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**Pain Relief Centers, P.A., and Amber Whitlock, and Krisandra Marie Edwards, and Miranda Keener Cox, and Erin Whitlock Stiltner, and Yesenia Ramirez-Zavala.** Cases 10–CA–260563, 10–CA–260566, 10–CA–260569, 10–CA–260570, and 10–CA–260703

February 23, 2022

## DECISION AND ORDER

BY MEMBERS RING, WILCOX, AND PROUTY

<sup>1</sup> Judge Goldman was subsequently appointed as Chief Counsel for Member Prouty and served in the role of Chief Counsel at the time that this case was decided by the Board. Given his involvement in the case before it reached the Board, Mr. Goldman was recused from, and took no part in, assisting the Board in its consideration of this case.

<sup>2</sup> We grant the General Counsel’s Motion to Strike the portion of the Respondent’s reply brief challenging the constitutionality of the Board’s “use of ‘double for cause protected’ [administrative law judges].” This argument was not raised previously, and thus, it is inappropriate to raise it upon reply. See Sec. 102.46(e) of the Board’s Rules and Regulations (stating that a reply brief “must be limited to matters raised in the brief to which it is replying”).

On exception, the Respondent argues that President Biden unlawfully removed former General Counsel Peter Robb from office, and thus, the judge’s decision is void because it was not validly prosecuted. The Board has determined that such challenges to the authority of the Board’s General Counsel based upon the President’s removal of former General Counsel Peter Robb have no legal basis. See *Aakash, Inc., d/b/a Park Central Care and Rehabilitation Center*, 371 NLRB No. 46, slip op. at 1–2 (2021). Member Ring acknowledges and applies *Aakash* as Board precedent, although he expressed disagreement there with the Board’s approach and would have adhered to the position the Board adopted in *National Assoc. of Broadcast Employees and Technicians—The Broadcasting and Cable Television Workers Sector of the CWA, AFL–CIO, Local 51*, 370 NLRB No. 114, slip op. at 2 (2021). See *Aakash*, 371 NLRB No. 46, slip op. at 4–5 (Members Kaplan and Ring, concurring).

On December 2, 2021, General Counsel Abruzzo issued a Notice of Ratification in this case that states as follows:

The prosecution of this case commenced under the authority of former General Counsel Peter B. Robb when complaint issued on August 19, 2020. The prosecution of this case has continued through litigation under the authority of former Acting General Counsel Peter Sung Ohr and myself.

Respondent has alleged that the complaint was prosecuted unlawfully because President Biden unlawfully removed former General Counsel Robb and former Acting General Counsel Alice Stock, and unlawfully designated former Acting General Counsel Ohr. Respondent has also alleged that my service as General Counsel was “ultra vires” until “the end of the Robb term.”

I was confirmed as General Counsel on July 21, 2021. My commission was signed and I was sworn in on July 22, 2021. Former General Counsel Robb’s term has indisputably now expired. In an abundance of caution, I was re-sworn in on November 29, 2021. After appropriate review and consultation with my staff, I have decided that the continued

On May 13, 2021, Administrative Law Judge David I. Goldman issued the attached decision.<sup>1</sup> The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel filed a Motion to Strike Portions of the Respondent’s Reply Brief, the Respondent filed a response, and the General Counsel filed a reply.

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<sup>2</sup> and has decided to

prosecution of this case was and is a proper exercise of the General Counsel’s broad and unreviewable discretion under Section 3(d) of the Act.

My action does not reflect an agreement with Respondent’s arguments in this case or arguments in any other case challenging the validity of actions taken after President Biden removed former General Counsel Robb. Rather, my decision is a practical response aimed at facilitating the timely resolution of the unfair labor-practice allegations that I have found to be meritorious.

For the foregoing reasons, I hereby ratify the continued prosecution of the complaint and all actions taken in this case subsequent to the removal of former General Counsel Robb, including by former Acting General Counsel Ohr and his subordinates.

Applying *Wilkes-Barre Hospital Company LLC, d/b/a Wilkes-Barre General Hospital*, 371 NLRB No. 55, slip op. at 1 fn. 2 (2022) (full-Board decision; collecting cases), we find that General Counsel Abruzzo’s ratification renders the Respondent’s argument moot. Member Ring acknowledges and applies *Wilkes-Barre* as Board precedent, although he expressed disagreement there with the Board’s approach, and he adheres to the views he expressed in that case. See *id.*

We also reject the Respondent’s challenge to the Board’s “courtroom deputy” program, under which the administrative law judge can elect to have a Board-side attorney or other employee assist in the technological aspects of conducting Board hearings via Zoom during the pandemic, such as operating the breakout and waiting rooms, screen-sharing exhibits, or troubleshooting technological issues. The Respondent asserts that the program is improper because the attorneys who acted as courtroom deputies here worked with those prosecuting the case. However, the courtroom deputy (a Headquarters, Board-side employee) neither works with nor assists Counsel for the General Counsel (a Regional Office, General Counsel–side employee) in prosecuting the case. Rather, the courtroom deputy’s role is purely administrative: ensuring that the hearing runs smoothly, allowing the judge to focus on the witness testifying, and mitigating technological glitches. As the judge advised the parties at the outset of the hearing, the courtroom deputy is “not here in an attorney rol[e] but rather, as a Courtroom Deputy to assist me and to assist you, if necessary, with technical Zoom-related issues. She has a lot of experience with Zoom and she won’t be answering any of your legal-related questions or rule on any issues; that’s for me. But she is here to help us manage transfer of documents and just help us as needed with Zoom issues.” The courtroom deputy program does not infringe upon the agency’s bifurcation of its prosecutorial and adjudicatory functions. See *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 117–118 (1987). Moreover, attorneys who serve as courtroom deputies are recused from working on the case following the hearing.

affirm the judge's rulings,<sup>3</sup> findings,<sup>4</sup> and conclusions as further discussed below and to adopt the recommended Order as modified.<sup>5</sup>

The judge found, and we agree, that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (NLRA or the Act) by coercively interrogating its medical assistants about their and other employees' protected concerted activity.<sup>6</sup> In addition, for the reasons stated by the judge and those set forth below, we affirm the judge's finding that the Respondent violated Section 8(a)(1) by discharging nurse practitioner Krisandra Edwards and medical assistants Miranda Cox, Yesenia Ramirez-Zavala, Erin Whitlock Stiltner and Amber Whitlock for initiating a walkout in protest of Office Manager Sharese Cromer's abusive treatment of them.

1. *The Respondent's defense that Krisandra Edwards is a statutory supervisor.* We agree with the judge, for the reasons set forth in his decision, that the Respondent did not meet its burden of showing that Edwards is a statutory supervisor of the Respondent's medical assistants. The Respondent argues in its exceptions that Edwards' authority to responsibly direct employees within the meaning of Section 2(11) of the NLRA is established by provisions of the North Carolina Nursing Practice Act and applicable regulations.<sup>7</sup> The Respondent's invocation of state law is insufficient to carry its burden of establishing Edwards' supervisory status.

<sup>3</sup> The Respondent has excepted to some of the judge's evidentiary rulings. It is well established that the Board will affirm an evidentiary ruling of an administrative law judge unless that ruling constitutes an abuse of discretion. See *Aladdin Gaming, LLC*, 345 NLRB 585, 587 (2005), petition for review denied sub nom. *Local Joint Executive Board of Las Vegas v. NLRB*, 515 F.3d 942 (9th Cir. 2008). After a careful review of the record, we find no abuse of discretion in any of the challenged rulings.

<sup>4</sup> 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. In addition, the Respondent argues that the judge's rulings demonstrate bias against it. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

No exceptions were filed to the judge's dismissal of the allegation that the Respondent engaged in unlawful polling of employees.

<sup>5</sup> We shall modify the judge's recommended Order to conform to the Board's standard remedial language and in accordance with our decision in *Cascades Containerboard Packaging-Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021). We shall substitute a new notice to conform to the Order as modified.

<sup>6</sup> In affirming the judge's finding that Office Manager Sharese Cromer's coercive interrogation of the medical assistants violated Sec. 8(a)(1), Member Ring notes that when Cromer conducted the interrogation, the conversations that the medical assistants had had among themselves and with nurse practitioner (and Sec. 2(3) employee) Krisandra

Statutory schemes other than the NLRA cannot in and of themselves establish supervisory status under the NLRA. See *Buchanan Marine, L.P.*, 363 NLRB 523, 524 (2015) (holding that supervisory status under maritime law does not establish that status under Section 2(11) of the Act); *Cook Inlet Tug & Barge, Inc.*, 362 NLRB 1153, 1155 (2015) (same); *Brusco Tug & Barge, Inc.*, 362 NLRB 257, 258 fn. 3 (2015) (same), incorporating by reference 359 NLRB 486, 493 (2012), enfd. 696 Fed.Appx. 519 (D.C. Cir. 2017).<sup>8</sup>

North Carolina state law does not answer a key question expressly posed by Section 2(11) of the NLRA: whether the authority is exercised "in the interest of the employer." In this regard, the requirement that an individual be accountable to management, which the Board emphasized in *Oakwood Healthcare*,<sup>9</sup> is indispensable. Indeed, that requirement does double duty. On one hand, Section 2(11) makes possession of authority "responsibly to direct" other employees one of 12 disjunctive indicia of supervisory status, and accountability to management gives meaning to the term *responsibly* in "responsibly to direct."<sup>10</sup> At the same time, accountability to management also satisfies the statutory imperative that authority be exercised "in the interest of the employer."<sup>11</sup> This is because the "concept of accountability" shows that the individual in question, in directing others, "will be carrying out the interests of management—disregarding, if necessary,

Edwards regarding their displeasure with Cromer's mistreatment of them had already resulted in protected concerted activity when Edwards told Cromer that the medical assistants found her unapproachable. See *Meyers Industries*, 281 NLRB 882, 887 (1986) (holding that concerted activity includes bringing a group complaint to the attention of management), affd. sub nom *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988); see also *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964). Cromer's interrogation focused directly on that concerted complaint.

<sup>7</sup> N.C. Gen. Stat. Sections 90.171.20 et seq.; 21 N.C.A.C. Sections 36.0801, 36.0802, 36.0812, 36.0401. Specifically, the Respondent cites provisions stating that nurse practitioners are accountable for certain "nursing acts" and "health services" and that define the practice of nursing to include "[p]roviding for the maintenance of safe and effective nursing care, whether rendered directly or indirectly."

<sup>8</sup> Member Ring agrees with the principle for which *Buchanan Marine*, *Cook Inlet Tug & Barge*, and *Brusco Tug & Barge* are cited—i.e., that statutory schemes other than the NLRA cannot in and of themselves establish supervisory status under the NLRA. He reserves judgment as to whether the Board in those cases correctly concluded that the individuals whose status was at issue were not supervisors under Sec. 2(11) of the Act.

<sup>9</sup> *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006).

<sup>10</sup> *Id.* at 691–692.

<sup>11</sup> See *Cook Inlet Tug & Barge, Inc.*, supra at 1155 ("[E]ven if the Coast Guard [regulations] hold[] captains accountable, it does not follow that the Employer holds them accountable, and supervisory authority must be exercised 'in the interest of the employer' under Section 2(11).").

employees' contrary interests. Excluding from coverage of the Act such individuals whose fundamental alignment is with management is at the heart of Section 2(11).” *Oakwood Healthcare*, supra at 692. Whether the State of North Carolina may hold a nurse accountable for medical actions does not establish that the Respondent holds Edwards accountable for the performance of the medical assistants within the meaning of Section 2(11).<sup>12</sup>

The judge was squarely correct, as detailed in his decision, that there was no evidence that the Respondent held Edwards accountable for the performance of the medical assistants. Although the Respondent's Office Manager and Supervisor Sharese Cromer<sup>13</sup> criticized the performance of the medical assistants, that criticism was never accompanied by even a suggestion that Edwards was accountable for it. As the judge found, in the one instance where Cromer testified that she asked Edwards' opinion of the performance of medical assistant Cox, there was “not the hint of a suggestion that Edwards is accountable for Cox's performance or that Edwards was supposed to take corrective action” against Cox.<sup>14</sup> There was no “prospect of adverse consequences” to Edwards by the Respondent.<sup>15</sup>

The Respondent additionally argues in its exceptions that Edwards effectively recommends discipline, again citing the incident when Cromer asked Edwards' opinion about medical assistant Cox. Cromer's testimony fails to establish that Edwards made a recommendation regarding discipline of Cox and that Cromer followed that recommendation without conducting an independent investigation. See *DirectTV*, 357 NLRB 1747, 1748–1749 (2011) (authority to effectively recommend generally means that

the recommended action is taken without independent investigation by superiors); *Los Angeles Water & Power Employees' Assn.*, 340 NLRB 1232, 1234 (2003) (same); *Children's Farm Home*, 324 NLRB 61, 61 (1997) (same). The Respondent likewise argues that Edwards effectively recommends the assignment of employees based on her asserted involvement in creating the Respondent's plan for medical care during the pandemic. Edwards denied any such role, and the judge discredited the contrary testimony of Cromer and Dr. Hans Hansen relied on by the Respondent. Moreover, their vague testimony that Hansen and Edwards “worked together” to make a Covid practice plan falls substantially short of establishing effective recommendation of assignment. Id.<sup>16</sup>

2. The Integrity of Board Processes. Finally, the importance of maintaining the integrity of the Board's processes leads us to make two observations regarding the litigation of this case. First, as the judge observed, the Respondent's counsel admitted directing witness Ashley McAdams, a front office employee of the Respondent who remained employed by the Respondent at the time of the hearing, “not to speak with [NLRB] agency investigators during the investigation of this case.” The judge rightfully expressed alarm regarding witness intimidation. “The Board's ability to secure vindication of rights protected by the Act depends in large measure upon the ability of its agents to investigate charges fully and to obtain relevant information and supporting statements from individuals.” *Certain-Teed Products Corp.*, 147 NLRB 1517, 1520 (1964). The Supreme Court has declared that “the danger of witness intimidation is particularly acute with respect to current employees—whether rank and file, supervisory,

<sup>12</sup> The Respondent's “Collaborative Practice Agreement” with Edwards acknowledges Edwards' medical obligations under state law. It fails to provide, however, that the Respondent holds Edwards accountable for the performance of the medical assistants and, as explained, there is no evidence that it did.

<sup>13</sup> The Respondent does not except to the judge's finding that Cromer is a statutory supervisor under Sec. 2(11) of the Act.

<sup>14</sup> Indeed, the judge discredited Cromer's testimony that

Edwards was responsible for making sure the exam rooms and medical assistant areas were clean. On May 7, when Cromer and [Dr. Hans] Hansen's wife became upset with the cleanliness of these areas, they did not go to Edwards or involve her in any way, but, rather, Cromer personally berated and threatened the medical assistants, suggested they could be fired, and made them stay late to clean. Edwards was not held accountable.

<sup>15</sup> *Oakwood Healthcare*, supra at 692.

<sup>16</sup> Even if Edwards were a statutory supervisor, the walkout of the four other discriminatees would remain protected. First, the record shows and the judge found that the walkout was prompted by “more than Edwards' suspension.” The walkout “followed days of heightened tension” between Cromer and the four medical assistants, which included Cromer's unlawful interrogation of them, a staff meeting in which Cromer berated them, and various threats to discharge them. Their

walkout thus was a protest of Cromer's abusive conduct toward them as well as in support of Edwards. The employees' concerted walkout in response to Cromer's supervisory conduct, including yelling and abusive and threatening behavior toward them, was for the purpose of mutual aid or protection because Cromer's conduct affected their working conditions. See *Mitsubishi Hitachi Power Systems Americas, Inc.*, 366 NLRB No. 108, slip op. at 17–18 (2018); *Trompler, Inc.*, 335 NLRB 478, 479 (2001), enf. 338 F.3d 747 (7th Cir. 2003); *Arrow Electric Co. v. NLRB*, 155 F.3d 762 (6th Cir. 1998). The clear link between the walkout and the four employees' workplace concerns about Cromer is fully sufficient to establish protected activity. See *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 153 (2014). Member Ring agrees that the medical assistants' walkout was both concerted and for the purpose of mutual aid or protection, but he does not rely on *Fresh & Easy Neighborhood Market*.

Second, where employees seek to protest the termination of a supervisor, the employees' activities are protected under the Act where the identity and capability of the supervisor involved has a direct impact on the employees' own job interests and on their performance of their work. See *Senior Citizens Coordinating Council of Co-op City*, 330 NLRB 1100, 1103–1105 (2000). Edwards' attempts to mitigate Cromer's abusive conduct directly related to the four employees' working conditions, including Cromer's frequent threats that their jobs were in jeopardy.

or managerial—over whom the employer, by virtue of the employment relationship, may exercise intense leverage.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 240 (1978). We underscore that interference with Board agents in the performance of their duties is proscribed under Section 12 of the Act and is punishable by fine and/or imprisonment.<sup>17</sup> “Congress has made it clear that it wishes all persons with information about unfair labor practices to be completely free from coercion in reporting them to the Board, and the Supreme Court has long recognized the ‘special danger’ of witness intimidation in NLRB proceedings.” *Interstate Management Co. LLC*, 369 NLRB No. 84, slip op. at 2–3 (2020) (quoting *NLRB v. Robbins Tire & Rubber Co.*, supra at 239, and citing *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967)).

Second, the Respondent sought to introduce into evidence an employment contract it purportedly entered into with Edwards. The judge found that the Respondent had failed to prove that the document is authentic, detailing the grounds of his “suspicion that the Respondent attempted to submit a fraudulent document into evidence in a federal administrative law hearing.” The submission of fraudulent evidence in an NLRB proceeding is a serious matter and may warrant referral to the Department of Justice for possible criminal prosecution. See *Multimatic Products*, 288 NLRB 1279, 1279 fn. 2, 1335–1337 (1988); accord *Elyria Foundry Co.*, 321 NLRB 1222, 1224 (1996) (“[T]he Board does possess the authority to order such a referral for criminal investigation, and we will not hesitate to exercise it in an appropriate case in order to protect the Board’s process.”), enf. denied in part on other grounds 205 F.3d 1341 (6th Cir. 2000). Under all the circumstances of this case, including that the judge limited his ultimate finding to the conclusion that the Respondent failed to prove a valid employment contract, we decline to make a referral here.

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Pain Relief Centers, P.A., Conover, North Carolina, its officers, agents,

<sup>17</sup> Sec. 12. of the Act provides:

Offenses and penalties. Any person who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this Act [subchapter] shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than one year, or both.

