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Maine Coast Regional Health Facilities, d/b/a Maine Coast Memorial Hospital, the sole member of which is Eastern Maine Healthcare Systems and Karen-Jo Young, an individual. Cases 01–CA–209105 and 01–CA–212276

March 30, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On November 2, 2018, Administrative Law Judge Paul Bogas issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings, and conclusions only to the extent consistent with this Decision and Order.¹

I.

The Respondent operates Maine Coast Memorial Hospital, which is located in Ellsworth, Maine. In 2015, Eastern Maine Hospital Systems (EMHS) became the parent company of the Respondent as well as eight additional hospitals or facilities.² Beginning about April 2016, EMHS maintained a media policy, also known as “EMHS system policy #12-000,” applicable to all of EMHS’s facilities, including the Ellsworth facility operated by the Respondent. The media policy read:

No EMHS employee may contact or release to news media information about EMHS, its member organizations or their subsidiaries without the direct involvement of the EMHS Community Relations Department or of the chief operating officer responsible for that organization. Any employee receiving an inquiry from the media will direct that inquiry to the EMHS Community Relations Department, or Community Relations staff at that organization for appropriate handling.

In September 2017, Karen-Jo Young, an activities coordinator at the Respondent’s Ellsworth facility, submitted a

¹ The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

² The other EMHS hospitals/facilities are Acadia Hospital, Blue Hill Memorial Hospital, CA Dean Memorial Hospital, Eastern Medical Center, Inland Hospital, Lakewood Continuing Care Center, the Aroostook Medical Center, and VNA Home Health & Hospice.

letter to the editor of a local newspaper, *The Ellsworth American*, discussing staffing shortages at the hospital and the impact on her and her coworkers’ working conditions, and expressing support for the Ellsworth nurses’ union’s efforts to improve staffing levels.³ On September 21, the day Young’s letter was published, the Respondent’s president discharged her, citing her violation of the media policy.

On January 15, 2018, after Young had been discharged and the underlying unfair labor practice charge had been filed, EMHS amended the original media policy to include the following “savings clause”:

This Policy does not apply to communications by employees, not made on behalf of EMHS or a Member Organization, concerning a labor dispute or other concerted communications for the purpose of mutual aid or protection protected by the National Labor Relations Act.

Neither EMHS nor the Respondent notified employees at any EMHS facility of this amendment, however.

II.

The judge found that Young was engaged in protected concerted and union activity when she wrote and submitted her letter to *The Ellsworth American* and that the Respondent violated Section 8(a)(1) and 8(a)(3) by discharging Young for that activity. Further, applying *Boeing Co.*, 365 NLRB No. 154 (2017), the judge found that the Respondent violated Section 8(a)(1) by maintaining the original media policy and enforcing that unlawful policy against Young. Moreover, the judge found that the Respondent’s amended media policy, issued after Young’s discharge, continued to be unlawful under *Boeing*, in violation of Section 8(a)(1). The judge’s proposed order included a provision requiring the rescission or revision of the amended media policy and the posting of notices at the Respondent’s hospital and at EMHS’s eight other facilities.

After careful consideration, we affirm the judge’s findings and conclusions that Young was discharged for engaging in protected concerted and union activity in violation of Section 8(a)(1) and 8(a)(3), for the reasons discussed in the judge’s decision. We also agree with the judge that the Respondent’s original media policy was

³ The Maine State Nurses Association/National Nurses Organizing Committee/National Nurses Union (the Union) represented a unit of nurses and other professional staff as well as a unit of technical employees. Young was not employed within either of those units and was not a supervisor.

unlawfully overbroad under *Boeing*.⁴ Contrary to the judge, however, we find that the Respondent's amended media policy is lawful under *Boeing*. Finally, we amend the remedy and substitute a new Order and notices consistent with our findings and the facts of this case.

III.

In *Boeing*, the Board overruled the "first prong" of the standard set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), which held that a facially neutral work rule or policy was unlawful under the Act if employees would reasonably construe the language of the rule or policy as prohibiting Section 7 activity.⁵ Under *Boeing*, the Board established a new test, the first step of which is to determine whether a facially neutral rule, reasonably interpreted, would potentially interfere with the exercise of NLRA rights. Accord *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 2 (2019). If it does not, then the Board will find the rule lawful without further analysis. *Boeing*, above, 365 NLRB No. 154, slip op. at 3, 16; accord *LA Specialty*, above, slip op. at 2.⁶ But if the rule would reasonably be read to restrict Section 7 rights, then the Board will go on to evaluate two factors: "(i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule." *Boeing*,

above, slip op. at 3; *LA Specialty*, above, slip op. at 2. Having performed this two-step evaluation, the Board will balance the potential impact on Section 7 rights against the justifications associated with the rule. Where the Board finds that the Section 7 impact is outweighed by those justifications, the rule will be found lawful; by contrast, the rule will be found unlawful where the employer's justifications are outweighed by the adverse impact on rights protected by Section 7. *Boeing*, above, slip op. at 16.

