engage in future protected concerted activity violated Section 8(a)(1) of the Act. Respondent on brief argues that the Board has held that where employees concertedly refuse to work to protest a working condition, and then attempt to return to work, the employer is privileged to question the employees as to their future intentions before reinstating them, and the employer can discharge the employee if she will not give assurances that she will remain on the job even if the condition she went on strike to protest continues, *Mike Yurosek & Son, Inc.*, 310 NLRB 831 (1993).

To start with, the Respondent's argument is based on a false premise, namely that the employees refused to work on January 14. The employees did not refuse to work. The employees spoke to the media while the employees were on break in the Respondent's parking lot. For this they were discharged on January 14. The employees intended to return to work after the break but the Respondent's actions precluded this. As some of the employees themselves explained, the reason they did not initially agree to the conditions was that they did not walk out on January 14 but rather Davis fired them. In the situation at hand, Respondent could not lawfully require that the involved employees waive their right to engage in concerted protected activity in the future in order to be considered for reinstatement. Respondent violated the Act as alleged in paragraph 5(d) of the complaint.[9]

Paragraph 5(e) of the complaint alleges that about March 13, Respondent by Della Boehman, removed union literature from a bulletin board at Respondent's facility despite allowing employees to post other types of nonwork-related literature on the same bulletin board. Counsel for the General Counsel on brief contends that it is a violation of the Act for an employer to prohibit the posting of union literature on a bulletin board while allowing other types of nonwork-related items to be posted, *Benteler Industries*, 323 NLRB 712, 714 (1996); that an employer cannot remove union material from a bulletin board because of its content while allowing other nonwork items to remain posted, *Roll & Hold Warehouse*, 325 NLRB 41, 51 (1977); that there was no evidence offered that Respondent ever followed its rule regarding employees obtaining authorization before posting items on the bulletin board; and that employee items were posted without authorization, and Paulin even posted a fake ad on the bulletin board for a month after she was disciplined. Respondent on brief argues that counsel for the General Counsel did not offer into evidence the leaflet that was removed, or any description of it; and that an employer which removes from its bulletin board union literature, but allows employees to post only personal items for sale, does not discriminate, *Fleming Cos.*, 336 NLRB 192, 194 (2001), and *Venture Industry*, 330 NLRB 1133, 1134 fn. 7 (2000).

In *Fleming Cos.*, supra, it is indicated, as here pertinent,

> Board law on this point is clear. In *Honeywell, Inc.*, 262 NLRB 1402 (1982), enfd. 722 F.2d 405 (8th Cir. 1983), the Board declared:
>
> In general, "there is no statutory right of employees or a union to use an employer's bulletin board." However, where an employer permits its employees to utilize its bulletin boards for the posting of notices relating to personal items such as social or religious affairs, sales of personal property, cards, thank you notes, articles, and cartoons, commercial notices and advertisements, or in general, any nonwork-related matters, it may not "validly discriminate against notices of union meetings which employees also posted." Moreover, in cases such as these, employer's motivation, no matter how well meant, is irrelevant.
>
> [Footnotes and citations omitted.] Accord: *Roadway Express, Inc. v. NLRB*, 831 F.2d 1285, 1290 (6th Cir. 1987) (where employer, by policy or practice, "permits employee access to bulletin boards for any purpose, section 7 of the Act . . . secures the employees' right to post union materials").

While Respondent has a rule in its handbook regarding employee use of bulletin boards, two of Respondent's employees testified, without contradiction, that they posted various items on the bulletin board without receiving prior approval and without having the posting initialed by the administrator. Consequently, Respondent's policy at the involved facility was to allow employees to post nonwork-related materials without receiving prior approval and without having the posting ini-

[8] Counsel for the General Counsel has shown that the employees' protected concerted activity was the reason for their discharge. The Respondent did not establish that the discharges would have occurred even absent the employees' concerted activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982).