<sup>18</sup> If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19)

successors, and assigns, shall take the action set forth in the Order as modified.

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

“(d) File with the Regional Director for Region 10, within 21 days of the date the amount of backpay is fixed either by agreement or Board Order, or such additional time as the Regional Director may allow for good cause shown, a copy of Miranda Cox’s, Krisandra Edwards’, Erin Stiltner’s, Amber Whitlock’s, and Yesenia Ramirez-Zavala’s corresponding W-2 forms reflecting the backpay awards.”

2. Substitute the following for paragraph 2(g).

(g) Post at its Conover, North Carolina facility copies of the attached notice marked “Appendix.”<sup>18</sup> Copies of the notice, on forms provided by the Regional Director for Region 10, 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If 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 May 13, 2020.

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. February 23, 2022

John F. Ring,

Member

pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. 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.”

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Gwynne A. Wilcox, Member

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David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate you about your or other employees' protected concerted activities.

WE WILL NOT discharge you for engaging in protected concerted activities.

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

WE WILL, within 14 days from the date of the Board's Order, offer Miranda Cox, Krisandra Edwards, Erin Stiltner, Amber Whitlock, and Yesenia Ramirez-Zavala full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Miranda Cox, Krisandra Edwards, Erin Stiltner, Amber Whitlock, and Yesenia Ramirez-Zavala whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest, and WE WILL make these employees whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Miranda Cox, Krisandra Edwards, Erin Stiltner, Amber Whitlock, and Yesenia

Ramirez-Zavala for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 10, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL file with the Regional Director for Region 10, within 21 days of the date the amount of backpay is fixed either by agreement or Board Order, or such additional time as the Regional Director may allow for good cause shown, a copy of Miranda Cox's, Krisandra Edwards', Erin Stiltner's, Amber Whitlock's, and Yesenia Ramirez-Zavala's corresponding W-2 forms reflecting the backpay awards.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Miranda Cox, Krisandra Edwards, Erin Stiltner, Amber Whitlock, and Yesenia Ramirez-Zavala, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

PAIN RELIEF CLINIC, P.A.

The Board's decision can be found at [www.nlrb.gov/case/10-CA-260563](http://www.nlrb.gov/case/10-CA-260563) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



*Joel R. White, Esq. (NLRB Region 10)*, of Winston-Salem, North Carolina, for the General Counsel.

*Matthew K. Rogers, Esq., (Law offices of Matthew K. Rogers)*, of Hickory, North Carolina, for the Respondent.

DECISION

INTRODUCTION

DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. This is a case involving employees of a medical clinic, who for several months harbored and shared with each other their dissatisfaction with the office manager's treatment of employees. When one of the employees, a nurse practitioner, confronted the office manager over the office manager's recent threat to terminate

employees, the office manager learned that the employees thought she was unapproachable and that they could not talk to her. She immediately responded by confronting the group of medical assistant employees and interrogating them about it. However, no one would admit to the office manager their concerns about her. When she left the area, the nurse practitioner chastised the medical assistants telling them “I went in there to take up for you, . . . and you guys have nothing to say.” That same day the office manager held a staff meeting where she complained that she had been “disrespected” and that “she was putting an end to it” and “if there was any issues, we needed to . . . discuss it then and there.” No one spoke up. The next morning, the nurse practitioner had still another dispute with the office manager and this time the office manager told the nurse practitioner that she was suspended. As the nurse practitioner was leaving, and at her call for others to come with her, four medical assistants started to walk out with her. When the office manager saw that they were going to leave she discharged them, and later that day in a text exchange informed the nurse practitioner that she was considered to have quit, and, therefore, no longer employed.

The government alleges that the office manager unlawfully interrogated and polled the employees when she demanded to know who believed she was unapproachable. The government further alleges that the five employees—the nurse practitioner and the four medical assistants—were unlawfully discharged for engaging in protected and concerted activity under the National Labor Relations Act (Act), specifically, the incipient walkout.

As discussed herein, I find merit to almost all of the government’s allegations. Specifically, the interrogation was unlawful, and the five employees were unlawfully discharged for engaging in protected concerted activity under the Act. I dismiss one

allegation of unlawful polling that I find was a constituent part of the unlawful interrogation.

#### STATEMENT OF THE CASE

On May 19, 2020, Amber Whitlock filed an unfair labor practice (ULP) charge, first amended August 18, 2020, alleging violations of the Act by Pain Relief Centers (Respondent or PRC or Pain Relief Center) and docketed by Region 10 of the National Labor Relations Board (Board) as Case 10–CA–260563. Also, on May 19, 2020, Krisandra Marie Edwards filed a ULP charge alleging violations of the Act by Pain Relief Centers, docketed by Region 10 of the Board as Case 10–CA–260566. Similarly, on May 19, 2020, Miranda Keener Cox filed a ULP charge alleging violations of the Act by Pain Relief Centers, docketed by Region 10 of the Board as Case 10–CA–260569. Erin Whitlock Stiltner filed a ULP charge alleging violations of the Act by Pain Relief Centers on May 19, 2020, docketed by Region 10 of the Board as Case 10–CA–260570. On May 22, 2020, Yesenia Ramirez-Zavala filed a ULP charge alleging violations of the Act by Pain Relief Centers, docketed by Region 10 of the Board as Case 10–CA–260703.

Based on an investigation into these charges, on August 19, 2020, the Board’s General Counsel, by the Acting Regional Director for Region 10 Subregion 11 of the Board, issued an order consolidating the above cases, and a consolidated complaint (hereinafter complaint) and notice of hearing in these cases for November 17, 2020. PRC filed an answer to the complaint denying all alleged violations of the Act on September 15, 2020.

The hearing was subsequently rescheduled to February 22, 2021. The cases were tried February 22–24, and March 2, 2021.<sup>1</sup> Counsel for the General Counsel and the Respondent filed posthearing briefs in support of their positions by April 6, 2021.<sup>2</sup>

<sup>1</sup> On February 19, 2021, the Respondent filed a Notice of Controlling Law, and Motion to Stay Proceedings, in which it contended that, on the authority of the Supreme Court’s decision in *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), the Board’s proceedings should be stayed in deference to a state court lawsuit the Respondent filed against the individual charging parties. At the commencement of the hearing, I denied the motion for the reasons set forth in the transcript at Tr. 11–15. The Respondent’s motion is hereby included in the record as ALJ Exh. 1.

<sup>2</sup> On April 9, 2021, the Respondent moved to substitute its posthearing brief with a new brief of substantially the same content but “cleaning up” various typos, missing words, and formatting issues. The motion represents that counsel for the General Counsel consents. No opposition has been filed. The motion is granted. However, I note that the substitute brief, like the original brief, improperly attached three “exhibits” that were not proffered at trial and are not part of the record in this case. These documents purport to be (1) the Respondent’s articles of incorporation, (2) an executive order (No. 116, March 10, 2020) issued by the Governor of North Carolina, and (3) a list of hyperlinks to 16 executive orders related to Covid-19 issued by the State. No request for administrative notice and no motion or explanation for attaching these extra-record documents to the brief was provided. The documents, in any event, appear wholly irrelevant to the issues in this case. These documents and references to them are stricken on my own motion. *King Soopers, Inc.*, 344 NLRB 842 fn. 1 (2005). In addition, the Respondent’s brief repeatedly and inappropriately cites to and quotes from rejected exhibits. These are not cited as part of a renewed motion to overrule my

evidentiary rulings, but rather, in disregard of my rulings. It would be too burdensome to strike each reference to a rejected exhibit, as they are interspersed throughout the Respondent’s brief, but they are disregarded.

I also note that the Respondent’s brief cites various pretrial affidavits as if they were substantive testimony. Generally speaking, they are not. At numerous points in the hearing counsel for the Respondent read portions of the witness’ affidavit to the witness, sometimes concluding by asking the witness if he had “read that correctly.” He invariably had, and the witness agreed he had, but I note that the witness’s agreement that a statement had been correctly read does not amount to an adoption of the statement. Pretrial affidavits can be used for impeachment, to refresh recollection and, in the case of a party-opponent, to establish admissions. But absent adoption, their contents remain hearsay. See Fed. R.Evid. 801(d)(1), Notes of Advisory Committee on Proposed Rules (“If the witness admits on the stand that he made the statement and that it was true, he adopts the statement and there is no hearsay problem”). I have not treated unadopted statements from the affidavits as substantive evidence. However, in some instances counsel read the affidavit statement and the witness agreed that this was “correct.” Particularly given the habit of counsel of asking if he had “read that correctly,” I must use my judgment as to whether, when he read a portion of the affidavit and asked if that was “correct,” the witness understood the question as asking whether the facts stated were correct or simply that counsel had read correctly, the former being an adoption, the latter leaving the statement as hearsay. I further note that nothing I have excluded as substantive evidence on such grounds makes a bit of difference to the outcome of any issue in these cases.

On the entire record, I make the following findings, conclusions of law, and recommendations.<sup>3</sup>

#### JURISDICTION

At all material times, the Respondent has been a professional corporation engaged in the practice of medicine, including interventional pain and addiction management, from offices in Conover and Salisbury, North Carolina. In conducting its medical operations, the Respondent admits that it annually derives gross revenues in excess of \$250,000, and purchases and receives at its Conover and Salisbury, North Carolina medical offices, goods valued in excess of \$5,000 directly from points outside of North Carolina. It is further alleged and admitted by the Respondent that it is an employer engaged in commerce within the meaning of the Act. Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case pursuant to Section 10(a) of the Act.

#### UNFAIR LABOR PRACTICES

##### FINDINGS OF FACT

##### A. Background

Pain Relief Centers operates two medical clinics. Each is devoted to a mix of pain management and addiction medicine treatment, approximately 75 percent pain management services and about 25 percent addiction services. One clinic is located in Conover, North Carolina, and the other, a satellite facility, in Salisbury, North Carolina. The events herein occurred at the Conover facility.

Pain Relief Centers is owned and operated by Dr. Hans Hansen, who also works as the sole medical doctor at both clinics. Sharese Cromer is the practice manager (sometimes referred to as office manager) for both Conover and Salisbury.

During the events herein, in May 2020,<sup>4</sup> in addition to Dr. Hansen, Krisandra Edwards, a nurse practitioner, and Thienkim Walters, a physician's assistant, worked as "providers" at the Conover clinic. Another nurse practitioner, Elizabeth Wood, primarily worked at the Salisbury location as a provider, although she sometimes worked at Conover.

There were four medical assistants in May of 2020—Miranda

Cox, Erin Whitlock Stiltner, Yesenia Ramirez-Zavala, and Amber Whitlock. Each of these medical assistants was assigned to a provider and assisted them throughout the day readying patient rooms, bringing patients to exam rooms, taking vitals, collecting urine specimens, preparing patient charts, and preparing injections for the providers.<sup>5</sup> They primarily worked at Conover but also at Salisbury. In the spring of 2020, Zavala worked with PA Walters,<sup>6</sup> Cox worked with Edwards. Whitlock worked with Hansen both at Conover and Salisbury. Stiltner worked primarily with Wood. (Whitlock and Stiltner, in particular, regularly worked at Salisbury twice a week.)

At the Conover office, towards the back of the facility was the "nurses" or "medical assistants" area. Three of the medical assistants maintained a desk and computer at that "back office" area. In addition, Nurse Practitioner Edwards had her desk in that area. Zavala worked down the hall farther toward the front of the PRC facility in Conover, working out of an office designated for Physician Assistant Walters, whom Zavala was assigned to assist.

There was also an office and administrative staff—referred to colloquially as the "front desk." Its work included reception, patient scheduling and rescheduling, patient check-in and check-out. These employees worked primarily in the "front office."

##### B. Growing Employee Frustration with Cromer

The medical assistants and Edwards testified for the General Counsel and described a growing frustration with Cromer's treatment of the staff in managing the Conover office.<sup>7</sup>

Edwards testified to hearing from the medical assistants in the March through May time period that Cromer "was very difficult to talk to, that she would yell at them. They felt like their jobs were threatened." Edwards testified that Cromer "gets very upset very easily." In particular Edwards' medical assistant, Cox, would come to Edwards often to talk about Cromer's treatment of her and others. According to Edwards, [t]he problems were that she [Cromer] was very difficult to talk to. They would ask me to go and tell her stuff, versus them go tell her stuff because they were disrespected. They were being . . . yelled at."

Each of the medical assistants testified credibly relating their

<sup>3</sup> On my own motion, I correct the transcript as follows: at Tr. 81, line 24, substitute "air" for "hair"; at Tr. 102, lines 9 & 11, substitute "Court Reporter" for "Mr. White"; at Tr. 102, line 14, add "Courtroom Deputy" before "Ms. Spielberg"; at Tr. 102, lines 21 & 25, substitute "Courtroom Deputy" for "Mr. White"; at Tr. 118, line 25, substitute "Judge Goldman" for "By Mr. White"; at Tr. 209, line 23, substitute "Judge Goldman" for "Mr. Rogers"; at Tr. 210, line 3, substitute "Judge Goldman" for "Mr. Rogers". I note that throughout this decision, I have occasionally included citations to the record to highlight particular testimony or exhibits. However, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case.

<sup>4</sup> All events herein are in 2020, unless otherwise identified.

<sup>5</sup> At least one of the medical assistants, Cox, was a "CNA," a certified medical assistant. Throughout the hearing, the medical assistants were often referred to colloquially as CNA's. Herein, I use the terms herein interchangeably.

<sup>6</sup> Earlier in the year Zavala assisted Dr. Tiffany until he left. After that, she assisted Walters.

<sup>7</sup> As we move from a background description of PRC to the conflicts at the workplace, it is appropriate to note that the witnesses in this case presented particularly polarized and often conflicting testimony. With witness testimony as polarized as that here, there are innumerable credibility disputes, including many that are minor and immaterial to the chief issues in this case. While I identify and discuss much of the disputed testimony, particularly involving the most significant issues, my failure to explicitly discuss a particular credibility dispute does not mean that it was not considered and resolved. Unless otherwise noted, the facts stated in the text are facts found and testimony supporting them is credited. As to those witnesses testifying in contradiction to the findings, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief. Throughout this decision the credibility resolutions have been derived from a review of the entire record, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As noted in footnote or texts, occasionally, on an immaterial matter, I decline to make a credibility resolution over a disputed matter, but I identify my decision not to do so.

ongoing concern with what they variously viewed as Cromer’s “belittling,” “disrespectful,” and “bully[ing]” treatment of the employees, often in front of other employees. Edwards’ medical assistant Cox, in particular, was offended, and feared for her job. In late January 2020, she told Cromer about a scheduled second surgery after complications from a previous one the past October. Cromer told her, in front of other employees (Edwards, Lasheka Thompson, and a “drug rep” Scott Roney) that Hansen had said “that they wanted to get rid of me, that I was a liability because I needed to be out for surgery.” Cox was embarrassed and upset and started crying. She testified that “I felt that this was a private matter with my own health and that she should’ve took me behind closed doors if she was going to embarrass me like that.” Cox talked to Walters and Thompson immediately after this incident and they agreed that it was “unprofessional” on Cromer’s part. Cox also talked to Zavala about this incident.<sup>8</sup>

Whitlock described an incident in late April or early May where Cromer—in front of the other medical assistants—relayed a message from Hansen to the effect of “if I wasn’t going to be glued to his hip then I just didn’t need to come into work.” Whitlock testified that Cromer’s “tone of voice” felt bullying in this instance.<sup>9</sup>

There were other incidents described in the testimony. In April, Cromer had a dispute with another employee, McAdams, who yelled at her over an idea Cox had for a more efficient way to treat patients in the drive-thru area that had been set up at the start of the Covid epidemic. Cox was upset and crying and called Edwards about it. Edwards called Cromer on behalf of Cox. Cromer said she would address it but then did so by requiring Cox to “hash . . . out” her differences with McAdams in front of patients and other employees. Cromer refused Cox’s entreaties to resolve the dispute in a private setting. This was upsetting to Cox. Then in early May, when PRC was still seeing patients in the drive-thru clinic, Cox complained to Stiltner that Cromer had told her that she was “being lazy and sitting on [her] butt,” instead of standing up and approaching the patients in cars. Cox described a similar incident, from May 6, when Cromer approached Whitlock, Zavala, and Cox outside in the drive-thru clinic and told them that “if we were caught yelling . . . to the patients from our seats, that . . . it was considered a HIPAA violation and that we would be sent home with no pay.” Cox testified that Cromer “specifically pointed at me and said, . . . specifically you.” Cox testified that she was particularly upset that Cromer spoke to her like this “in a drive-through—I mean, for everybody to see—patients to see, anybody driving by could see.”<sup>10</sup> Cox spoke to Edwards about the incident. Indeed, in

<sup>8</sup> Cromer, who attended the entire hearing as the Respondent’s designated representative testified extensively about events but did not deny this conversation. I credit Cox’s credibly offered and un rebutted testimony. In its brief (R. Br. at 43), the Respondent attacks Cox for responding to this incident by saying at the time in January 2020, that she would “get a lawyer and fight it” and “take Hansen down.” However, being told that your employer can and wants to “get rid of you” for a health issue is not, as the Respondent characterizes it, “a perceived slight.” It would be reasonable to consider speaking with a lawyer. As to the threat to “take Hansen down,” such hyperbole reflects the distress caused by Cromer’s comments, but my assessment is that it does not undermine Cox’s testimonial credibility at the hearing 15 months later. Her

March to May, Cox would talk and “vent” to Edwards of her concerns with Cromer multiple times in a week.

All of this is background for a series of disputes with Cromer in mid-May that finally erupted in a final incident the morning of May 14, 2020, that ended employment at PRC for Nurse Practitioner Edwards and the four medical assistants Stiltner, Whitlock, Cox, and Zavala.

### C. The May 7 Cleaning Incident

First, on May 7,<sup>11</sup> the medical assistants took great umbrage at Cromer’s complaints about the condition of the office. The medical assistants had been working outside for several weeks operating the parking lot drive-thru clinic initiated in response to the Covid pandemic. According to Zavala and Cox, the supply closet had been locked for weeks, and the medical assistants did not have a key. Cromer had said she would call a locksmith. Zavala testified that as a result there were no cleaning supplies. Cromer disputed this, contending that the rooms had been cleaned daily and that she first learned the closet was locked that morning and had a locksmith open it within the hour. In any event (and without resolving that credibility dispute), according to Cox, at about 2:30 or 3 pm Cromer came into the medical assistants area with a container of baby wipes and told them that Cathy Hansen—Dr. Hansen’s wife—“said the office is disgusting, that you guys need to stop what you’re doing and clean up.” Cromer came into the medical assistants work area “yell[ing]”, telling them that the office was “a mess,” and the patients’ rooms were “disgusting” and “filthy and they needed to be cleaned before we left that day.” Stiltner testified that Cromer added that if “Dr. Hansen’s wife had been there and seen it, she would’ve had a fit.” Zavala testified that Cromer told them “Cathy was getting ready to fire all of us.” Cox protested that “this was our first day back inside and we didn’t have stuff to clean with.” Cromer told the medical assistants, “it needs to be cleaned before everybody gets fired.”