Applying the above principles, we find, contrary to the judge, that the Respondent's amended media rule is lawful because, when reasonably interpreted, there is no potential interference with the exercise of Section 7 rights.⁷ The amended media rule expressly carves out from its prohibition "communications by employees, not made on behalf of EMHS or a Member Organization, concerning a labor dispute or other concerted communications for the purpose of mutual aid or protection protected by the National Labor Relations Act." Based on this clear language, an objectively reasonable employee would not interpret the amended media rule, with the express savings clause, as interfering with his or her Section 7 rights. *LA Specialty*, above, slip op. at 2 (stating that a challenged rule should be determined by reference to "the perspective of an

⁴ The General Counsel asserts that the Respondent's exceptions to the judge's finding that the original media policy was unlawful under Sec. 8(a)(1) should be dismissed as they were not adequately briefed under Sec. 102.46 of the Board's Rules and Regulations. The Respondent's exceptions brief does address these exceptions, however. Albeit briefly, the Respondent contends that the lawfulness of the original policy is now moot because it has been replaced by the lawful amended media policy. The Respondent also argues that the original media policy was lawful in any event under *Boeing*, above, because it did not deter Sec. 7 activity and served a legitimate and substantial business justification – protecting the Respondent's public image and branding by preventing unauthorized individuals from speaking to the media on the Respondent's behalf. The judge found, however, that the policy was not tailored to these asserted justifications and, further, that the Respondent's interest was outweighed by the significant impact on employees' Sec. 7 right to communicate with third parties, such as the media, about work-related disputes, including the alleged understaffing issue at the Ellsworth facility. We agree. The issue is not moot, moreover, because the original policy was in effect during the relevant Sec. 10(b) period and, as explained below, the Respondent never informed employees that the policy was later amended to exclude Sec. 7-protected communications with the media.

⁵ Prongs two and three of *Lutheran Heritage*'s test, however, remain intact after the *Boeing* decision. That is, if a rule was promulgated in response to union activity (prong two) or if a rule has been applied to restrict the exercise of Sec. 7 rights (prong three), the Board will still find the challenged rule unlawful. See e.g., *AdvancePierre Foods, Inc.*, 366 NLRB No. 133, slip op. at 1-2 fn. 4 (2018) (employer's no solicitation/no distribution rule, promulgated in response to learning employees were distributing union authorization cards, unlawful under *Lutheran Heritage*'s prong two).

⁶ The *Boeing* Board explained that, over time, the Board would sort employer rules into the following three categories: *Category 1*, which will include rules that the Board designates as lawful to maintain, either

because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule; *Category 2*, which will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications; and *Category 3*, which will include rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. *LA Specialty*, above, slip op. at 2. These categories "will represent a classification of *results* from the Board's application of the new test. The categories are not part of the test itself." Id. (quoting *Boeing*, above, slip op. at 4) (emphasis in original). In *LA Specialty*, the Board slightly modified the nomenclature under *Category 1*, explaining that going forward the Board would refer to the subcategories as 1(a) and 1(b). *LA Specialty*, above, slip op. at 2 fn. 2.

⁷ We affirm the judge's findings and conclusion that the original media rule significantly burdens the employees' protected rights to communicate with third parties about labor disputes in order to seek improvements in their working conditions, and that the restrictions on Sec. 7 rights far outweighed the Respondent's proffered justifications. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978) (the right to "seek to improve terms and conditions of employment . . . through channels outside the immediate employee-employer relationship" is essential to vindicate the guarantees of the Act). However, rather than apply the *Boeing* analysis to the amended media policy, the judge extended his finding that the original media policy was unlawful to also find the amended media policy unlawful, reasoning that "the relevant circumstances do not change the result under the *Boeing* analysis." We disagree with the judge's analysis and apply *Boeing* to analyze the amended media policy separately.

objectively reasonable employee”).⁸ Accordingly, we conclude that the amended media policy is lawful.