[9] *Mike Yurosek & Son, Inc.*, supra, can be distinguished in that there the Board discussed the possibility of employees planning to engage in a recurring or intermittent strike regarding overtime, which amounts to employees unilaterally determining conditions of work. There the Board concluded that the economic strikers were entitled to reinstatement but that the employer could determine what their intentions were for the future and warn them that it would regard future refusals to work overtime as grounds for disciplinary action. There the Board did not conclude that an employer has the right to condition the reinstatement of unlawfully discharged nonstriking employees on the waiver of their statutory right to engage in concerted protected activity.

tialed by the administrator. Therefore, Respondent may not validly discriminate against union notices which an employee also posted. With respect to Respondent's argument that counsel for the General Counsel did not offer into evidence the leaflet that was removed, or any description of it, it is noted that Boehman testified that Davis told her to remove the union literature from the bulletin board and Davis did not instruct her to remove anything else from the bulletin board. Another of Respondent's witnesses, Brown, testified that she was in the breakroom when Boehman took down some union postings and Paulin said something to Boehman about it. So not only did Paulin testify about the union material she posted being removed by Boehman but two of Respondent's witnesses testified about the union material. That should be sufficient to establish that it was indeed union material that was removed from the bulletin board on March 18. Respondent violated the Act as alleged in paragraph 5(e) of the complaint.

Paragraphs 6(a) and (b) of the complaint allege that about March 13, Respondent verbally warned Paulin because she assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities. Counsel for the General Counsel on brief contends that Respondent violated the Act when it disciplined Paulin for confronting Boehman over the removal of the union literature; that an employer may not provoke an employee into an outburst through its unlawful actions and then use the outburst as a basis for discipline, *Caterpillar, Inc.*, 322 NLRB 674 (1996); and that here the entire incident was provoked by Boehman's unlawful removal of the union material, Paulin's behavior did not rise to the level of a threat, no threatening language was used, Paulin simply informed Boehman that she could not remove the leaflets from the bulletin board and she was going to record what Boehman did in the notebook the Union gave her for just such a purpose, and, therefore, the issuance of a verbal warning to Paulin clearly violated the Act. Respondent on brief argues that Boehman verbally counseled Paulin for being disrespectful toward her in the breakroom with other employees present; that Boehman did not issue Paulin a formal disciplinary action, and the verbal counseling was not part of Respondent's progressive discipline system; that there was no tangible, adverse employment action; that Boehman testified that Paulin's support for the Union and her posting of union literature did not motivate Boehman's decision to counsel Paulin; that Respondent has issued formal discipline to other employees for disrespect; and that if anything, Paulin was treated more favorably than the other employees.

According to Boehman's testimony, Paulin asked her if she knew what she was doing was against the law, Paulin offered to show her in a book that it was against the law, and Paulin told her that she was going to record the incident in a little notebook she had. What Boehman and Brown left out in their testimony about this incident is very telling. Paulin testified that she told Boehman that she was given a little notebook from the Union to write things down that happened and she was going to write this down in her notebook. During her testimony at the trial herein, Brown did not mention Paulin's statement to Boehman that she was given a little notebook from the Union to write things down that happened and she was going to write this down in her notebook. And although Boehman testified that Paulin told her, "I hope you know that everything you're saying to me right now I'm writing down in my little white book" (Tr. 210), Boehman did not testify that Paulin told her that she was given a little note book from the Union to write things down that happened and she was going to write this incident down in her notebook. The reason that both of Respondent's witnesses avoided testifying about the fact that Paulin told Boehman that she was going to record the incident in a note book given to her by the Union to record such events was that this was the real reason for the discipline and someone realized that in recording Boehman's unlawful activity in the union notebook Paulin was engaged in union activity. Standing instead of sitting, placing one's hands on one's hips and then folding them, and raising one's tone of voice but not yelling cannot justify discipline in the circumstances extant here.[10] Paulin's conduct was triggered by Boehman's unlawful activity. Paulin was provoked but her reaction was not sufficient to warrant discipline. Under the circumstances extant here, Paulin's reaction was restrained and measured. What Boehman did not like was being told with other employees present that what she was doing was against the law, and it was going to be recorded in a union notebook. Paulin was not being disrespectful toward Boehman in making these statements. Paulin was just stating the facts. What Boehman was doing was unlawful. And Paulin had every right to record it in note book provided to her by the Union. Boehman admitted that, without conceding that it was a union notebook. Even before this, Paulin engaged in union activity and the Respondent knew it in that Paulin, who wore a union button to work every day and posted union material on the bulletin board in the employee breakroom, passed out union flyers in front of Respondent's building and Respondent's director, Ann Snyder, told her to move to the street. Antiunion animus is demonstrated by the fact that Respondent unlawfully removed union material from the bulletin board in the breakroom. And the discipline, albeit according to Respondent it did not become part of the progressive discipline system, was an adverse employee action. Counsel for the General Counsel has made a prima facie showing under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).[11] On the other hand, Respondent has not shown that it would have taken the same action absent Paulin assisting the Union and engaging in union activity. Respondent violated the Act as alleged in paragraphs 6(a) and (b) of the complaint.