The medical assistants stayed late and cleaned, but they were angry about it, discussing among themselves how Cromer had “acted again.” While cleaning the patient exam rooms and the medical assistant area was their responsibility, they had only that day transitioned back from outside in the parking lot—an adaptation of the clinic to Covid—and felt that they “had just been out there busting their tails just like everybody else.” They were angry about the manner in which Cromer spoke to them (“one hand behind her back, kind of pointing, and just—I just felt like she was really belittling us, like, you know—like a child”). Cox

demeanor was trustworthy, and I reject the suggestion of the Respondent that this incident was the source of a “vendetta” that undermines her credibility.

<sup>9</sup> Cromer testified but did not deny this incident. Hansen testified and did not deny having said it to Cromer. I credit Whitlock’s un rebutted and credibly offered account.

<sup>10</sup> These incidents were not denied by the PRC witnesses. I credit them as testified to by Cox.

<sup>11</sup> Some testimony dates this incident to May 12 (Tr. 273, 316), but based on the record as a whole (Tr. 72, 268, 472, 474, 560, 682), I find that this incident occurred on or about May 7.



testified that “the way she addressed us. Rude. Her mannerism was very rude.” However, no one complained to Cromer.<sup>12</sup>

*D. The May 12 Incident Involving Front Office Staff Leaving Early; the May 13 Cromer and Edwards Dispute; Cromer’s Interrogation of Medical Assistants*

The following week, on May 12, another incident embroiled the office. When a patient walked in the reception area about 1 pm, the front staff had already left for the day. Cox brought the matter to Edwards, who was in the medical assistants’ area where she had her desk. Edwards was “was just fed up with the way that the medical assistants were getting treated” and had “had enough” and decided to go to Cromer about the matter. She sent a text message to Cromer, letting her know that the front office staff had left early. Her text stated:

Hey just let you know while front office jetted and we are still back here working and yes I’m tattling because I can! Sorry

Cromer responded, “Got it.” At that point Edwards and Cromer talked on the phone. Edwards testified that Cromer told Edwards that she would take care of it, and “that we were going to all be working longer hours.” After the phone call, Cromer sent out a mass text to ten people, including most of the medical assistants and front office staff:

Effective immediately no one is to leave the office before 330pm even if we are done seeing patients there is plenty to work on.

Time will increase to 500pm when we increase hours may 18th

If you are caught leaving before time to go You will be considered to be abandoning your post and you will be terminated.

Everyone must respond with a thumbs up if you have received this message

Cromer claimed, in testimony that was the product of leading questioning (see, Tr. 690) that she sent the text because “Edwards wanted something sent.” However, Edwards was not happy about Cromer’s threat to terminate employees, and I discredit the assertion, unstated by Edwards, that Edwards wanted something sent. The next morning, May 13, after Edwards arrived at work in the morning, and before seeing patients, she walked up to the front offices where Cromer’s office was located. Cromer was speaking with a receptionist and when she finished, she and Edwards went into Cromer’s office.

<sup>12</sup> I note that Cromer, in her testimony, discussed this incident but did not dispute the employees’ account—including the threat of discharge and I credit their un rebutted account. The exception to this, as noted, is that Cromer contended, contrary to the employees, that she first learned that the cleaning closet was locked the morning of May 7, that it had been unlocked every previous day, that the rooms were cleaned daily, and that she called a locksmith that morning who unlocked the closet within an hour of being called. Cromer also testified that the rooms and medical assistant area were in very bad condition. I suspect her description is overdrawn, or alternatively that, in accordance with the employees’ testimony, they hadn’t been cleaned for many days, as Cromer’s description sounds like something that must have developed over many days of failing to clean the rooms. (Tr. 687–688.) In any event, I accept that the rooms needed cleaning, and that it was the medical assistants’ job to do it. I need not and do not resolve any dispute over the reasonableness of

Edwards told Cromer that she did not tell her about the front staff leaving early for “her to reprimand the medical assistants, CNAs.” Edwards said, she “sent her that information for the problem to get fixed about the schedule.”

Edwards told Cromer “[t]hat the M.A.s felt uncomfortable coming to her, and . . . I didn’t intend her to reprimand . . . the M.A.s because of what happened.” Edwards told Cromer that the schedule that dictated who would lock up and clean up each afternoon was not being followed. Cromer told Edwards, “well, that all went out the window when Covid hit.”

Edwards responded with reference to the May 7 cleaning incident, “well, if that’s the case, then why just a week before did you threaten the girls with the jobs because of a dirty office.”

Cromer testified that Edwards was “very irate,” and that “[s]he was fussing because I had sent that text message out yesterday.”<sup>13</sup>

Edwards testified that Cromer was becoming furious. Edwards testified that she told Cromer, “we’re adults, we should be able to talk about this without cursing at each other and be professional,” but that Cromer “just continued to yell at me and telling . . . me to get the fuck out of her office.” Cromer, for her part, testified that Edwards “continued to keep getting upset.” Zavala, who could overhear the conversation from where she was in Walters’ office, testified that Edwards “kept saying that she just wanted to have a civil conversation and Sharese yelled at her to get the fuck out of her office.” Cromer brought up that “she was trying to save Mandy [Cox]’s ass because Cathy [Hansen] . . . couldn’t stand her.” As Cox, who was standing in the hallway about 50 feet away heard it, Cromer said that “Cathy could not stand Mandy and that she had saved my job many of times.” Cromer complained that “she had to give [Cox] PTO time when she went out for surgery” and complained that Cox was “lazy” and did not perform her work adequately. Cromer suggested in her testimony that Cox was at risk of being fired. Edwards defended Cox, saying she did a good job. In her testimony, Cromer’s antipathy toward Edwards was not hidden—she volunteered that Edwards “was trying to give special treatment to Mandy—they were close friends,” and Cromer and Edwards argued over whether preparing (“drawing up”) medical injections—which Edwards did not want Cox to do, she wanted to prepare her own injections for patients—was within the scope of Cox’s duties as a medical assistant. Edwards testified that Cromer began “getting more upset. She began to yell out

Cromer’s demands. What is relevant is the employees’ shared and discussed dissatisfaction with Cromer’s treatment of them, during this incident and others, and as to that I believe and find that the employees testified sincerely and credibly.

<sup>13</sup> Cromer denied (Tr. 698) discussing with Edwards that the medical assistants were having a hard time approaching her. I discredit that. I believe Cromer and Edwards discussed it and that it made a huge impact on Cromer. I believe Edwards, not only for the credible way she testified to it, but, in addition, Cromer’s testimony is belied by the fact, discussed below, that only minutes later Cromer went down to the medical assistants office to interrogate the medical assistants about her “unapproachability,” and she also alluded to it, as discussed below, in the afternoon staff meeting, telling the assembled employees that “she had been disrespected, that she had been talked about, and that she was putting an end to it.”

obscenities saying, get the fuck out of my office. . . . [S]he yelled it multiple times.” This was corroborated by Cox, who was standing down the hallway, about 50 feet away. The conversation degenerated, with Cromer asking whether they needed to (or suggesting they) call Cathy Hansen, but instead of doing that, she continued to demand that Edwards leave her office. Edwards did so, and Cromer slammed the door to her office upon Edwards leaving. Edwards returned to the medical assistants’ area, “clearly upset,” according to Whitlock.<sup>14</sup>

A few moments after Edwards returned to the medical assistants’ area, Cromer came into the medical assistants’ area and stated, “it’s been brought to my attention that I’m unapproachable. Is that true?” Cromer wanted to know, “who back here feels like they can’t come and talk to me.” Cromer asked the employees to “raise our hands if any of us felt that way.” No one responded and no one raised their hand. Cromer stated, “well, there sure is a lot of talking going on about me back here.” Cromer announced that there was going to be a meeting that day and that medical assistants were to attend. Then Cromer left.<sup>15</sup>

After Cromer left, Edwards chastised the medical assistants, saying something to the effect that “I went in there to take up for you, . . . and you guys have nothing to say.” Cox responded that “she was scared to say anything because of Sharese’s demeanor and the way she was carrying herself and kind of raising her voice at everybody.”

*E. The May 13 Afternoon Staff Meeting; New Policies Announced*

That afternoon Cromer conducted the employee meeting that she had mentioned to the medical assistants. The meeting was conducted in her office at about 2 pm,<sup>16</sup> and it lasted, by various witness estimates, a half hour to an hour. The front office staff and the medical assistants were present for the meeting. Hansen testified that he “was there for moments of the meeting and then I left,” but no witness testified to seeing him at the meeting, and four (Stilton, Whitlock, Zavala, and Cox) testified that he was not present. Hansen’s claim aside, no medical providers or managers other than Cromer were present for the meeting. This was Cromer’s meeting.<sup>17</sup>

The meeting began, as Zavala put it, with Cromer letting “everyone know that she had been disrespected, that she had been talked about, and that she was putting an end to it.” Cromer asked people to sign a statement saying that they had “received

<sup>14</sup> I credit the testimony, as stated in the text, which is based on the testimony of Cromer, Edwards, Zavala, and Cox. In fact, there is little in dispute, and almost none of the testimony of the three General Counsel’s witnesses about this incident was denied by Cromer. One exception is discussed in the preceding footnote. Another, more general discrepancy was the conflicting suggestions as to who was angry and who was not in the conversation. Cromer denied “screaming” at Edwards. Zavala testified that Cromer was “yelling” during the conversation. Cox also corroborated that Cromer was yelling during the conversation. I am unsure whether there is a difference between yelling and screaming in this instance, but, in any event, I believe, and find, that this was a heated conversation and that Zavala and Cox overheard portions of it precisely because it was angry and at times loud. I am confident—and find—that Cromer was the largest contributor to this, as set out above in the text.

<sup>15</sup> Asked by PRC counsel whether she went “back to the MA station after she [Edwards] left your office,” Cromer responded, “[n]ot that I

and read the new employee handbook,” dated April 16, 2019. Cromer said she was going to implement a new handbook, but it was not ready yet. They went through the pages of the handbook together.

Cromer also handed out some new policies for employees to sign “and said that things at PRC were going to change.” Cromer said that “we were not allowed to have cell phones out anymore.” She told the group there would be a new arrival time of 7:45 am. The distributed policies included an “Absenteeism and Tardiness” policy for employees to sign. That policy stated:

Absenteeism and Tardiness

Employees are expected to arrive *on time* and work their assigned schedule. Employees who fail to do so without authorization, or justification from Practice Manager are subject to disciplinary action, including termination. All employees should notify the Practice Manager as soon as reasonably possible if they expect to be tardy.

Required Working Hours:

Monday thru Thursday from 7:45 a.m. until 5:00 p.m.

Friday’s are CLOSED

You are expected to be here and clocked in by 7:45 A.M. including Salisbury. If you are more than 3 mins late it will result in corrective action. (*Three write ups of any kind will result in termination.*) You are required to stay until 5:00 PM there will be no leaving early anymore. You must be done with work at 5:00 P.M. and out the door. If it’s your week to lock up you need to turn off all lights, lock all doors, set an alarm, NO ONE should be here after 5:00 P.M.

I understand that I am required to abide by these requirements and I will comply with understanding.

(Emphasis in original).

Another policy distributed by Cromer for signature by employees was a new cell phone policy. It stated:

Cell Phone Policy Effective 05/12/20

Cell phones have become an issue in the office preventing some of you from doing work. Instead we are playing on facebook, posting selfies during business hours etc ...

No cell phone usage will be allowed if you have an emergency

remember.” For a witness who expressed certainty on most all issues, this resort to lack of memory was noticeable. The account in the text, which is based on testimony from Stiltner, and some from Edwards, is credited.

<sup>16</sup> A couple of witnesses estimated the meeting occurred at 3 pm. The discrepancy is not material, but I find that the likelihood is that it began closer to 2 pm.

<sup>17</sup> In his testimony, Hansen evinced no familiarity with events at the meeting. If he was, as he claims, there at the beginning, it was for a very short time, and, as referenced, his presence was not observed, which I believe suggests that he was not there, given that his presence would be notable, as the owner and top official of PRC. Were it necessary to decide whether Hansen was present, even at the beginning of the meeting, as claimed, I would find that he was not. However, I do not believe it necessary to resolve that issue.

and need to have your phone nearby please come talk with me and we will figure out a solution. You may also give your work number for emergencies.

*All phones must be kept out of sight and silent during business hours. If you are seen posting, chatting, taking a quick call, texting, or it is out on your desk at any time the following disciplinary actions will take effect. Unless you have direct permission from me to have your cell phone on your desk for business matters.*

First Offence:

You will be written up and suspended for 1 day without pay.

Second Offence:

Will be a second write up and a three day suspension without pay.

Third Offence:

The 3rd time will be an automatic termination. No questions asked you will be told to turn in your PRC belongings and leave the premises.

I understand Pain Relief Centers revised Cell Phone Policy and I will adhere to it to the best of my abilities.

(Emphasis in original, misspellings reproduced as in original.)

Cromer announced that starting the upcoming Monday (May 18), medical assistants would no longer be assigned permanently to one provider. Instead, medical assistants would rotate among the different providers. Cromer also told the medical assistants that they were to ensure that they drew up medications for providers for the injections—if a provider was “seen drawing their own meds, we would be terminated.” This was the very point that Edwards and Cromer had argued about that morning, with Cromer criticizing and Edwards defending Cox. Cromer also announced new weekly lock-up schedules. Previously, each employee had been charged with locking the building at the end of the day for one day a week, now the employee would be in charge for the entire week, and employees were told not to leave early on the week they were to lock up.

Cromer told the employees to “get on board or get left behind.” Cromer also declared that “she wasn’t going to deal with any more gossiping in the workplace.” Cromer said “that we had a lot to say behind her back and she was done with the petty and drama.” She told employees “if there was any issues, we needed to . . . discuss it then and there.” Cromer said that “she was done bending over backwards for the staff and that if we had any

issues, that we needed to come to her and not to Dr. Hansen because he didn’t want to hear it.” Cromer said employees were not “to bother Dr. Hansen for any reason while he was seeing patients or dictating notes.” She asked if anyone had any concerns but no one in the meeting responded or had any questions for Cromer, other than the front office staff who went over some scheduling issues with Cromer.<sup>18</sup>

*F. The May 14 incident*

1. The initial “front office” dispute involving Cromer, Edwards, and Hansen

After the Wednesday afternoon, May 13 staff meeting, described above, employees headed home. The next morning, between 7:45 and 8 am, as work was getting started, Cox, Stiltner, and Whitlock were in the medical assistants’ area discussing “what had been going on recently.” Cox told the others that she “was tired of walking on eggshells.” Whitlock told Cox and Stiltner “that she probably wasn’t going to be back on Monday because she was tired of working a hostile environment.” Stiltner chimed in “that she needed a job and wasn’t going to leave.”<sup>19</sup>

At around 8 am, just before Edwards arrived at work, Cromer came back to the medical assistants’ area, put a multi-page document on Edwards’ desk, and told Cox to tell Edwards to “close her charts out” by the end of the day.

The document Cromer left for Edwards was a list of “unlocked visit” reports, listing patients whose electronic medical charts still needed to have billing codes added after a visit. Only once a chart was “closed” or “locked” could billing be generated to insurance and the patient. The provider who sees a patient is generally responsible for “closing the chart.”<sup>20</sup>

Edwards arrived about 8:15 am, and Cox told Edwards that that Cromer had left the paperwork for her. As she began to look through the paperwork left by Cromer, she determined that a number of the charts were for patient visits where she had not seen the patient, or which had been taken off her schedule. Stiltner heard Edwards say aloud, “I haven’t even seen these patients.” Edwards walked up the hallway to Cromer’s office to tell her that she could not close out these charts.<sup>21</sup>

Cromer was by her office door. Cromer testified that Edwards looked “agitated” as she waited for Cromer to finish helping with a patient matter in the reception area. Miranda Sigmon, who was working in the reception area on May 14, and one of the people working with Cromer when Edwards approached, testified that

<sup>18</sup> The credited account of the staff meeting is based on credible testimony offered by employee witnesses called by the General Counsel. With the exception of the issue of Hansen’s brief presence (discussed above) none of it was disputed by witnesses for the Respondent.

<sup>19</sup> The account of this morning conversation was from Cox’s pretrial affidavit. At trial, Cox adopted this portion of her affidavit.

<sup>20</sup> Agreeing with counsel’s leading questioning (Tr. 703), Cromer identified Respondent Exhibit 13 as “the unlocked visit report that [she] put on Ms. Edwards’ desk.” I accept that Respondent Exhibit 13 is similar to that placed on Edwards’ desk by Cromer. But Respondent Exhibit 13 contains markings that demonstrate, on its face, that it was generated no earlier than May 20, 2020, and includes a previous patient appointment to be “locked” that was dated May 19, 2020. This was not the “unlocked visits report” that Cromer placed on Edwards’ desk the

morning of May 14. The discrepancy is of little evidentiary consequence, other than providing one more example of a disturbing and often discrediting tendency of the Respondent to try its case with leading questioning to which its witnesses readily agreed, whether true or not. This misidentification of Respondent’s Exhibit 13 also reflects an indifference to the accuracy of documents, noted most seriously in the Respondent’s proffering of a purported employment contract between Edwards and the Employer that is suspect, as discussed below.

<sup>21</sup> In her testimony, Edwards, and Stiltner at times referred to the materials left for Edwards by Cromer as patient “charts.” However, they were not full medical charts, but rather, a computer-generated document compiled by the Employer to identify the patient charts that needed to be “closed” and “locked.”

Edwards told Cromer that she needed to speak with her. Sigmond testified credibly that Edwards was “stomping her foot and waving some papers around.” Cromer told Edwards to wait and when done in the reception area, Cromer invited Edwards into her office.