We note that, in large part, the judge's analysis relied on Young's previous discharge under the unlawful original media policy and the Respondent's failure to repudiate that discharge or to inform employees that the amended policy permitted the type of protected activity that had triggered Young's discharge. In the judge's view, those circumstances would lead a reasonable employee to draw “the only logical conclusion”: that the amended policy still prohibited protected activity such as that engaged in by Young.⁹ We disagree. Instead, we find it significant that the parties stipulated that Young's discharge was the first and only incident where an employee had been disciplined under the original media policy. Under these circumstances, we find that an objectively reasonable employee would not view Young's isolated discharge under the original media rule as obscuring the very clear meaning of the savings clause in the amended media rule, which expressly allows for Section 7 activity and which replaced the original media policy.¹⁰

For those reasons, we conclude that the Respondent's amended media policy is lawful and can be categorized as a Category 1(a) rule under *Boeing*. Accord *LA Specialty*, above, slip op. at 4–5 (employer's media contact rule prohibiting employees from speaking to the media on their employer's behalf, when reasonably interpreted, does not potentially interfere with the exercise of Section 7 rights and is lawful under *Boeing* as a Category 1(a) rule).

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative actions necessary to effectuate the policies of the Act. Among the latter, the Respondent shall make Karen-Jo Young whole for any loss of earnings and other benefits incurred as a result of her unlawful discharge under the unlawful original media rule. Backpay 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). The Respondent shall also compensate Karen-Jo Young for any adverse tax consequences of receiving a lump-sum backpay award, and file with the Regional Director for Region 1, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), we shall also order the Respondent to compensate Karen-Jo Young for any reasonable search-for-work and interim employment expenses regardless of whether those expenses exceed 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*, above, compounded daily as prescribed in *Kentucky River Medical Center*, above.

Having found that the Respondent's original media policy was unlawful but was then amended in a manner that made it lawful, we shall provide for the posting of notices advising employees that the unlawful original media policy has been replaced with the lawful amended media policy (also known as EMHS system policy #12-000), and clarifying that the amended media rule is lawful because it expressly allows for employee communications with the news media protected by the Act.

We shall also substitute a new notice for the Maine Coast Memorial Hospital and a separate notice for EMHS's eight other facilities where EMHS system policy #12-200 was in effect, consistent with our findings and conclusions and to more accurately reflect the particular facts of this case. Regarding the last point, although the original and amended media policies were in effect at all EMHS facilities, including Maine Coast Memorial Hospital, as noted above there is no record evidence that Young's discharge and her protected activity were known

⁸ The judge relied heavily on the pre-*Boeing* decision, *First Transit, Inc.*, 360 NLRB 619 (2014), for the principle that savings clause language “may, in certain circumstances, clarify the scope of an otherwise ambiguous and unlawful rule.” The viability of *First Transit* after *Boeing*, however, is questionable given that case involved the “reasonably construe” prong of *Lutheran Heritage*, above, which, as we discussed, *Boeing* expressly overruled. *Boeing*, above, at 620. The judge further relied on *First Transit* in finding the savings clause deficient because it failed to address “the broad panoply of rights” that employees enjoy under the Act and, as a result, the clause created an “ambiguity” that must be construed against the Respondent. In addition to the judge's precarious reliance on *First Transit*, we further reject this finding as inconsistent with the principles of *Boeing* and subsequent decisions. See *LA Specialty*, above, slip op. at 2 (“[A] challenged rule may not be found unlawful merely because it could be interpreted, under some hypothetical

scenario, as potentially limiting some type of Section 7 activity, or because the employer failed to eliminate all ambiguities from the rule, an all-but-impossible task.”)

⁹ The judge did not find, the General Counsel did not argue, nor does the record support finding that employees at EMHS's other facilities were aware of Young's unlawful discharge or her protected activity.

¹⁰ The judge further found that even if the amended media rule is lawful, “that would not cure the violation the Respondent committed by maintaining the earlier version of the policy” because the Respondent did not repudiate the original media rule under *Passavant Memorial Area Hospital*, 237 NLRB 138, 139 (1978). We agree that the prior policy remained unlawful, notwithstanding the Respondent's subsequent amendment.

among employees outside that hospital. For that reason, only the notice-posting at Maine Coast Memorial Hospital will include cease-and-desist and affirmative provisions related to Karen-Jo Young's unlawful discharge. See, e.g., *Lily Transportation Corp.*, 362 NLRB 406, 407-408 (2015) (Board ordered new notice where the employer had rescinded, without notification to employees, an unlawful work rule); see also *Murray American Energy, Inc.*, 366 NLRB No. 80, slip op. at 1 fn. 4 (2018) (separate notices tailored to address the different unfair labor practices that occurred at each plant).