CONCLUSIONS OF LAW

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

[10] It is noted that Boehman also testified that Paulin kind of snickered when she said it was against the law. Brown did not corroborate Boehman on this point. At best, Boehman's observation is a subjective evaluation. What occurred might have been nothing more than a nervous smile or laugh on the part of Paulin. This certainly would not justify discipline.

[11] Approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the following conduct, Respondent committed unfair labor practices contrary to the provisions of Section 8(a)(1) of the Act:

(a) About January 14, 2004, Respondent discharged its employees Sheila Kelley, Stacy Kjelsen, Misty Paulin, Norma Lemon, Rita Adkisson, Tammy Hamilton, and Tammy Snyder because they engaged in concerted activities with each other for the purposes of mutual aid and protection by gathering together at Respondent's facility during their break to protest staffing conditions and complain to the news media about their terms and conditions of employment, and to discourage employees from engaging in these or other concerted activities.

(b) Since about January 15, 2004, Respondent has refused to reinstate Sheila Kelley, Stacy Kjelsen, Misty Paulin, Norma Lemon, Rita Adkisson, Tammy Hamilton, and Tammy Snyder unless they agree not to engage in the activity described in (a) above or other protected concerted activity.

(c) About March 13, 2004, Respondent, by Della Boehman, removed union literature from a bulletin board at Respondent's facility despite allowing employees to post other types of non-work-related literature on the same bulletin board.

4. By on or about March 13, 2004, verbally warning its employee Misty Paulin because she assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities, Respondent committed unfair labor practices contrary to the provisions of Section 8(a)(1) and (3) of the Act.

REMEDY

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

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[12]

The Respondent will be required to remove from its records any reference to the unlawful discharges of Sheila Kelley, Stacy Kjelsen, Misty Paulin, Norma Lemon, Rita Adkisson, Tammy Hamilton, and Tammy Snyder, and any reference to the unlawful verbal warning to Misty Paulin.

[Recommended Order omitted from publication.]

---

[12] Respondent argues that Lemon and Adkisson are not employees but rather supervisors. As noted above, this issue was already decided against Respondent by the Regional Director of Region 25 of the Board, and the Employer's Request for Review of the Regional Director's Decision and Direction of Election was denied by Order of the Board dated May 26, with Chairman Battista dissenting, and with the majority indicating that the Employer's request raises no substantial issues warranting review. Jt. Exh. 2. As pointed out by counsel for the General Counsel on brief, a representation case finding that an individual is not a supervisor is not binding in a subsequent unfair labor practice proceeding involving a violation of Sec. 8(a)(1), *JAMCO*, 294 NLRB 896, 899 (1989). Counsel for the General Counsel contends that nonetheless, the prior decision should be given some deference since the Board has already reviewed this issue based on the same evidence that is currently before me, and the Board has upheld the holding that LPNs at Respondent's involved facility are not supervisors within the meaning of the Act. The burden of proof is on the party claiming supervisory status. The evidence offered in the representation proceeding is the only evidence offered in the proceeding before me. Respondent argues that LPNs are supervisors because they have authority to assign, reassign, responsibly direct, discipline, transfer, and reward. Respondent does not argue that LPNs have the authority to hire, transfer, suspend, lay off, recall, promote, or effectively recommend such actions. Respondent has not introduced in this proceeding any evidence other than that which was already introduced in the representation proceeding. In effect, Respondent is asking for a different result based on the exact same evidence which has already been ruled on by the Regional Director and the Board. Respondent has not supplied any valid reasons for making findings contrary to those already made regarding Respondent's failure to show that LPNs at the involved facility are supervisors. Obviously, if Respondent had additional evidence to show that LPNs were supervisors, it would have introduced it at the trial herein. Respondent has not met its burden of proof.