Edwards entered Cromer’s office and Cromer came in and stood or sat behind her desk. Edwards said, “Sharese, I can’t close these charts out.” Edwards told Cromer that she had not seen some of the patients or they had been put on someone else’s schedule but not taken off hers. Edwards told Cromer that the front desk would need to take the patients she had not seen off her schedule. Cox followed Edwards up the hallway because “with everything that had been going on in the past few days . . . I wanted to listen in and see what had been said.” Cox, who stopped behind a corner so she could not be seen, heard Edwards tell Cromer that “this is not accurate. . . I don’t have time to be doing this. I’m in clinic.”<sup>22</sup> Cromer declared, in an allusion to yesterday morning’s argument, “Sandy, I’m not doing this with you today,” and reminded Edwards that it was her responsibility as the provider to “close out your charts.” Cox testified credibly that Cromer yelled for Edwards “to get out of her fucking office.” Cromer repeatedly told Edwards to “get the fuck out of her office.”

Hansen approached, intervened from the hallway, asking “what’s going on?” Cromer then said, with Hansen listening, that Edwards had “cursed and yelled at her the day before.” Edwards denied this, and said, “you were the one doing all the cursing and the yelling.”<sup>23</sup>

Although the record is confused and unclear, by this point it seems that the dispute moved into the hallway, out of Cromer’s office. Hansen, apparently taking up for Cromer, told Edwards she needed to calm down and said that “there was two sides to every story.” Edwards replied that she did not need to calm down because she wasn’t the one using foul language. Stiltner testified that she could hear yelling and the voices of both Edwards and Cromer from the medical assistants’ area but could not make out what was being said.

<sup>22</sup> Whitlock testified that Cox remained in the medical assistant area the entire time of the incident between Cromer and Edwards. I discredit this. I believe and find that Cox followed Edwards up the hall and listened in. However, not wanting to be seen eavesdropping, she returned to the medical assistants’ area before the incident ended and before Edwards returned. This explains why Cox did not hear all of the conversation between Edwards and Cromer, including the part about her. Whitlock likely did not notice Cox had left the area at all.

<sup>23</sup> Cromer testified and described the basics of the situation much as Edwards did but described herself as not “yelling at her or degrading her or anything like that,” and described Edwards as “furious.” Cromer claimed Edwards was “acting erratically,” and repeatedly testified and claimed she told Edwards that “I’ve never seen you this way.” Cromer testified repeatedly in regard to this incident that, “I had no idea what was wrong with her. . . We’ve always been very cordial and able to speak to one another.” I do not credit or believe any of this. At a minimum, Cromer gave as good as she got in this encounter, and I do not for a minute believe that she was puzzled or mystified by Edwards’ frustration. Contrary to her repeated claim that “[w]e’ve always been very cordial,” just the day before they had had a furious argument in the same spot (Cromer’s office) with Cromer repeatedly yelling at Edwards to “get the fuck out of my office.” Hansen also testified, claiming he arrived on

Edwards asked Hansen if he was going to allow Cromer to talk to her that way. Cromer, was upset and screaming, and Edwards described her own voice as “raised.” Edwards testified that patients could hear all of them. Hansen did not respond. Edwards said to Hansen, “of all people, Dr. Hansen, you should have my back.” Hansen told Edwards that “I do not have your back.” Edwards said, “you are my attending physician, you should have my back.” Hansen repeated that he did not.

One point of controversy is whether Edwards was told to “go home” or otherwise suspended. It is clear she was. At this point in the dispute, according to Edwards, Cromer told Edwards that she was suspended and to “go home for the day.” Hansen reiterated Cromer’s remarks, telling Edwards that she “should take the day off.” Notably, Cromer essentially admitted this (although she placed it earlier in the dispute), testifying that she told Edwards, “maybe you should go home for the day and cool off” (“I asked Sandy to go home for the day because of her behavior”). This is further reinforced by Cromer’s text to Edwards later that afternoon (GC Exh. 3) in which she admitted to Edwards that “I suspended you for one day” during this incident. Cromer further testified that during the encounter she told Hansen, “I said, Dr. Hansen, I told Sandy she should go home for the day and cool off.” In addition, Ashley McAdams, an employee witness called by the Respondent, testified that with Dr. Hansen present, she heard Cromer “tell Sandy that she needed to go home for the day.” Based on the above, there is no question that at this point, Cromer had been suspended.

Stiltner testified that she heard the office door open and Cromer saying, “you need to get your things and leave.” Edwards started walking backwards down the hallway still facing Cromer and Hansen who came into the hallway continuing the conversation and following Edwards back down the hallway.<sup>24</sup> Cromer and Edwards began to argue. Although the testimony is mixed as to where the parties were standing, I find that while standing in the front office hallway Cromer told Edwards, “I’ll get you for abandoning your patients.” Edwards, said, “how can you get me for abandoning my patients when you just suspended

the scene “to investigate the disturbance he heard.” The tendentiousness of his testimony was remarkable. With regards to Edwards’ behavior, he declared that “I don’t know if I’ve ever seen a nurse practitioner act like that.” Hansen worked into his testimony that Cromer had told him she was concerned about Edwards’ “sliding levels of attentiveness,” a bit of hearsay that was beside the point, never corroborated, and essentially volunteered. These are small but illustrative examples. Cromer and then Hansen’s testimony cannot be believed when it is disputed because in instance after instance, their testimony—usually in the form of endorsing a leading question by counsel—exhibited a pronounced and obvious tendency to testify, often in exaggerated form, in a manner they calculated would be the “right” answer to help the Respondent’s case, as opposed to their truthful recollection.

<sup>24</sup> Zavala testified that Cromer yelled from her office as Edwards backed down the hall “you’re fired.” I do not credit that. No other witness testified to Cromer saying this to Edwards during this phase of the incident. If Cromer had “fired” Edwards during this initial dust-up with Edward, others, and particularly, Edwards, would have remembered it and testified to it. Overall, I found Zavala to be an articulate witness, but in a number of instances her recollection seemed at odds with that of the other witnesses, and I have largely disregarded her testimony on disputed issues.

me for the day?” Edwards said, “I’ll sue you.” Cromer said, “that’s fine, I have your contract.”<sup>25</sup>

Standing in the hallway, with Hansen and Cromer about 10 feet away, at that point, Edwards tossed the papers with the list of patients that Cromer had put on her desk straight up in the air. She said, “I will leave” and “I’m taking the girls with me.” She then said, “let’s go; let’s roll out, girls,” and walked down the hallway to the medical assistants’ area.

Here, for the first time, Cromer claims that Edwards, after having been told to go home for the day, announced that she “quit.” Cromer testified that in the front office hallway, in response to the suggestion that she leave for the day, Edwards said, “I quit and I’m taking your staff with me.” Edwards vigorously denies it.

No medical assistant heard her say it. As to the Respondent, there were a total of three witnesses in addition to Cromer. Hansen, who claimed that Edwards later said she quit at the back door by the medical assistant area, did not corroborate Cromer’s claim that Edwards said she quit during the confrontation with Cromer by her office or in the front office hallway. Indeed, Hansen’s testimony essentially denies it. Hansen endorsed his pre-trial statement’s assertion that Edwards said, “something like, I’m leaving and taking your staff with me” (Tr. 801), and when asked to admit, therefore, that she did not say she “quit,” Hansen retorted that she used the term “at the back door.” Thus, Hansen, who Cromer testified was closer to Edwards than she when Edwards allegedly said she quit in the front office hallway does not back up Cromer’s claim.

Nor did Miranda Sigmon, a witness called by the Respondent who was working in the reception area on May 14. She was called to testify by the Respondent and testified about the encounter in the front office hallway. She did not testify that Edwards said or used the word “quit.” Rather, she testified, in accordance with Edwards’ and Hansen’s account, that Edwards said, “I’m leaving and I’m taking your staff with me—phrasing consistent with a suspension and walkout. Then, as she “stomped off towards the back of the building” Sigmond heard Edwards say, “let’s go girls.”

The only witness to back up Cromer’s claim that Edwards said she “quit” in the front office was Ashley McAdams, who performed insurance authorizations and verifications for PRC. However, McAdams’ testimony was riddled with credibility problems. I make nothing of McAdams inadvertent recollection that these events took place on May 13—instead of May 14—such an error in date is an irrelevancy as far as I am concerned.

<sup>25</sup> This was a reference to the employment contract between Edwards and PRC that Cromer had recently prepared but not yet provided to Edwards, as discussed below.

<sup>26</sup> See, *Residence Inn by Marriott Santa Fe All-Suites Hotel*, 369 NLRB No. 84, slip op. at 2 (2020) (“we readily agree with the judge that employees have a Section 7 right to provide evidence to the Board and to cooperate in Board and other state and federal labor and employment-related investigations without interference. Congress has made it clear that it wishes all persons with information about unfair labor practices to be completely free from coercion in reporting them to the Board, and the Supreme Court has long recognized the ‘special danger’ of witness intimidation in NLRB proceedings”) (footnotes omitted).

But the substance of McAdams’ testimony is worth noting. McAdams, testified that when Cromer told Edwards to “go home for the day,” Edwards

turned around and she put her finger in her face and says I quit and I’m taking the staff with me. And then she got in front of Dr. [ ] Hansen’s face and said, are you going to allow this? And he said, yes. And they went down the hallway.

I discredit McAdams’ claim that Edwards said she quit. For one thing, McAdams’ claim that Edwards said she quit as she put her finger in Cromer’s face, is at odds with Cromer’s version of the episode. Edwards sticking her finger in Cromer’s face is a detail Cromer would not have omitted, had it happened. By all accounts, Edwards’ declaration about taking “your staff” or “the girls” “with me” was Edwards’ final remark before heading down the hallway towards the medical assistant area. Cromer testified that Edwards was 5 to 10 feet from her and that Edwards was closer to Hansen than she was to Cromer when she said it. That would make McAdams account impossible. This discrepancy must be added to the admitted fact that counsel for the Respondent directed McAdams not to speak with agency investigators during the investigation of this case (Tr. 821–822), a matter that (surprisingly) is not alleged as a violation of the Act,<sup>26</sup> but nonetheless is of real concern in terms of witness intimidation and ultimately witness credibility.<sup>27</sup> Given these factors, I am unwilling to credit McAdams’ claim that she heard Edwards “quit” over the failure of Hansen, and Sigmond to testify that they heard it—not to mention the denial of Edwards that she said it and moreover, the failure of any other witness to report that they heard it.<sup>28</sup>

Given this, I do not credit the claim that Edwards said she “quit” during the front-office part of the dispute with Cromer and Hansen, before she headed down the hallway to the “back office” medical assistants area.

## 2. The continuation of the dispute in the back office with the medical assistants

Edwards headed down the hall to the medical assistants’ area in the back. Whitlock, Stiltner, and Cox were there. Cox had already grabbed her bag and stood up, taking her cue from hearing Edwards say she was leaving and “taking the girls” with her. When Cox heard Edwards say that she was “taking the girls,” Cox grabbed her bag, stood up and, according to Cromer, who arrived a few minutes later, put “her jacket on, ready to go.” When Whitlock heard Edwards say it, she stayed at her desk, but began collecting her things to leave.

<sup>27</sup> *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978) (“The danger of witness intimidation is particularly acute with respect to current employees—whether rank and file, supervisory, or managerial—over whom the employer, by virtue of the employment relationship, may exercise intense leverage”).

<sup>28</sup> That is enough for me to decide it is necessary to discredit McAdams. Independently, and in addition, I note that McAdams (and others) were directed by Cromer to “write down exactly what happened and what they saw” on May 14 and directed by Cromer to send the statements to Cromer (Tr. 826). No safeguards against retaliation were provided by Cromer in regards to this directive, raising still another concern about witness coercion and, therefore, of credibility. See, *Johnnie’s Poultry Co.*, 146 NLRB 770 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965).

Edwards entered the area, went to her desk, which was pushed up against the far-left wall not far from the back door, and began gathering her things. At that point Stiltner and Whitlock were sitting at their desks against the exam room wall in the medical assistants' area. At some point, the record is unclear, Zavala, who had run down from Walters' office, entered the area too. Zavala "got up in [Edwards'] face," and told her, "don't leave me here . . . I'm going with ya'll."

Just a minute or two later Cromer and Hansen entered the medical assistants' area, having followed Edwards down the hallway. Cromer and Cox exchanged conversation, noticed by Stiltner but not overheard by her. Cox testified that Cromer said that, "she had gave us the opportunity to talk to her yesterday and nobody had anything to say." Cox told her "look at how you handle situations, you're cussing Sandy out . . . [W]hy would we feel comfortable coming to you about anything when you're cussing other staff members." Cox stated that if Edwards left, she would be leaving as well.

Stiltner saw Whitlock had begun to gather personal items, so Stiltner did the same and they both stood up. Whitlock had gathered her things at this point. According to Stiltner, Cromer then looked to Stiltner and Whitlock, and snapped her fingers at them and said, "sit down and get back to work, with these two gone, I can afford to give you two a raise." Whitlock testified that "Cromer turned to me and Stiltner, snapped her fingers, and pointed at both of us and told us to sit down, that if Edwards and Cox was leaving, she then could afford to give us a raise."<sup>29</sup>

When Stiltner and Whitlock just stood there, motionless, Cromer, according to Cox, "accused all of us of abandoning our post and she pointed her finger at all of us and said that we were fired. . . . [I]t was . . . a repeated, you're fired, you're fired, you're fired, you're fired, and pointing at all of us." Whitlock gave a similar account, although she did not mention that Cromer mentioned abandonment of post at this time. Rather, she stated that she collected the rest of her things and with Stiltner moved toward the back door, where, by that time Zavala was also standing by the back door, with Edwards and Cox close by at their desks. Cox also testified credibly that she saw Zavala standing at that point in the doorway to the back door exit, just inside the facility, with her bag and key in hand. Cox put her daily schedule that contained confidential patient information in the trash can designated for shredding. Cromer said, "well you're leaving, and she pointed at all of us and said, you're fired, you're fired,

<sup>29</sup> Cox reported this in her affidavit, in a portion she expressly adopted during cross-examination, as Cromer stating, "Since they are leaving, I can give you all a raise if you stay."

<sup>30</sup> I note that on brief the Respondent makes much of the fact that Edwards (and, according to the brief, Cox) said they would get an attorney and that only 3 days later on Sunday, May 17, an attorney contacted PRC on behalf of the employees. But I think it is reasonable for employees being fired and/or accused of violating their contract, to say they will obtain counsel and then expeditiously do so—just as it is reasonable for an employer to expeditiously retain counsel when it is charged with unfair labor practices. Contrary to the suggestion of the Respondent, threatening to obtain counsel and expeditiously doing so says nothing negative about the veracity or validity of the allegations in this matter.

<sup>31</sup> Whitlock and Respondent witness Ashley McAdams thought that Cox had not left when Whitlock, Stiltner, and Zavala left, but Stiltner and Cox's testimony convinces me she did, but then came back to return

you're fired." Zavala handed her key to Cromer. Cromer said, "that's fine, you're fired too." At some point, Cromer accused Edwards of abandoning her patients and violating her contract and Edwards replied, "that's fine, I'll get a lawyer."<sup>30</sup>

Edwards asked Hansen, "are you going to let her talk that way to employees." He did not respond. Cox said, "right there is your problem. . . . [Y]ou're allowing her to disrespect us and talk to us this way," but Hansen did not answer. At that point, Zavala, Stiltner, Whitlock and Cox exited the back door. Cromer yelled at them to leave their building keys. Whitlock told her they were on top of her computer inside. Cox turned back and returned her key to Cromer.<sup>31</sup>

Cox left again and that left Edwards there with Cromer and Hansen. Cromer insulted Cox's physical appearance. Edwards turned to Cromer and said that this kind of remark could be expected given Cromer's previous experience as a manager at a Cook Out restaurant.

Cromer left the medical assistants area. Edwards began gathering her bags. Hansen was in his office that opens near the backdoor.

Edwards said, "Dr. Hansen, I felt like you betrayed me." Hansen responded that he did not betray Edwards, and that "[i]t's not your job to take up for the medical assistants." Edwards responded, "well it is my job because somebody has to advocate for them." Edwards told Hansen that she "did not want to quit." Hansen said, "well, don't. Take the day and think about it." Edwards left.

### 3. The Respondent's claims that in the back office the medical assistants and Edwards said they quit

In contrast to the detailed account of the incident elicited at trial from Edwards and the four medical assistants, credited as set forth above, the Respondent's witnesses' version of events during the May 14, "back office" portion of the incident was light. In their testimony, the two that were present, Cromer and Hansen, skipped almost all of the moment-by-moment details provided by Edwards and each of the medical assistants, and made almost no effort to rebut Charging Parties' versions of events, except on one issue: the issue of whether, as claimed by the employees, Cromer told them they were fired, or as Cromer and Hansen claim, they said they quit. To this latter point the Respondent's witnesses hewed tightly, but for multiple reasons, their testimony lacks credibility and I reject it.<sup>32</sup>

the key. McAdams testified that after Zavala, Whitlock and Stiltner were gone, with Edwards, Hansen and Cromer present, she overheard from down the hallway Cox tell Hansen, "they were going to sue Dr. Hansen and . . . the practice." This could have happened when Cox returned momentarily to return her key, but I discredit this as unproven, as neither Edwards, Hansen, Cromer, nor Cox testified to it. As discussed below, circumstances surrounding McAdams' testimony undercut her credibility and this is even more so when she is the sole witness to testify about an alleged comment.

<sup>32</sup> Preliminarily, I note that I found the conclusory responses (see, e.g., Tr. 718, 771, 785, 802) in which witnesses asserted that the alleged discriminatees quit and were not terminated, wholly unconvincing. Instead, I accord weight to the accounts of events given by each witness about what they saw and heard and what happened, considered based on their demeanor, the consistency, and likelihood and probabilities.

The Respondent's witnesses depicted Comer as calm, helpful, just trying to understand what was happening. Cromer's testimonial claim was that immediately after the dustup with Edwards—an incident she claimed was unprecedented (“I’d never seen her act that way before”), but which, in fact, had happened just the day before too—she and Hansen followed Edwards into the medical assistants’ area, where Cromer allegedly said, “hey girls, what’s going on? You know, can we sit down and talk about this? You know, what is going on?”

I do not believe this is the approach Cromer took. It is contradicted by multiple witnesses and seems highly improbable given the overall testimony and admitted sharpness of events with Edwards that led her to the medical assistants’ area, as well as Cromer’s proven willingness to speak sharply to the employees in multiple circumstances.