ORDER

The Respondent, Maine Coast Regional Health Facilities d/b/a Maine Coast Memorial Hospital, the sole member of which is Eastern Maine Healthcare Systems, Ellsworth, Maine, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining or enforcing any work rule or system policy, such as the original version of EMHS system policy #12-200, that prohibits employee communications with the news media protected by the National Labor Relations Act, or that requires employees to involve, or obtain permission from, the Respondent or Eastern Maine Health Systems (EMHS) before engaging in such communications.

(b) Discharging, disciplining, or otherwise discriminating against employees for engaging in protected concerted activities and/or for supporting Maine State Nurses Association/National Nurses Organizing Committee/National Nurses United, or any other labor organization.

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

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

(a) Advise the Respondent's employees that the original media policy will not be used to discipline them for communicating with the news media, with or without the involvement of the Respondent or EMHS, regarding employees' terms and conditions of employment or union activity.

(b) Within 14 days from the date of this Order, offer Karen-Jo Young full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(c) Make Karen-Jo Young whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth herein.

(d) Compensate Karen-Jo Young for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 1, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Karen-Jo Young, and within 3 days thereafter, notify the employee in writing that this has been done and that the discharge will not be used against her 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) Within 14 days after service by the Region, post at its facility in Ellsworth, Maine, a copy of the attached notice marked "Appendix A," and at all facilities where EMHS's original media policy may have been circulated, including Acadia Hospital, Blue Hill Memorial Hospital, CA Dean Memorial Hospital, Eastern Medical Center, Inland Hospital, Lakewood Continuing Care Center, the Aroostook Medical Center, and VNA Home Health & Hospice, post copies of the notice marked "Appendix B."¹¹ Copies of the respective notices, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's or EMHS's authorized representative, shall be posted 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 an internet site, and/or other electronic means, if the Respondent or EMHS customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent and EMHS to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent or EMHS has gone out of business or closed any of the facilities involved in these proceedings, the Respondent or EMHS shall duplicate and mail, at its own expense, a copy of the notice to all current

¹¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notices 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."

employees and former employees employed by the Respondent or EMHS at any time since April 1, 2016.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 1 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.

Dated, Washington, D.C. March 30, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX A

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 maintain or enforce any work rule or system policy that prohibits employees from engaging in NLRA-protected communications with the news media, or that requires employees to involve, or obtain permission from, Maine Coast Memorial Hospital or Eastern Maine Health Systems before engaging in such communications.

WE WILL NOT, in particular, maintain or enforce our original media policy stated in EMHS system policy #12-200 because the Board found that this policy, as originally stated, violated the Act. Effective January 15, 2018, we

amended that policy to expressly permit NLRA-protected employee communications with the news media, and the Board found that this amended policy is lawful.

WE WILL NOT discharge, discipline, or otherwise discriminate against employees for engaging in protected concerted activities and/or for supporting Maine State Nurses Association/National Nurses Organizing Committee/National Nurses United, or any other labor organization.

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

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

WE WILL make Karen-Jo Young whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, less any net interim earnings, plus interest, and WE WILL also make her whole for reasonable search-for-work and interim employment expenses, plus interest.

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

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Karen-Jo Young, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

MAINE COAST REGIONAL HEALTH FACILITIES
D/B/A MAINE COAST MEMORIAL HOSPITAL

The Board's decision can be found at www.nlrb.gov/case/01-CA-209105 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.



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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT maintain or enforce any work rule or system policy that prohibits employees from engaging in NLRA-protected communications with the news media, or that requires employees to involve, or obtain permission from, Eastern Maine Health Systems or one of its affiliated hospitals before engaging in such communications.

WE WILL NOT, in particular, maintain or enforce our original media policy stated in EMHS system policy #12-200 because the Board found that this policy, as originally stated, violated the Act. Effective January 15, 2018, we amended that policy to expressly permit NLRA-protected employee communications with the news media, and the Board found that this amended policy is lawful.

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

MAINE COAST REGIONAL HEALTH FACILITIES
 D/B/A MAINE COAST MEMORIAL HOSPITAL

The Board's decision can be found at www.nlr.gov/case/01-CA-209105 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.