Cromer testified that while she was saying, “hey, girls, what’s going on?,” and otherwise passively observing the situation, Whitlock, Stiltner, and Zavala, were all heading out the back door with bags packed. Cromer testified that this prompted her to say,

I said, are you guys all quitting? And they said, yes. And I said, if you guys are leaving, please turn in your keys before you leave. They all walked over to me, one by one, and handed me their key. . . . And then left.

Hansen testified that Cromer simply pleaded with the employees, “let’s talk about this. You know, settle down. Come on, let’s talk about this.” McAdams, testified that from her office she “heard Sharese down the hallway with them, and she asked them if they were leaving. And she said – they said, yes, they quit.”

I discredit this. First of all, the insouciance of it is all in marked contrast to the turmoil, yelling, and sharp speech otherwise described by witnesses. Moreover, it seems completely out of character. Repeatedly in the last two days, and just moments before, Cromer had been involved in angry profanity-laced arguments with Edwards. By her own admission she had just directed her to leave and go home for the day. The previous day she had sent a text to staff threatening them with termination for leaving early and in the May 13 staff meeting announced new rules threatening termination for noncompliance. The Respondent’s witnesses’ account seems far-fetched given the circumstances.

The Respondent’s account is transparently designed to

<sup>33</sup> It also did not enhance McAdams’ credibility that she appeared willing to provide the answers that Respondent’s counsel wanted. When her initial answers were not adequately conclusive or complete, counsel simply asked again, making the intended answer obvious. Thus, after testifying that she had heard—not seen but heard—Cromer “down the hallway” asking the employees if they were leaving, McAdams testified that in response to Cromer “she said—they said, yes, they quit.” (Tr. 813.) This answer, of course, left ambiguous which or how many of the charging parties McAdams allegedly heard say this, a matter that would be hard to determine with any precision from earshot down the hall. It is, indeed, likely that McAdams would not know, given that she was not in the room. But such answers would not do, and counsel returned to it:

Q Okay. Did you—did you see anybody tell Ms. Edwards, Ms. Whitlock, Ms. Stiltner, Ms. Zavala, or Ms. Cox that they were fired?

A No.

Q Did you hear each one of them say that they quit?

highlight the claim that it makes central to its defense: the claim that there was no angry declarations of “you’re fired” from Cromer but instead, the Charging Parties—each of them—announced that they “quit.” I discredit these claims, specifically and credibly denied by each of the Charging Parties. McAdams backed up Cromer, but her testimony is suspect given her (previously discredited) enthusiasm for claiming Edwards said she quit in the front-office argument with Cromer. Moreover, the Respondent counsel’s efforts to control her participation in the investigation, and her impressment into

Cromer’s effort to build evidence for the case, both of which are described above, render McAdams’ testimony in support of the Respondent the potential product of coercion.<sup>33</sup>

Hansen was the other witness for the Respondent to testify about these events. He also offered little detail. And while he repeatedly, in blatantly conclusory testimony asserted that Edwards and the medical assistants “quit” (see, Tr. 771, 772, 785, 791, 802), *he never testified that any of the medical assistants said that they quit.* Moreover, as to Edwards, although he claimed she said she quit, (Tr. 787, 801), he admitted on cross-examination that the written statement he submitted to the Region during the investigation of these events, which he endorsed at trial as being “truthful,” never stated that Edwards said she quit, and never asserted that any of the five alleged discriminatees said that they quit. One need look no further than the *Jencks* case itself to see the value that the Supreme Court puts on such omissions in the weighing of credibility.<sup>34</sup> Here, on a central point—in truth, the point on which the Respondent stakes its defense—it owner and top official’s claim is utterly absent from his pretrial account of events submitted in this federal investigation.

This is discrediting, for sure, but also revealing. The Charging Parties walked out, Edwards after being told to go home, the medical assistants in support of her call for them to go with her. Cromer told them they were fired as they headed for the door. But after hearing Cromer and Hansen’s testimony, I suspect that in their view, the employees’ move to walk out, by itself, constituted a quit and an intolerable provocation. Cromer’s firing of them was an attempt to reassert her control of the situation. Only later, I suspect, Hansen and Cromer came to understand that the law might not view the incipient walkout as evidence of resignation, and with that knowledge grew the false claim that the

A Yes. [Tr. 814.]

This is a witness that gave the impression she was willing to answer the way she thought she was “supposed” to, rather than based on what she recalled.

<sup>34</sup> As the Supreme Court explained in *Jencks v. United States*, 353 U.S. 657 (1957), its seminal decision requiring production of pretrial statements:

Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness’ testimony and the version of the events given in his reports is not the only test of inconsistency. *The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness’ trial testimony.* [Emphasis added.]

employees *announced* they were quitting as they prepared to walk out.<sup>35</sup>

G. Edwards-Cromer text exchange the afternoon of May 14; picking up the contract May 18

That afternoon, after Edwards had left PRC, Cromer texted Edwards stating:

I won't text you ever again after this just finishing up some business please turn in your key fob on Monday between 830 and 930am and also your office keys failure to do so will result in a \$250 fee for your key fob and a \$250 fee for your office key to have the office rekeyed also you will be responsible for your tail coverage they will send an invoice to your home address. good luck in your future endeavors

If you choose to mail them to you that is fine just let me know they're in the mail so you will not get charged

Edwards responded later that day:

So just to clarify are you terminating my employment at pain relief center?

Cromer replied:

No ma'am he [you] walked out today I suspended you for one day you said you quit it has been documented

You

Take care

Edwards responded to this:

No you told me to go home  
I told dr Hansen I didn't want to quit and he said take the day off

Cromer responded:

Yes ma'am I suspend you for one day you said you quit and you were taking stuff with you you abandoned your patience during clinic hours and you took my staff which is poaching you voluntarily quit when you walked out the back door and cleaned out your desk have a good day

Edwards responded:

Please have copy of my contract on Monday ready for me.

The following Monday May 18, Edwards turned in her key and key fob. Edwards had asked in her text exchange with

Cromer for a copy of her employment contract, which, as discussed below, Cromer had prepared (or had prepared) for Edwards in March 2020. On May 18, the Respondent provided Edwards a copy of what the Respondent claims was her employment contract. However, as discussed below, there is reason for concern that the purported contract provided to Edwards, and offered into evidence at the hearing, was not the contract between Edwards and PRC.

#### H. *The matter of the purported employment contract*

During the hearing, the Respondent proffered Respondent Exhibit 1. During cross-examination of Edwards, counsel for the Respondent first attempted to introduce this document into evidence. This document purported to be and was titled as an employment contract between "Pain Relief Centers and Krisandra Edwards F.N.P.," and recited on its face that it was entered into "this 23rd day of July 2018."

In his opening statement, counsel for the Respondent represented that Edwards was hired in July 2018 "pursuant to a written contract that Ms. Edwards signed with Dr. Hansen." That much is false—the record is clear that no contract was signed until March 2020, and it was backdated to July 23, 2018. Respondent Exhibit 1 appeared to be the document described as signed in March 2020 but backdated to 2018—but there was a problem. When Edwards reviewed the document on the witness stand, she categorically denied that this was the contract she signed. She agreed that it was her signature that appeared at the signature page (page 6) of the contract, and on the signature page of an attached Non-Disclosure Agreement (also purporting to be entered into July 23, 2018), but she denied that it was a copy of the contract that she had signed:

Q So you're saying that that's your signature but this is not a copy of the contract that you signed; is that right?

A That's exactly what I'm saying.

(Tr. 106.)

Edwards maintained that in March 2020, she had come into the office and signed a contract, but it was not this document. She only saw and signed one page, and was sure it was not the same because she had reviewed the document because she did not want to agree to a lengthy—5 or 10 year—contract. Respondent Exhibit 1 has a 10-year term.

On redirect the General Counsel examined Edwards about the contract.<sup>36</sup> Edwards pointed out (Tr. 217) that, in particular, the

<sup>35</sup> Finally, I specifically discredit Cromer's claim that before being fired the medical assistants had "cleared the computers" and "reset my computers to factory settings and erased all my software that was on the computers before they left." This is a significant claim of sabotage, specifically denied by all of the Charging Parties, and made without the slightest documentation or other evidentiary corroboration, of which there undoubtedly would be some, had this occurred. The flippancy of the charge and the lack of any support for it, reflect a reckless and casual attitude toward the oath of honesty that reared its head on more than one occasion in this proceeding.

<sup>36</sup> The General Counsel examined the witness by referring her to proposed General Counsel's Exhibit 4. This document appeared to be an exact copy of Respondent's Exhibit 1, the only difference being that the Respondent had marked Respondent's Exhibit 1 for litigation purposes

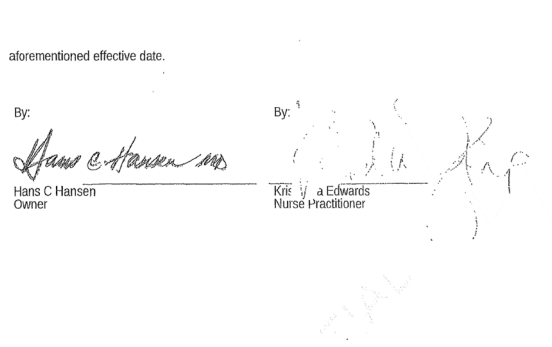
with an internal page numbering system (Tr. 218–219). So that there would be only one copy of this purported contract in the record, after discussion with counsel (Tr. 727) I ruled that the documents appeared identical and that Respondent's Exhibit 1 would be admitted into evidence, and that any testimony taken from Edwards where she was referring to the document marked as General Counsel's Exhibit 4 would be as if she was referring to and examining Respondent's Exhibit 1. No party has identified any differences between the documents (with the exception of the added internal numbering). I note that in the transcript discussion of this issue, reference was repeatedly but inadvertently made to General Counsel's Exhibit 7 (see, Tr. 726–727). Those references should have been and are hereby corrected to refer to General Counsel's Exhibit 4.



signature affixed to the Non-Disclosure Agreement “appears like it’s been copied and pasted”:

If you look at my name under the line where I signed, it looks as if that has been cut out and placed on top of my name. And it wouldn’t look like that if I would have signed it.

Edwards is likely not a forensic documents examiner, nor am I, but the force of her observation is impossible to deny. Here is a reproduced image of the signature page of the Non-Disclosure Agreement:



I note that in addition to the concerns raised about Edwards’ signature, Hansen’s signature appears traced as it is double lined throughout.

The record is clear, as far as it goes, that in March 2020, Cromer prepared and Edwards signed some form of employment contract. At the time Edwards signed it, Cromer told her that she would have Hansen sign it as well, but that he was not in the office. The suggestion that it would be backdated to 2018, is contained in a March 4, 2020 text exchange between Cromer and Edwards (GC Exh. 5). Edwards did not receive a copy of the contract at the time she signed it in March. When she returned to PRC on May 18, to return her keys she was provided with a copy of the document entered into evidence as Respondent Exhibit 1—the one she says she did not sign in March 2020, and that she never saw until receiving it on May 18, 2020.

Unfortunately, the Respondent’s witnesses’ testimony did little to dispel the suspect nature of the document proffered as Edwards’ contract. Cromer testified and asserted that at her request, a management company employed by PRC, Blue Sky MD, prepared the contract for Edwards. Cromer testified that she saw Edwards sign it and, although the record is not entirely clear (see, Tr. 677), Cromer seemed to indicate that Respondent’s Exhibit 1 was the contract she claims to have seen Edwards sign. No details were provided. However, Cromer admitted that PRC did not have an original of the contract, only a copy. She claimed that Edwards had the original, something Edwards denied. Suspiciously, given the circumstances, Cromer admitted that PRC maintained an original contract for each of the other providers who have contracts with PRC. In other words, only as to Edwards’ purported contract—the one whose authenticity is in dispute, and which forms a basis for a lawsuit by PRC against Edwards (see ALJ Exh. 1)—is PRC unable to produce an original.

As to the attached non-disclosure agreement, Cromer testified only—again, in agreement with counsel’s suggestion (Tr. 678) that “[t]o the best of [her] knowledge,” the signatures on the non-disclosure agreement were that of Dr. Hansen and Edwards. This formulation—that it was their signatures “to the best of her knowledge”—lead me to conclude that Cromer did not (and does not claim) to have witnessed Edwards or Hansen signing the non-disclosure agreement, and it is these signatures, in particular, that look the most obviously fabricated. Cromer denied signing Edwards’ name to the contract and denied having “any knowledge or any reason to believe that this not Ms. Edwards’ signature on that contract.”

Then Hansen testified. He agreed—again, in response to more leading testimony (Tr. 768–769)—that to the “best of [his] knowledge” Edwards signed a written contract when she was hired. There is, of course, no evidence of this, indeed, all the evidence is that she did not. Hansen then claimed that the contract Edwards signed when she was hired in 2018, was Respondent Exhibit 1. This, of course, is contradicted by Edwards, of course, but also by Cromer. Their testimony is clear that the whatever contract she signed was created in March 2020 and backdated to her 2018 time of hire. Then Hansen then specifically claimed that he signed the Edwards contract “within the week” that Edwards started work in 2018. Again, this is obviously untrue—flatly contradicted even by Cromer.

What we are left with is suspect evidence, with signatures suggestive of fabrication, and with testimony that only enhances the suspicion that the Respondent attempted to submit a fraudulent document into evidence in a federal administrative law hearing.

For purposes of this decision, I limit my finding to the conclusion that it is unproven that Respondent’s Exhibit 1 is a valid contract between Edwards and PRC.

#### Analysis

The General Counsel contends that the Respondent unlawfully interrogated and polled employees on May 13, about their and others concerted and protected activities. He further contends that on May 14, the Respondent unlawfully discharged its employees—specifically the five Charging Parties—for engaging in protected and concerted activity. For the reasons set forth herein, I agree, although I dismiss the polling allegation. As further explained below, my conclusions are based on my finding that Cromer has been shown to be a supervisor and agent of the Respondent under the Act, and further premised on my finding rejecting the Respondent’s contention that Edwards is a statutory supervisor under the Act.

#### A. Interrogation and Polling Allegation (Complaint ¶¶6(i) and (ii))

The General Counsel contends (¶6(i) that on May 13, Cromer unlawfully interrogated employees about their and other employees protected and concerted activities. The General Counsel further alleges (¶6(ii)) that during the same incident Cromer unlawfully polled employees to ascertain employee support for protected concerted activities.

To review, the morning of May 13, Edwards confronted Cromer about Cromer’s text the previous day threatening to terminate employees and told her that employees “felt uncomfortable coming to her.” Edward upbraided Cromer for recently

“threatening the girls with the jobs because of a dirty office.” Cromer almost immediately thereafter went to the medical assistants’ area and told employees:

it’s been brought to my attention that I’m unapproachable. Is that true?” . . . who back here feels like they can’t come and talk to me.

Cromer asked the employees to “raise our hands if any of us felt that way.” No one responded and no one raised their hand. Cromer stated, “well, there sure is a lot of talking going on about me back here.” Later that day, at the staff meeting, Cromer told employees that “she had been disrespected, that she had been talked about, and that she was putting an end to it.” She also told them “she wasn’t going to deal with any more gossiping in the workplace.” Cromer said, “that we had a lot to say behind her back and she was done with the petty and drama.” She told employees “if there was any issues, we needed to . . . discuss it then and there.”

Under Section 8(a)(1), an employer may not “interfere with, restrain, or coerce employees” in the exercise of their Section 7 rights. “The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.” *American Freightways Co.*, 124 NLRB 146, 147 (1959). “In determining whether an employer’s statement violates Section 8(a)(1), the Board considers the totality of the relevant circumstances.” *Saginaw Control & Engineering, Inc.*, 339 NLRB 541 (2003).

Here, Cromer’s demand to know whether she was perceived as unapproachable and her demand to know who believed they could not come talk to her would reasonably be understood by employees as coercive and intimidating questioning about matters that constituted employee protected and concerted activities.

First of all, the General Counsel has built a strong case demonstrating that Cromer’s perceived manner of treatment of and perceived attitude toward employees was a matter of mutual concern for employees, specifically for the Charging Parties. Their concern centered not so much on the substantive work rules associated with her management of the office, but rather, the manner, tone, threats of termination, and perceived demeaning treatment of employees. This is a subject of employee concern that falls squarely within the Act’s concern for “working conditions.”<sup>37</sup>

The employees’ concerns with Cromer that prompted her interrogation were also manifested in concerted activity. It was concerted not only in that employees discussed the matter with each other (see, e.g., 58–59, 144–145, 466, 474, 475) and ultimately on May 14, took action induced by it (see, the *Mushroom Transportation* line of cases),<sup>38</sup> but it was also a matter that

Edwards brought directly to Cromer’s attention (Tr. 70, 692, 145). Conduct is concerted “when an individual attempts to bring a group complaint to the attention of management.” *Phillips Petroleum Co.*, 339 NLRB 916, 918 (2003); *Mitsubishi Hitachi Power Systems*, supra at slip op. 18 (finding concerted activity where it was a “logical outgrowth of the concerns” discussed among coworkers); *Amelio’s*, 301 NLRB 182, 182 fn. 4 (1991) (finding that “an individual is acting on the authority of other employees where the evidence supports a finding that the concerns expressed by the individual employee are a logical outgrowth of the concerns expressed by the group”).

This is exactly what Edwards did when she told Cromer on May 14, that employees were uncomfortable coming to her with their concerns, and by implication why she was coming to her instead. Cox did the same thing on May 14, when, in response to Cromer telling the medical assistants “she had gave us the opportunity to talk to her yesterday and nobody had anything to say,” Cox told her “look at how you handle situations, you’re cussing Sandy out. . . . [W]hy would we feel comfortable coming to you about anything when you’re cussing other staff members.”

It was precisely Cromer learning of this protected and concerted activity that sparked her May 13 interrogation, and it was the subject of it. Moments after finishing her conversation with Edwards she demanded to know from the medical assistants in the area if it was true that she was unapproachable and demanded to know who felt that they could not talk to her. That this concerned the protected and concerted discussion of the difficulty of dealing with Cromer was underscored when, after no one responded to her interrogation, she stated, “well, there sure is a lot of talking going on about me back here.” Moreover, that this incident concerned the protected discussions of Cromer by employees, was emphasized again when, later that day at the staff meeting, Cromer essentially continued her rant from the morning, telling employees that “she had been disrespected, that she had been talked about, and that she was putting an end to it.”

Given this context, the interrogation was clearly unlawful. It was initiated by the office manager, a high-ranking daily presence in the clinic. It was not casual but was directed toward determining who was responsible for telling employees that she was not approachable, a criticism that, based on her reaction, clearly rankled Cromer. That the interrogation immediately followed an angry exchange between Edwards and Cromer, overheard in part by many of the employees, only adds to the tendency of the interrogation to coerce. As does the fact that later that day in the meeting Cromer continued harping on the theme by announcing that employees were “talking behind her back” and employees were required to discuss any issue they had “then

<sup>37</sup> *St. Rose Dominican Hospitals*, 360 NLRB 1130, 1131–1132 (2014) (employee activity expressing concern about coworker’s “attitude” protected by Act); *Mitsubishi Hitachi Power Systems Americas, Inc.*, 366 NLRB No. 108, slip op. at 17–18 (2018) (complaints about supervisor’s bullying and abusive behavior protected by the Act); *Trompler, Inc.*, 335 NLRB 478, 480 fn. 26 (2001) (and cases cited therein), enf. 338 F.3d 747 (7th Cir. 2003); *Dreis & Krump Mfg. Co. v. NLRB*, 544 F.2d 320, 328 fn. 10 (7th Cir. 1976) (employee discussions about supervisor’s deficiencies that potentially affected safe working conditions, employee performance, and could lead to unwarranted discipline “cannot seriously

be contended to further a purpose other than their ‘mutual aid or protection,’ regardless of any personal feelings of anger on the part of [the employee] toward the supervisor”).

<sup>38</sup> *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964) (“It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees”).

and there.” Notably, Cromer’s interrogation of the medical assistants was met with nonresponsiveness—no one was willing to answer, something Edwards remarked upon as soon as Cromer left.<sup>39</sup> Such attempts by employees to conceal knowledge of protected activity weighs in favor of finding an interrogation unlawful. *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1183 (2011); *Evergreen America*, 348 NLRB 178, 208 (2006), *enfd.* 531 F.3d 321 (2008).

I find that under all the relevant circumstances, Cromer’s questioning was an unlawful interrogation. However, I do not find that Cromer asking people to raise their hand if they felt she was unapproachable, was also an unlawful poll. That would be splicing a single incident too finely to withstand scrutiny. In this case the alleged polling was simply part of the unlawful interrogation. Traditionally, unlawful polling usually involves an effort by an employer to assay union sympathies or support—this was not that.<sup>40</sup> Rather, the allegation was pled in the complaint as an attempt to ascertain employee support for the protected activities. To my mind, Cromer’s demand that employees raise their hands if they agreed that she was unapproachable was just another way for Cromer to emphasize that she was serious about wanting answers to her interrogation. I note further that the General Counsel’s brief (GC Br. at 29–30) analyzes this allegation as an interrogation issue, and not a polling issue. I will dismiss complaint paragraph 6(a)(ii), the polling component of the allegation.

#### B. The discharges (complaint ¶8)

The General Counsel alleges that the five Charging Parties were unlawfully discharged due to their protected and concerted activity. I agree.

An employer violates Section 8(a)(1) of the Act when it discharges an employee for engaging in activity protected by Section 7 of the Act. *Nestle USA, Inc.*, 370 NLRB No. 53, slip op. at 10 (2020). Without a doubt, this includes the discharge of employees for participating in or commencing a work stoppage. *NLRB v. Washington Aluminum*, 370 U.S. 9 (1962); *Atlantic Scaffolding Co.*, 356 NLRB 835, 838 (2011); *CGLM, Inc.* 350 NLRB 974, 974 fn. 2 (2007), *enfd.* 280 Fed.Appx. 366 (5th Cir. 2008). Here, the employees were discharged for just that.

##### 1. The employees were discharged

First of all, and contrary to the contention of Respondent, the employees were discharged. The four medical assistants, Cox, Zavala, Stiltner, and Whitlock were told they were discharged as they began walking off the job. Then they left the building as directed.

The test for determining whether employees have been discharged is “whether the employer’s statements or conduct ‘would reasonably lead the employees to believe that they had been discharged.’” *Kolkka Tables & Finnish American Saunas*, 335 NLRB 844, 845 (2001), quoting *NLRB v. Hilton Mobile Homes*, 387 F.2d 7, 9 (8th Cir. 1967). “It is sufficient if the words or actions of the employer would logically lead a prudent person to believe his or her tenure has been terminated.” *WR*

<sup>39</sup> Edwards chastised the medical assistants, saying something to the effect that “I went in there to take up for you, . . . and you guys have nothing to say” to Cromer. Cox responded that “she was scared to say

*Reserve*, 370 NLRB No.74, slip op. at 2 fn. 6 (2021); *North American Dismantling Corp.*, 331 NLRB 1557 (2000), *enfd.* in relevant part, 35 Fed.Appx. 132 (6th Cir. 2002). There is no ambiguity when an employee is told they are fired. On this issue, the Board, in *Bates Paving & Sealing, Inc.*, 364 NLRB 509, 510 (2016), explained:

there was no ambiguity in what [owner] Bates said to [employee] Marana: Bates told Marana he was fired. That suffices to meet the General Counsel’s burden of proving an adverse employment action.

That is exactly what Cromer did here. She told the four medical assistants they were fired. This suffices to meet the General Counsel’s burden of proving a discharge.

Edwards, who had been suspended for the day, had a slightly different situation. She left as directed by Cromer. Any ambiguity as to whether Cromer’s “you’re fired” fiat applied to Edwards was cleared up that afternoon when Cromer texted Edwards, stating that she “won’t text you ever again” after “finishing up some business.” This business was Cromer’s demand that Edwards turn in her key fob and keys. If she did not, Cromer told Edwards, the office would be “rekeyed,” and Edwards would be charged for it. Cromer added, “good luck in your future endeavors.” Obviously, this sounded like a discharge. Edwards responded, “So just to clarify are you terminating my employment at pain relief centers?” Cromer responded, “No ma’am, [you] walked out today I suspended you for one day you said you quit it has been documented. You take care.” Edwards responded that she had told Hansen she did not want to quit and that Hansen had told her to take the day off. Cromer replied, again, admitting that she suspended Edwards and again claiming that Edwards said she quit, asserting further that “you voluntarily quit when you walked out the back door and cleaned out your desk have a good day.”

This is a discharge. Cromer is severing the employment relationship and her words “would logically lead a prudent person to believe his or her tenure has been terminated.” *WR Reserve*, 370 NLRB No.74, slip op. at 2 fn. 6 (2021). That Cromer misstated what happened and erroneously insisted that the discharge was a quit does not change anything. As I have found, Edwards did not say she quit. Nor did Edwards “quit when [she] walked out the back door.” Edwards was suspended.

The Respondent insists, based on little other than insistence, and discredited and/or conclusory testimony by its witnesses, that the employees resigned. In fact, as I have found, and contrary to the Respondent’s claims, no one announced that they were quitting. Instead, they began to walk out, without explaining themselves to management, at Edwards’ call, made in response to her suspension, without saying anything about resigning. For her part, Edwards was deemed discharged because she walked out after being told to leave. She was suspended, and then discharged. There is no evidence that she resigned.

I recognize that the Respondent essentially equates employees starting to walk out with a resignation. But that is contrary to the

anything because of Sharese’s demeanor and the way she was carrying herself and kind of raising her voice at everybody.”

<sup>40</sup> See *Struksnes Construction Co.*, 165 NLRB 1062 (1967),

premises and operation of the Act. *Atlantic Scaffolding*, 356 NLRB 835, 838 (2011) (rejecting assertion that the employer could terminate employees because there was no indication whether they would return to work from walkoff), citing *Anderson Cabinets*, 241 NLRB 513, 518–519 (1979) (“Calling a strike a voluntary quit or an absence from work justifying discharge is to write Section 13 out of the Act”). *enfd.* 611 F.2d 1225 (8th Cir. 1979); *Richardson Transfer & Storage Co.*, 176 NLRB 504, 512–513 (1969) (employer who confused concerted and protected activity for a “quit” violated Act by discharging employees).

And even indulging the Respondent’s speculative claim that that the employees, or some of them, wanted to or would have resigned, in fact they were fired before they walked out and before they resigned. That’s a discharge. *Electromec Design & Development Co.*, 168 NLRB 763, 763–764 (1967) (employee who announced to coworkers and management he was resigning due to employer’s failure to approve wage increases was unlawfully discharged for joining in walkout of wages and other issues). Similarly, the Respondent cannot advance a case for resignation by searching for evidence that an employee began to walkout while subjectively believing or planning not to return to work from the walkout. Such evidence is an irrelevancy. The post-hoc interrogation of the subjective mind set of each individual employee about what they hoped or intended or thought would happen when they walked out in support of their coworker cannot prove a resignation “The Act is concerned with concerted activity, not concerted thought.” *Advance Cleaning Service*, 274 NLRB 942, 944 fn. 3 (1985). The employees’ subjective and individual motivations for joining in the walkout are not relevant to whether the action is protected. *Fresh & Easy Neighborhood Market Inc.*, 361 NLRB 151, 153 (2014). “Rather, the analysis focuses on whether there is a link between the activity and matters concerning the workplace or employees’ interests as employees.” *Id.*, *Tomar Products, Inc.*, 151 NLRB 57, 61 fn. 13 (1965) (a group walkout “even where there is no common focus of dissatisfaction and each participant’s complaint differs from all the others—is a protected concerted activity”). Here, the employees started to walk out and were discharged for it before anything else happened. That’s a discharge, regardless of their speculative, individual future plans.<sup>41</sup>

Finally, the Respondent contends that only Hansen—and not Cromer—had the authority to terminate employees. This is a contention without force. Putting aside, for the moment that Cromer is a statutory supervisor—that is a matter is discussed below—Cromer terminated the four medical assistants in front of Hansen, and Hansen did not disavow it, which is effectively a ratification. *Dentech Corp.*, 294 NLRB 924, 926–928 (1989); *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82, 83 (1988).

Moreover, Cromer’s status as an agent of the Respondent,

<sup>41</sup> I recognize that *after* a worker goes out on strike *and thereafter resigns*, an employer does not have to offer reinstatement to the resigned worker where the employer can prove that the striker’s resignation was a product of an “unequivocal evidence of intent to permanently sever the striker’s employment relationship.” *L.B. & B. Associates, Inc.*, 346 NLRB 1025, 1029 (2006) (citations and parentheticals omitted), *enfd.* 232 Fed.Appx. 270 (4th Cir. 2007); *S & M Mfg. Co.*, 165 NLRB 663,

within the meaning of Section 2(13) of the Act, is not open to serious question. “The Board’s test for determining whether an employee is an agent of the employer is whether, under all of the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management.” *Pan-Oston Co.*, 336 NLRB 305, 305–307 (2001). In short, “[i]t is well established that where an employer places a rank-and-file employee in a position in which employees would reasonably believe that the employee speaks on behalf of management, the employer has vested that employee with apparent authority to act as the employer’s agent, and the employee’s actions are attributable to the employer.” *Mid-South Drywall Co.*, 339 NLRB 480 (2003). Significantly, as set forth in Section 2(13) of the Act, when making the agency determination, “the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.” Cromer, the office manager, was not exactly a rank-and-file employee. She did, in fact, speak and act for management every day. She called staff meetings, conducted meetings, corrected employees, approved schedules and vacations, answered payroll questions, and, notably, threatened employees with termination on multiple occasions. Only the day before in the staff meeting, she had warned employees that “she was done bending over backwards for the staff and that if we had any issues, that we needed to come to her and not to Dr. Hansen because he didn’t want to hear it.” The employees’ unanimous perception of her as an authority figure, as testified to by numerous employees, would be unremarkable save for the Respondents’ denial of her agency status. Clearly, Cromer’s “work responsibilities . . . align h[er] interests with management rather than with the [rank-and-file employees].” *Board Ford, Inc.*, 222 NLRB 922, 922 (1976). I find that Cromer acted as an agent for the Respondent generally, and specifically when threatening and discharging employees.

## 2. The employees were discharged for concerted and protected activity

Not only were the employees discharged, but they were discharged for engaging in activity protected by the Act. “To be protected under Section 7 of the Act employee conduct must be both ‘concerted’ and engaged in for the purpose of ‘mutual aid and protection.’” *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151, 152 (2014).

Under Section 7, both the concertedness element and the “mutual aid or protection” element are analyzed under an objective standard. An employee’s subjective motive for taking action is not relevant to whether that action was concerted. “Employees may act in a concerted fashion for a variety of reasons—some altruistic, some selfish—but the standard under the Act is an objective one.” *Circle K Corp.*, 305 NLRB 932, 933 (1991), *enfd. mem.* 989 F.2d 498 (6th Cir. 1993).

664 (1967) (“We find that mere submission of their ‘resignations’ did not constitute an unequivocal abandonment of their status as strikers or of their right to further employment with the Respondent”). Even there, the strikers’ intent is adjudged objectively, but, in any event, this precedent is inapposite here, where the employees were affirmatively discharged (and one suspended) before they managed to go on strike, and before they resigned.

*Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB at 153.

There is no question but that the employees' move to walk out was concerted. It was done as a group endeavor, initiated by Edwards' call to action upon her suspension: she yelled "let's roll out girls," as she headed back to the medical assistants' area from her noisy confrontation with Cromer and Hansen, much of which was overheard by the medical assistants. Obviously, this was not five employees acting, coincidentally and individually at the same time to leave work. They were acting in concert, in support of Edwards, who initiated the walkout by declaring that she would take her suspension and "tak[e] the girls" with her.

The walkout was also commenced for the purpose of "mutual aid or protection." As the Supreme Court has recognized, Congress designed Section 7 to protect concerted activities not just "for the narrower purposes of 'self-organization' and 'collective bargaining'" but also "for the somewhat broader purpose of 'mutual aid or protection.'" *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). As the Court explained in *NLRB v. City Disposal Systems*, 465 U.S. 822, 835 (1984):

in enacting § 7 of the NLRA, Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment. There is no indication that Congress intended to limit this protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way.

And just as an employee's subjective motivation is not relevant to an analysis of whether that action is concerted "[n]or is motive relevant to whether activity is for 'mutual aid or protection.'" *Fresh & Easy Neighborhood Market Inc.*, 361 NLRB at 153. As referenced above: "Rather, the analysis focuses on whether there is a link between the activity and matters concerning the workplace or employees' interests as employees." *Id.*

Here, the walkout's proximate cause was the Employer's discipline of Edwards, which led Edwards to announce she was "taking the girls" with her. This time the employees responded to Edwards, perhaps because just the day before Edwards had upbraided the medical assistants for failing to support her when she went to Cromer "to take up for you." This time, the medical assistants joined with Edwards.

Indeed, contrary to its claims, the Respondent recognized exactly what was happening. As Edwards was leaving, Hansen told her, "[i]t's not your job to take up for the medical assistants." Edwards responded, "well it is my job because somebody has to advocate for them." Thus, the Respondent's top official

understood full well that this incident was rooted in a show of solidarity over workplace conditions.

This is classic protected activity, and it makes no difference that the employees failed to give notice<sup>42</sup> or failed to make a prior demand for change over the issue.<sup>43</sup> The walkout is protected even if the employer does not have actual knowledge that the employees are engaged in a protected work stoppage. *Roemer Industries, Inc.*, 205 NLRB at 65.

Moreover, the record evidences that there was more than Edwards' suspension at issue. The walkout followed days of heightened tension between Cromer and the employees. Just the day before Cromer had unlawfully interrogated the medical assistants, followed by a staff meeting where she berated employees for "disrespecting" her and promised to "put[ ] an end to it." Just that morning, before the walkout (and before Edwards' argument with Cromer), Cox told the others that she "was tired of walking on eggshells." Whitlock told Cox and Stiltner "that she probably wasn't going to be back on Monday because she was tired of working a hostile environment."

This background also provides objective support for the finding that the walkout was for mutual aid and protection. See *Electromec Design & Development Co., Inc.*, 168 NLRB 763 (1967) (in finding a walkout protected concerted activity, Board relied on the manifest dissatisfaction of employees with the employer's failure to accede to demands made three weeks earlier and not renewed prior to the walkout). And to that very point—in order for a walkout to be protected, it is not necessary that employees agreed in advance as to the purpose or aim of their walkout. The walkout is protected even when the employees engaging in it do not have a "specific mutual agreement as to why they were leaving work or what they were seeking to accomplish by such action." *Tomar Products, Inc.*, 151 NLRB 57, 61 & fn. 13 (1965) (a group walkout "precipitated . . . at least in part, in protest" of coworker's discipline or "dissatis[action] with their conditions of employment" is protected "even where there is no common focus of dissatisfaction and each participant's complaint differs from all the others"). Indeed, employee activity is protected even if (as the Respondent here claims) it is part of a "vendetta" against the employer. If it sparks or is part of a concerted response to working conditions, the vendetta is protected activity. *Du-Tri Displays, Inc.* 231 NLRB 1261, 1269 (1977) ("I would find Werbeck's discharge unlawful even accepting Respondent's contention that Werbeck's complaints were made for the purpose of satisfying 'some vendetta which he had threatened against' Respondent").

Accordingly, the Respondents were discharged by the Respondent for engaging in concerted and protected Section 7 activity. Such discharges violate the Act.<sup>44</sup>

upon their employer to remedy a condition they find objectionable. The language of s[ec.] 7 is broad enough to protect concerted activities whether they take place before, after, or at the same time such a demand is made").

<sup>44</sup> I note that the General Counsel contends that the Board's *Wright Line* test is the applicable test in this situation. I do not agree. The Board applies *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982), in cases turning on employer motivation. Here, the facts show that the employer discharged the employees for starting to engage in a walkout. Edwards was discharged

<sup>42</sup> *NLRB v. Washington Aluminum*, 370 U.S. 9, 14 (1962); *Bethany Medical Center*, 328 NLRB 1094, 1094 (1999) ("The Act protects the right of employees to engage in concerted activities, including the right to strike without prior notice"); *Roemer Industries, Inc.*, 205 NLRB 63, 65 (1973) ("The protection afforded employees by this section extends to employees concertedly engaged in walkouts and work stoppages to protest against an employer's discharges of their fellow employees").

<sup>43</sup> *NLRB v. Washington Aluminum*, 370 U.S. at 14 ("We cannot agree that employees necessarily lose their right to engage in concerted activities under s[ec.] 7 merely because they do not present a specific demand

### 3. The Respondent's defenses

The Respondent's defenses to the discharges are varied, peripatetic, but meritless. Its chief defense, that the employees resigned, has been considered and rejected, above.

The Respondent also argues extensively (R. Br. at 40–46) that the employees were treated well by PRC Cromer and did not have grounds to be upset with Cromer's treatment of them. However, the Board and the Supreme Court have long eschewed any attempt to impose a requirement of reasonableness on employees' decisions to engage in concerted activity.<sup>45</sup>

To the extent that the Respondent argues that Cromer and PRC's treatment of the employees was so reasonable that it discredits the veracity of employee complaints, I reject the argument. I credit the sincerity of the employees' concerns with Cromer's treatment of them. Those concerns were credibly and convincingly testified to by multiple witnesses.

The Respondent's claim that the walkout was unprotected because a walkout violates requirements for advance notice before resigning found in the PRC handbook, or state medical and nursing board policies, is severely undercut by the fact that the employees did not resign—and did not even get out of the building—but were fired by the Respondent for the mere act of initiating a walkout.

In any event, it is well settled that the Respondent cannot enforce a rule in its handbook that permits an employee to be disciplined for activities protected by the Act.<sup>46</sup> Its claim that

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for walking out the back door as part of the walk out. The Employer does not posit an alternative motive for the discharges. Rather, it obviate that possibility by denying it discharged anyone, claiming that Edwards and the medical assistants quit. I have found that they did not quit. There is no dispute about the Employer's motive advanced by the Employer or ascertainable from the record. A *Wright Line* analysis is, therefore, unwarranted. *Matsu Sushi Restaurant*, 368 NLRB No. 16, slip op. at 1 fn. 2 (2019) (“A *Wright Line* analysis is not warranted here because the Respondent has not asserted that it discharged the employees for any reason other than their protected concerted [activity]. . . . Indeed, the Respondent does not concede that it discharged the employees at all. Its principal defense, which we have rejected, is that [the employees] quit”), enf. 819 Fed.Appx. 56 (2d Cir. 2020); *Atlantic Scaffolding Co.*, 356 NLRB 835, 838 (2011) (“Where, as here, employees are terminated for engaging in a protected concerted work stoppage, *Wright Line* is not the appropriate analysis, as the existence of the 8(a)(1) violation does not turn on the employer's motive”); *CGLM, Inc.*, 350 NLRB 974, 974 fn. 2 (2007) (and cases cited therein); *Circle K Corp.*, 305 NLRB at 934 (*Wright Line* analysis not required where protected conduct is sole motivating factor for the discharge).

With regard to *Wright Line*, I also note that at pages 56–57 of its brief, the Respondent, while denying it discharged any of the employees, cites *Wright Line* and contends that there were a variety of incidents other than the walkout that *could have* justified a discharge of Edwards and Cox. Even assuming, wrongly, that *Wright Line* were applicable, this would not advance the Respondent's case. It is well-settled that for an employer to meet its *Wright Line* burden, it is not sufficient for it simply to produce a legitimate basis for discharge. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983). The issue is not whether the employer “could have” taken action against the employee, but whether it “would have” absent the employee's protected activity. *Carpenter Technology Corp.*, 346 NLRB 766, 773 (2006); *Weldun International*, 321 NLRB 733 (1996), enf. in relevant part 165 F.3d 28 (6th Cir. 1998). The

Edwards' contract prohibits leaving without notice elides that she was suspended and ignores that the Respondent failed to prove the terms of her contract. Instead, the Respondent attempted to introduce into evidence a document carrying an odor of fabrication. In any event, individual employment contracts cannot restrict the right to strike. *J. I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944) (“Individual contracts no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining

. . . . [w]herever private contracts conflict with [the Board's] functions, they obviously must yield or the Act would be reduced to a futility”).

Nor does the state nursing or medical board policy impinge on the employees' rights that were exercised here. As a general matter, the Act protects the right of employees to engage in concerted activities, including the right to strike, without prior notice.<sup>47</sup> This fully applies to health care institutions, and the Board has on numerous occasions found health care institutions in violation of the Act for issuing discipline based on an employee's participation in a work stoppage.<sup>48</sup> The contention by the Respondent that state medical and nursing board policies vitiate employee rights to engage in a walkout otherwise protected by the Act cannot survive the combination of the Board's repeated affirmation of health care employees' right to strike and the Supremacy Clause of the U.S. Constitution. However, that issue

Respondent does not claim—much less prove—that, absent the walkout, it would have discharged Cox or Edwards.

<sup>45</sup> *NLRB v. Washington Aluminum Co.*, 370 U.S. at 16 (“It has long been settled that the reasonableness of workers' decisions to engage in concerted activity is irrelevant”); *Anaconda Aluminum Co.*, 160 NLRB 35, 40–41 (1966) (“But absent unusual circumstances not here present, the protections accorded employees under the Act are not dependent upon the merit, or lack of merit, of concerted activity in which they engage. Nor are these rights defeasible by the ‘unwisdom’ of the action taken or limited by the maturity of the judgement displayed”). See also *Trompler, Inc.*, 335 NLRB 478, 480, fn. 26 (2001) (“In our view, if employees are protesting working conditions, whether caused by a supervisor or by higher management action, those employees can protest by any legitimate means, including striking. The fact that some lesser means of protest could have been used is immaterial. We would not second-guess the employees' choice of means of protest”), enf. 338 F.3d 747 (7th Cir. 2003).

<sup>46</sup> *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16–17 (1962); *Consumer Power*, 282 NLRB 130, 132 (1986) (“Respondent's disciplinary policy cannot, at any rate, lawfully ‘mandat[e]’ that Knight be discharged in violation of [the Act]”); *Consolidated Diesel*, 332 NLRB 1019, 1020 (2000) (“Respondent cannot apply its policy without reference to Board law”).

<sup>47</sup> *NLRB v. Erie Resistor*, 373 U.S. 221 (1963); *Bethany Medical Center*, 328 NLRB 1094 (1999); *Montefiore Hospital & Medical Center v. NLRB*, 621 F.2d 510 (2d Cir. 1980).

<sup>48</sup> See, e.g., *Vencare Ancillary Services*, 334 NLRB 965, 968–971 (2001), enf. denied 352 F.3d 318 (6th Cir. 2003); *Bethany Medical Center*, 328 NLRB 1094 (1999); *Health Care & Retirement Corp.*, 310 NLRB 1002, 1017–1018 (1993); *East Chicago Rehabilitation Center, Inc.*, 259 NLRB 996 fn. 2 (1982), enf. 710 F.2d 397 (7th Cir. 1983); *Mercy Hospital Assn.* 235 NLRB 681, 683 (1978) (Board has rejected contention “that a spontaneous walkout of hospital employees is per se unprotected under the Act”).

need not be reached. In this case, the employees were discharged and/or suspended by the Respondent, before they left the workplace, so the matter is not at issue.

There are limits to employees' right to engage in protected activity—but they involve circumstances wholly absent here: unlawful actions, violent misconduct, conduct in breach of a collective-bargaining agreement, or otherwise indefensible actions. In this case, the incipient walkout approaches none of these limitations. There was no violence, no illegality in conduct, no collective-bargaining agreement to violate. The walkout also meets none of the tests for "indefensibility." The facilities were not damaged by the incipient walkout, and although the Respondent makes much of the hardship it faced with a walkout, all patients scheduled were seen that day, there is no evidence of any emergency medical circumstances on May 14, there was no risk of harm to patients, and certainly none shown. There is nothing indefensible in the employees' actions that would warrant finding the walkout unprotected. In order to lose the Act's protection, "more must be shown than that the activity caused inconvenience."<sup>49</sup>

And of course, the fact that the Respondent discharged its employees before they could walk out certainly calls into question its bona fides regarding the hardships it pleads. As explained in *Mercy Hospital Assn.*, 235 NLRB at 683:

[i]f the absence of the six aides had created an emergency then Hospital Administrator Cox was insensitive to the welfare of the hospital's patients when he . . . precipitately discharged them rather than seek to have them return to work and overcome the alleged emergency.

Finally, the Respondent contends (R. Br. at 23–24) that the unfair labor practice charges and the consolidated complaint are "vague" and "conclusory" and as a result the complaint should be dismissed for failure to state a claim. This contention is meritless.

As to the unfair labor practice charges filed by the charging parties, it is settled that an unfair labor practice charge is not a formal pleading, and its function is not to give notice to the respondent of the exact nature of the charges against him. Rather this is the function of the complaint. *NLRB v. Fant Milling Co.*, 360 U.S. 301, 307–308 (1959); *Texas Industries v. NLRB*, 336 F.2d 128, 132 (5th Cir. 1964). However, I note that here the charges expressly cover the allegations in the complaint. The charges state the discharges by individual name and alleged date that the discharge occurred. The amended charge in Case 10–CA–260563 alleges an unlawful interrogation on May 13, 2020.

As to the complaint, the Respondent's motion to dismiss is untimely and misdirected. Sec. 102.24(b) of the Board's Rules and Regulations. In any event, the Respondent has failed to demonstrate that the complaint fails to state a claim upon which relief can be granted. The complaint meets the specificity required by Section 102.15 of the Board's Rules and Regulations.

<sup>49</sup> *East Chicago Rehabilitation Center, Inc. v. NLRB*, 710 F.2d 397, 404 (7th Cir. 1983), enforcing *East Chicago Rehabilitation Center, Inc.*, 259 NLRB at 996 fn. 2 ("The Respondent contends that the strike caused disruptions in patient care and the employees therefore sacrificed the protection of the Act. We disagree. . . . Although some patient care schedules were not completely adhered to, there is no showing that the strike

And I note further that no bill of particulars was filed. The allegations of the complaint, if true, indisputably set forth a violation of the Act. They were proven true. The defense is rejected. *Children's Receiving Home of Sacramento*, 248 NLRB 308, 308 (1980) ("In determining whether a complaint states a claim upon which relief may be granted, the test is whether the allegations therein, if true, set forth a violation of the Act")

### C. Supervisory Status Issues

#### 1. Cromer

Cromer is the Respondent's practice manager (sometimes called office manager). The General Counsel contends that she is a supervisor pursuant to Section 2(11) of the Act. This is not contested by the Respondent on brief, it is effectively admitted in its answer to the complaint, and, in any event, it has been amply proven on this record by the General Counsel.

a. The Respondent does not deny that Cromer is a statutory supervisor. Instead, it carefully limits its claim to the argument that Cromer is not "a 2(11) supervisor of Edwards, Cox, Stiltner, Whitlock or Zavala." (R. Br. at 35.) This purposeful phrasing—asserting only that Cromer is not *these employees'* supervisor—is repeated over and over throughout its brief. However, the distinction is an irrelevancy, as the Board holds that a statutory supervisor's acts and statements are attributable to the Respondent, whether specifically authorized or not. *Ace Heating and Air Conditioning, Inc.*, 364 NLRB 218, 219 at fn. 7 (2016) ("the Board continues to hold, as we have elsewhere stated, that an employer is bound by statements of its supervisors whether specifically authorized or not"). See *Sysco Food Services of Cleveland*, 347 NLRB 1024, 1034 fn. 23 (2006); *Ideal Elevator Corp.*, 295 NLRB 347 fn. 2 (1989), citing *Dorothy Shamrock Coal Co.*, 279 NLRB 1298, 1299 (1986), *enfd.* 833 F.2d 1263 (7th Cir. 1987).

b. Consistent with its position on brief, in its answer, Cromer's supervisory status is not denied—indeed, the Respondent carefully avoids answering the allegation. On that basis, pursuant to the Board's rules, I deem it admitted.

Paragraph 5 of the complaint alleges:

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Dr. Hans Hansen – Owner  
Sharese Cromer – Practice Manager

The Respondent answers paragraph 5 of the complaint with the following byzantine response:

Respondent admits that Sharese Cromer ("Cromer") has the title of "Practice Manager." Respondent denies that Hansen and

jeopardized any patient's safety or health. We find the employees did not lose the protections afforded health care employees under the Act"); *Mercy Hospital Assn.* 235 NLRB 681, 683 (1978) (that work stoppage at hospital placed an additional burden upon remaining personnel is insufficient to render work stoppage unprotected).

Cromer were the exclusive supervisors of Cox, Stiltner, Whitlock or Ramirez, or that Cromer was the supervisor of Cox, Stiltner, Whitlock or Ramirez with regard to medical duties. It is denied that Cromer was a Supervisor in relation to Claimant Edwards, or that Cromer had supervisory authority with regard to certain duties of Claimants Cox, Stiltner, Whitlock or Ramirez. Whether Cromer is a supervisor relating to the Complaint is subject to detailed consideration of various factors which Respondent has not fully performed or concluded. Further, the allegation is vague and appears to assume that both Hansen and Cromer were “general agents” in all respects, which with regard to Cromer is expressly denied. Except for what is expressly admitted, denied.

To summarize, this answer denies that Cromer is the “exclusive” supervisor of Whitlock, Stiltner, Zavala, or Cox, their supervisor “with regard to medical duties,” or their supervisor “with regard to certain duties.” It further denies that Cromer is a supervisor “in relation to” Edwards.

However, as to the portion of its answer that appears intended to respond to the actual allegation of Cromer’s supervisory status alleged in the complaint, the Respondent characterizes the issue as “[w]hether Cromer is a supervisor relating to the Complaint,” and asserts that it has not fully considered the matter.

Section 102.20 of the Board’s Rules and Regulations provides:

The respondent shall, within 14 days from the service of the complaint, file an answer thereto. The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

The key here is that with all the focus in its answer about whether Cromer is the supervisor of particular people, for particular duties, with regard to the complaint’s actual allegation that she is a statutory supervisor, the Respondent does not answer.

The closest it gets is its assertion that “relating to the complaint,” it has not completed consideration of the matter. It neither admits nor denies Cromer’s supervisor status. It does not even state that it is without knowledge as to whether she is a supervisor. Rather, it states that this is a matter that requires “detailed consideration of various factors which Respondent has not fully performed or concluded.” In other words, the Respondent is studying the matter.

<sup>50</sup> I note that the Respondent’s answer includes a “general denial” (at page 2) and also concludes its answer to paragraph 5 of the complaint by stating: “Except for what is expressly admitted, denied.” This also appears to be a “catch-all general denial, inspired perhaps by the Federal Rule of Civil Procedure 8(b)(3), which provides in relevant part that:

[a] party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.

That is a non-answer, and hence, properly considered an admission under Rule 102.20. One could stretch things and interpret the Respondent’s answer as a claim that the Respondent is without knowledge as to whether Cromer is a statutory supervisor, but such a claim about a matter necessarily within a party’s purview is illegitimate. It would suggest a sham and such responses are also treated as admissions. *Harvey Aluminum (Inc.) v. NLRB*, 335 F.2d 749, 758 (9th Cir. 1964) (“Under comparable provisions of the Federal Rules of Civil Procedure, an answer asserting want of knowledge sufficient to form a belief as to the truth of facts alleged in a complaint does not serve as a denial if the assertion of ignorance is obviously sham. In such circumstances the facts alleged in the complaint stand admitted”) (footnotes omitted). See also, *Information Processing SVC, Inc.*, 330 NLRB No. 95 (2000) (unpublished) (even in light of leniency accorded to a party acting pro se, respondent’s assertions in its answer that it had no knowledge of its chief of operations and vice president’s supervisory statute under the Act is stricken as a sham).<sup>50</sup>

Accordingly, I deem and find that in its answer the Respondent has admitted that Cromer is a statutory supervisor under Section 2(11) of the Act.

c. In any event, the record amply demonstrates that Cromer is a supervisor within the meaning of Section 2(11) of the Act. The General Counsel has met his burden in this regard, even apart from the Respondent’s admission and its failure to contest the complaint allegation.

Section 2(11) of the Act defines the term supervisor to include any individual with the authority to:

hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively to recommend each action, if...such authority is not in a merely routine clerical nature, or requires the use of independent judgment.

It is long settled that to qualify as a supervisor, it is not necessary that an individual possess all of the powers specified in Section 2(11) of the Act. Rather, possession of any one of them is sufficient to confer supervisory status. *Wal-Mart Stores, Inc.*, 335 NLRB 1310 (2001); *Chicago Metallic Corp.*, 273 NLRB 1677 (1985), *enfd.* in relevant part, 794 F.3d 527 (9th Cir. 1986). While Section 2(11)’s listing of supervisory indicia is disjunctive, that does not alter the essential conjunctive requirement that a supervisor must exercise independent judgment in performing the enumerated functions. *Advanced Mining Group*, 260 NLRB 486, 506–507 (1982).

Individuals are

statutory supervisors if: 1) they hold the authority to engage in

However, the applicable Board Rule and Regulation, Section 102.20, does not provide for any form of general denials. To the contrary, it instructs that a Respondent “shall *specifically* admit, deny, or explain each of the facts alleged in the complaint.” (Emphasis added.) It provides that any facts not “specifically denied” are deemed admitted. Thus, the Respondent’s general denials are at odds with the responsive pleading requirements of Board practice. They cannot operate as a denial of Cromer’s supervisory status.



any one of the 12 listed supervisory functions, 2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment, and 3) their authority is held in the interest of the employer.

*NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 713 (2001).

Supervisory status may be shown if the putative supervisor has the authority either to perform a supervisory function or to effectively recommend the same. *Coral Harbor Rehabilitation and Nursing Center*, 366 NLRB No. 75, slip op. at 17 (2018). The party asserting supervisory authority bears the burden of establishing by a preponderance of the evidence that the individual has the authority to perform or effectively recommend at least one of these listed actions. *Kentucky River Community Care*, 532 U.S. at 710; *Entergy Mississippi, Inc.*, 367 NLRB No. 109, slip op. at 2 (2019), affirmed, 973 F.3d 451 (5th Cir. 2020).

The record here strongly supports a finding of supervisory status. First of all, it is important to note that in considering the supervisory status issues, I disregard the ubiquitous general, conclusory assertions of witnesses. Such do not establish supervisory authority and by the same token do not rebut or counter probative evidence in support of supervisory status. See *Golden Crest Healthcare*, 348 NLRB 727, 731 (2006) (“purely conclusory evidence is not sufficient to establish supervisory status; instead, the Board requires evidence that the employee actually possesses the Section 2(11) authority at issue”); *Chevron Shipping*, 317 NLRB 379, 381 fn. 6 (1995) (conclusory statements without supporting evidence do not establish supervisory authority); *Reliance Clay Products Co.*, 105 NLRB 135, 136 (1953) (finding supervisory status where “testimony, phrased in conclusory language,” is not “sufficient to rebut the persuasiveness of the factual testimony which points at least to his authority responsibly to direct the work of the construction crew”).

Turning to legitimate record evidence, as background, I point out that after serving at PRC as a medical assistant for 6–9 months, in early 2019, Cromer became assistant to then Office Manager Hope Simmons. In that capacity she followed the direction of Simmons, and also of a management and billing company, Blue Sky MD, that provided management services to the Respondent from May 2018 to May 2020. After a couple of months as Simmons’ assistant, Cromer replaced Simmons as office manager in the spring of 2019.

In considering the allegation of Cromer’s supervisory status, it is important that in April 2020, just a month and a half before the events in this case, Cromer hired Stiltner and Whitlock, and in Stiltner’s case hired her twice. Neither Stiltner nor Whitlock had contact with anyone else from PRC during the hiring process other than Cromer. Stiltner related her hiring process in some detail—she met Hansen only after she had been an employee for a few days. Cromer solicited, interviewed, and offered Stiltner and Whitlock their jobs, without the apparent involvement of others.

Cromer also fired Stiltner, just a couple of weeks after she arrived in April 2020. Stiltner was originally hired as a “master scheduler/receptionist” in early April 2020, and “let go” by Cromer a couple of weeks later. Stiltner testified that Cromer fired her after a couple of weeks when her “drawer had came up

short” because she forget to add a credit card payment. Stiltner described the incident, in which Cromer mocked her for her error, and “[f]rom that point, it just, kind of, went downhill.” She testified that Cromer told her “she didn’t have time to fix my mistakes, and that she was going to let me go.” Cromer testified that it was a “mutually agreed . . . upon separation.” I credit Stiltner’s much more detailed account, but even by Cromer’s version, the “mutual agreement” was between her and Stiltner. There is no hint that anyone else was involved for management in the termination of Stiltner’s employment.

After leaving PRC after two weeks, Stiltner was hired back, again, dealing only with Cromer, in early May, in a process initiated by Cromer. Cromer asked Whitlock if Stiltner was interested in returning, and when Whitlock forwarded Cromer’s text inquiry to Stiltner, Stiltner contacted Cromer to discuss it. Cromer told her to start the following Monday as a medical assistant.

For her part, Cromer testified that she sought and received Hansen’s approval to hire Whitlock and Stiltner, but clearly, even by her own testimony, they were hired on her recommendation, based on what she told Hansen. Notably Hansen did not provide any corroboration—other than the most conclusory—establishing his involvement in hiring Whitlock or Stiltner. I find that Cromer’s alleged consultation with Hansen about hiring Stiltner and Whitlock was unsubstantiated, exaggerated, and at best, perfunctory. Cromer’s hiring of Stiltner and Whitlock, and her termination of Stiltner in mid-April, demonstrate the independent judgement necessary to establish supervisory status.

Other indicia of supervisory status abound. Cromer admittedly suspended Edwards on May 14 (GC Exh. 3, Tr. 708, 712). Hansen was present for this, but there is no evidence he initiated it, objected, or took any steps that suggested Cromer lacked the authority to do this. Indeed, he reaffirmed it in the back of the office by the exit door before Edwards left the building. And of course, there is the incident on May 14, where Cromer told the medical assistants they were fired. Hansen was present, but again there is no evidence that he took any steps to undermine this order, or to indicate in any way that Cromer lacked authority to discharge the employees. The discharges have stuck. This provides further evidence of Cromer’s exercise of authority to decide to suspend and then discharge employees. I do not doubt that Hansen, as owner, has the power to overrule her decision, but in these very pertinent examples he did not, and clearly the actions were independently initiated by Cromer.

Moreover, Cromer, more than once on this record, threatened employees with suspension or discharge. She did it on May 6, when she told the medical assistants in the parking lot that “if we were caught yelling . . . to the patients from our seats, that . . . it was considered a HIPAA violation and that we would be sent home with no pay.” She did it on May 7, when, after Hansen’s wife complained that the medical assistants’ area and exam rooms were not clean, Cromer demanded that the employees stay late and clean up telling them, “it needs to be cleaned before everybody gets fired.” She did it again, when, after Edwards complained about the front staff leaving early, Cromer sent a text to all (all almost all) the medical assistants and front staff announcing new time and attendance rules and stating,

If you are caught leaving before time to go You will be considered to be abandoning your post and you will be terminated

In addition, in her testimony, Cromer asserted that she prepared the cell phone policy at the direction of Dr. Hansen, but that she prepared the absentee policy “mainly because of Sandy,” based on the concerns Edwards had expressed over the front office employees’ leaving early the day before. There was more than a little disingenuity in this. This testimony (Tr. 699) was triggered through overtly leading questions, and appeared designed to suggest Edwards’ authority, as the Respondent’s claim that Edwards is a statutory supervisor and not an employee was suggested by counsel at every turn. However, there is no evidence and no claim that Edwards asked her to create a new absentee policy or to change any policy at all. The incident demonstrates Cromer had the authority and did create and put into effect policies—a policy threatening termination no less—on her own volition and without direction from Dr. Hansen or anyone else. In this regard, Cromer’s testimony about her actions contradicted Hansen’s conclusory (and unconvincing) agreement with counsel’s suggestion that Cromer did not have authority to change these policies without his approval and that he approved of the policy changes. (Tr. 782–783.) As Cromer explained, this was not true, at least as to the absentee policy, the motivation for which she specifically contrasted with the cell phone policy, with only the latter being directed by Hansen. I credit Cromer’s admission over Hansen’s led testimony on this point.

Finally, it is noticeable that after the discharge of the five Charging Parties, Cromer played an active role in obtaining witness statements from other employees. She directed that Ashley McAdams provide her with a copy of her statement. Cromer (along with Hansen and the Respondent’s attorney) engaged in the search for documents responsive to the General Counsel’s subpoena. And Cromer was designated by the Respondent as the FRE Rule 615 representative for the Respondent throughout the hearing.

I find that Cromer easily meets the standard for a supervisor within the meaning of Section 2(11) of the Act. The evidence shows she uses her independent judgement to hire employees, and even by her own admission, to effectively recommend hire. She uses her independent judgement—checking with no one—to fire and suspend. She regularly threatened discipline and termination as well, with no evidence that she needed to obtain authority to do it. She uses her independent judgement to develop new employment policies including policies that threaten discipline. On top of all of this, as I have found, Cromer’s supervisory status is deemed admitted by the Respondent in its answer, and not contested in its brief. Cromer is a statutory supervisor, and, as noted above, under Board precedent her actions are attributable to the Respondent.

<sup>51</sup> I note also that some of the contentions in the Respondent’s brief are based on flat misstatements of the record. For example, the Respondent contends (R. Br. at 35) that:

With regard to authority to suspend, Edwards testified that she was the only person at PRC that used such authority. (Edwards Tr. 122:2-13). But, of course, the record doesn’t state that, and it did not happen. Rather, Edwards is the only person at PRC who received a suspension. (Tr.

## 2. Edwards

The Respondent contends that Edwards is a supervisor under the Act. Edwards is a nurse practitioner—a provider—in the Respondent’s argot. Although there are differences in education, training, and credentialing between a nurse practitioner and a medical doctor, Edwards sees patients in the clinical office setting very much like a medical doctor sees patients there. She is assisted by the medical assistants. There is no question but that a nurse practitioner, Edwards had far more education, salary, and credentials than the medical assistants she worked with so closely. Moreover, there is no question that her work requires significant independent judgement in carrying out her professional duties. However, as noted above, the existence of independent judgment in professional duties will not suffice to prove supervisory status. The decisive question is whether the individual has been found to possess the authority to use independent judgment with respect to the exercise of one or more of the specific authorities listed in the Act. *Advanced Mining Group*, 260 NLRB 486, 506–507 (1982).

The Respondent’s case for Edwards’ supervisory status rests entirely on conclusory assertions that Edwards satisfies any (or at least one) of the supervisory indicia. See, e.g., Tr. 761–764. But, as referenced above, such evidence is of no value. What is missing is any examples or instances of Edwards engaging in the supervisory indicia. It is not enough for the Respondent’s witnesses tendentiously to assert over and over that she has such authority. It is not enough if Edwards agrees that as a nurse practitioner she is “able to direct” (Tr. 101) or that she supervises (Tr. 112) certified nursing assistants in the provision of medical care. It is not enough for Respondent’s witnesses to agree with counsel’s question that Edwards used her “independent judgement” (Tr. 744) to provide medical care, a conclusory account that, in any event does not necessarily concern statutory indicia. Similarly, it does not advance the case for witnesses to state that Edwards supervised the medical assistants. The mere fact that an employer states that an employee “supervises” other employees or holds that employee out to other employees as a “supervisor” is not enough to establish that that individual is a supervisor within the meaning of Section 2(11) of the Act. See, e.g., *Poly-nesian Hospitality Tours*, 297 NLRB 228 (1989), enf. 920 F.2d 71 (D.C. Cir. 1990).<sup>51</sup>

There is no credible evidence that Edwards had authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward or discipline other employees. There are no examples, of her doing so, there is no documentary evidence suggesting it—there is only conclusory assertions of it—something the record is overrun with and mostly based on leading questions by counsel. As noted supra, that proves nothing.

The Respondent suggests that Edwards was in charge of “assigning” medical assistants. However, there is no evidence to

122.) Similarly, the Respondent suggests (Tr. 35) that in complaining to Cromer on May 12, about the front staff leaving early “Edwards was acting a supervisor directing Cromer to take action,” which resulted in Cromer threatening to terminate the staff. There is zero evidence that Edwards directed Cromer to do anything, much less directed her to threaten to terminate employees for leaving early. The Respondent cannot rebut the General Counsel’s evidence in this manner.

support this, as that term is defined by Board precedent. Thus, there is no evidence that Edwards was engaged in “the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks to an employee.” *Oakwood Healthcare, Inc.*, 348 NLRB 686, 689 (2006) (construing the term “assign” in Sec. 2(11) of the Act).

Edwards did not assign employees within the meaning of Section 2(11) because the medical assistants’ work was essentially the same for all the patients they saw. Edwards, as a nurse practitioner, was paired with a medical assistant. The medical assistant received a patient list. The medical assistant readied the patient rooms, brought patients to exam rooms, took vitals and urine specimens, prepared patient charts, checked insurance authorizations and prepared injections for the provider. Edwards had no role in the assignment of this overall palette of tasks or determining the time or place that the medical assistant worked.

Contrary to Hansen’s conclusory testimony that Edwards had the authority to assign each of the medical assistants to work with her, there is no examples of this or other evidence of it. Rather, the practice was that each medical assistant worked regularly assisting a specific provider: Zavala was required to work with Walters, Whitlock assisted Hansen, Stiltner with Woods (and also Hansen), and Cox assisted Edwards. There is no evidence at all, and no example at all, demonstrating that Edwards had authority to assign the medical assistants to providers. Hansen’s baldly conclusory statements are discrediting to his testimony in this regard. On May 13, in a policy change announced by Cromer, it was announced that medical assistants would henceforth rotate weekly among the providers. There is no evidence that Edwards played any role in developing this new policy or that she would play any role in determining these new assignments.

Notably, for Edwards to instruct a medical assistant to perform a specific task that is among the medical assistants’ overall tasks is not to assign. As the Board has explained with regards to charge nurses’ authority over other nurses and employees:

In sum, to ‘assign’ for purpose of Section 2(11) refers to the charge nurse’s designation of significant overall duties to an employee, not to the charge nurse’s ad hoc instruction that the employee perform a discrete task.

*Oakwood Healthcare*, supra at 689.

It is precisely this type of ad hoc instruction to perform a discrete task that Edwards was called on to provide to the medical assistants, such as telling the medical assistant to let the patient know that a recommended medication had not been approved, or to ask a medical assistant to make phone calls to a pharmacy for a patient. This is not “assignment” for purposes of Section 2(11) of the Act.

Nor is there evidence that Edwards “responsibly directed” the medical assistants. As the Board has explained, to satisfy the term “responsibly direct” in Section 2(11) the

person directing and performing the oversight of the employee must be accountable for the performance of the tasks by the other, such that some adverse consequence may befall the one

providing the oversight if the tasks performed by the employee are not performed properly. . . .

Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.

*Oakwood Healthcare*, supra at 692.

There is no evidence at all—again, just the baldest conclusory assertions far removed from any actual examples—that Edwards bore any accountability for the work of the medical assistants. Indeed, the actual record events tell a different story. Thus, while Cromer testified that Edwards was responsible for making sure the exam rooms and medical assistant areas were clean, this is not believable. On May 7, when Cromer and Hansen’s wife became upset with the cleanliness of these areas, they did not go to Edwards or involve her in any way, but, rather, Cromer personally berated and threatened the medical assistants, suggested they could be fired, and made them stay late to clean. Edwards was not held accountable.

There is no intimation on the record that Edwards had authority to take corrective action against the medical assistants much less any “prospect of adverse consequences for” Edwards if she did not. Indeed, the only instance in the record where Edwards was asked about the performance of an employee—when Cromer complained to Edwards about Cox and asked Edwards opinion on her “before anything was done”—carries not the hint of suggestion that Edwards was accountable for Cox’s performance or that Edwards was supposed to take corrective action, much less that she could suffer adverse consequences if she did not. To the contrary, the whole incident is a vivid demonstration that Edwards had no role in responsibly directing Cox and that any problems with Cox—which Edwards, in any event, did not agree there were—would be handled by Cromer and Hansen.

In sum, the Respondent has failed to meet its burden to demonstrate that Edwards is a supervisor under the Act. Its chief evidence is nakedly conclusory assertions that she is, but such is not probative of the issue. I find that Edwards is an employee under the Act.

#### CONCLUSIONS OF LAW

1. The Respondent Pain Relief Centers, P.A. is an employer engaged in commerce within the meaning of Section 2(2) and (6) of the Act.

2. On or about May 13, 2020, the Respondent violated Section 8(a)(1) of the Act by coercively interrogating employees about their and other employees’ views and discussions about Office Manager Cromer’s approachability and whether they felt that they could not come talk to her.

3. On or about May 14, 2020, the Respondent violated Section 8(a)(1) of the Act by discharging its employees Miranda Cox, Krisandra Edwards, Erin Stiltner, Amber Whitlock, and Yesenia Ramirez-Zavala for initiating a walkout.

4. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(7) 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 therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having unlawfully discharged Miranda Cox, Krisandra Edwards, Erin Stiltner, Amber Whitlock, and Yesenia Ramirez-Zavala, shall reinstate each of them to their former jobs or, if their positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privilege previously enjoyed. The Respondent shall make each of them whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful discharge of them. The make whole remedy shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In accordance with *King Soopers, Inc.*, 364 NLRB 1153 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), the Respondent shall compensate Cox, Edwards, Stiltner, Whitlock, and Ramirez-Zavala, for search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), the Respondent shall compensate the above-named employees for the adverse tax consequences, if any, of receiving lump sum backpay awards, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 10 a report allocating backpay to the appropriate calendar year for each employee. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner. In addition to the backpay-allocation report, the Respondent shall file with the Regional Director copies of Cox's, Edwards', Stiltner's, Whitlock's, and Ramirez-Zavala's corresponding W-2 forms reflecting the backpay awards. *Cascades Containerboard Packing—Niagara*, 370 NLRB No. 76 (2021).

The Respondent shall also be required to remove from its files any references to the unlawful discharge of Cox, Edwards, Stiltner, Whitlock, and Ramirez-Zavala, and to notify them in writing that this has been done and that the discharges will not be used against them in any way.

The Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in the Respondent's facility in Conover, North Carolina, wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be

distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any 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 May 13, 2020. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 10 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>52</sup>

## ORDER

Respondent, Pain Relief Centers, P.A., Conover, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their and other employees' protected and concerted activities.

(b) Discharging employees because they engage in protected concerted activities.

(c) In any like or related in 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 Miranda Cox, Krisandra Edwards, Erin Stiltner, Amber Whitlock, and Yesenia Ramirez-Zavala full reinstatement to their former jobs or, if their jobs no longer exist, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Miranda Cox, Krisandra Edwards, Erin Stiltner, Amber Whitlock, and Yesenia Ramirez-Zavala whole for any loss of earnings and other benefits suffered as a result of their discharges, plus reasonable search-for-work and interim employment expenses, in the manner set forth in the remedy section of this decision.

(c) Compensate Miranda Cox, Krisandra Edwards, Erin Stiltner, Amber Whitlock, and Yesenia Ramirez-Zavala for the adverse tax consequences, if any, of receiving a lump-sum backpay award and file with the Regional Director for Region 10, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

(d) File with the Regional Director for Region 10 copies of Krisandra Edwards', Erin Stiltner's, Amber Whitlock's, and Yesenia Ramirez-Zavala's corresponding W-2 forms reflecting the backpay awards.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter, notify Miranda Cox, Krisandra Edwards, Erin Stiltner, Amber Whitlock, and Yesenia Ramirez-Zavala in

<sup>52</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended

Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

writing that this has been done and that the discharges will not be used against them in any way.

(f) 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.

(g) Post at its Conover, North Carolina facility copies of the attached notice marked "Appendix."<sup>53</sup> Copies of the notice, on forms provided by the Regional Director for Region 10, 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If 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 May 13, 2020.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 10 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.

#### 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

<sup>53</sup> If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate you about your or other employees' protected concerted activities.

WE WILL NOT discharge you for engaging in protected concerted activities.

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

WE WILL, within 14 days from the date of this Order, offer Miranda Cox, Krisandra Edwards, Erin Stiltner, Amber Whitlock, and Yesenia Ramirez-Zavala full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Miranda Cox, Krisandra Edwards, Erin Stiltner, Amber Whitlock, and Yesenia Ramirez-Zavala whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest, and WE WILL make these employees whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Miranda Cox, Krisandra Edwards, Erin Stiltner, Amber Whitlock, and Yesenia Ramirez-Zavala for the adverse tax consequences, if any, of receiving lump-sum backpay awards and WE WILL file with the Regional Director for Region 10, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL file with the Regional Director for Region 10 copies of Krisandra Edwards', Erin Stiltner's, Amber Whitlock's, and Yesenia Ramirez-Zavala's corresponding W-2 forms reflecting the backpay awards.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Miranda Cox, Krisandra Edwards, Erin Stiltner, Amber Whitlock, and Yesenia Ramirez-Zavala, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

PAIN RELIEF CLINIC, P.A.

posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. 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."

Administrative Law Judge's decision can be found at [www.nlr.gov/case/10-CA-260563](http://www.nlr.gov/case/10-CA-260563) by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