Gene M. Switzer, Esq., for the General Counsel.
Frank T. McGuire, Esq. and *Joshua A. Randlett, Esq.* (Rudman Winchell, LLC), of Bangor, Maine, for the Respondent.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Bangor, Maine, on July 17 and 18, 2018. Karen-Jo Young, an individual, filed the initial charge on October 31, 2017, and amended that charge on June 19, 2018. Young filed a second charge on December 28, 2017. The Acting Regional Director for Region One of the National Labor Relations Board (the Board) issued the consolidated complaint on February 28, 2018, and an amended consolidated complaint on June 20, 2018. At trial the amended consolidated complaint was further amended to clarify the name of the Respondent. The complaint, as amended, alleges that Maine Coast Regional Health Facilities d/b/a Maine Coast Memorial Hospital, the sole member of which is Eastern Maine Healthcare Systems (the Respondent), violated Section 8(a)(1) and 8(a)(3) of the National Labor Relations Act (the Act or NLRA) by terminating the charging party's employment because she engaged in protected concerted and union activity by submitting a letter to a local newspaper in which she made common cause with employees voicing concerns about working conditions, and violated Section 8(a)(1) of the Act by maintaining an unlawful policy restricting employees' work-related communications with the media. The Respondent filed a timely answer in which it denied committing the violations alleged.

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a nonprofit corporation, operates a hospital in Ellsworth, Maine, where it annually derives gross revenues in excess of \$250,000 and purchases and receives goods valued in excess of \$5000 directly from points outside of the State of Maine. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act. I find that the Maine State Nurses Association/National Nurses Organizing Committee/National Nurses Union (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts

The Respondent operates Maine Coast Hospital in Ellsworth, Maine. In 2015, the Respondent became affiliated with Eastern Maine Healthcare Systems (EMHS), which manages a network of nine hospitals. On November 21, 2017, EMHS became the “sole member” of the Respondent, which, according to the parties, means that EMHS is the nonprofit equivalent of the Respondent’s corporate parent and that the Respondent is the equivalent of a wholly owned subsidiary of EMHS.¹ The Respondent employs approximately 500 persons at Maine Coast Hospital. The Union represents two bargaining units of Maine Coast Hospital employees. One unit, composed of registered nurses and other professional staff, has been represented by the Union for decades and was covered by a contract that went into effect on May 21, 2016, and was effective at the time of the alleged violations. The other unit, composed of technical employees, has been represented by the Union since November 2017. Young, the charging party in this case, was not a member of either bargaining unit during her employment with the Respondent.

B. Management Actions; Employee Resignations and Petition over Staffing

The highest ranking official at the Respondent is its president, John Ronan. Ronan is an employee of EMHS, not the Respondent, and he serves simultaneously as the president of the Respondent and a second EMHS network hospital. EMHS performs the human resources, legal services, and some patient accounting, functions for the Respondent. The record shows that when the Respondent became affiliated with EMHS in 2015, the Respondent was facing challenges with both finances and employee morale. Ronan testified that the Respondent had been losing money since 2010 and that when he became acting president² in the fall of 2016, the loss for the prior year was \$6 to 7 million. The new management team took actions intended to address the Respondent’s financial situation. By the period beginning in September of 2017, the Respondent was beginning to be profitable, but the management’s actions did not solve the Respondent’s other problem—poor employee morale—and may have exacerbated it. For example, the Respondent cancelled the contracts of 50 of the 54 physicians at the facility, discharged six of those physicians outright, and attempted to renegotiate the contract terms of the others.³ A number of the hospital’s physicians, including four of the five physicians in the emergency department, responded by resigning rather than agreeing to renegotiate their contracts. Physicians expressed anger over the Respondent’s actions at a heated meeting during which Ronan acknowledged that the way management had handled the physician contracts for the emergency department was confusing and frustrating. Transcript at Page(s) (Tr.) 257–258. Young, the charging

¹ Transcript at Page(s) (Tr.) 267–268, 411.

² Ronan remained in acting status until August 2017, at which time he became president of the Respondent.

³ The changes the Respondent was seeking to make in the physician’s contracts related to wages, hours, benefits, and other terms and conditions of employment.

party in this case, credibly testified that employees at the hospital had discussed the physician resignations and that the departures were “very upsetting for everybody.” (Tr. 39–40.)

In addition, the nurses’ bargaining unit had ongoing concerns that the Respondent was not adequately staffing the hospital with nurses. When nurses who left the Respondent were not replaced, the employees would call attention to this by placing a note on the departed nurse’s locker. Staffing concerns were a subject of negotiations and this led to the inclusion of new language in the most recent contract, which became effective in May 2016. After that contract went into effect, the Union continued to have concerns about the adequacy of nurse staffing and believed that the Respondent was not adhering to the contract provision regarding staffing levels and attempted to draw management’s attention to the issue. (Tr. 147–148.) Ronan acknowledged that there was a shortage of nurses at the hospital during this time period, although he was quick to add that the Respondent had not “cut” any nurse positions. (Tr. 171–172.) The Union did not invoke the grievance process to address the staff shortages, but instead chose to present a petition to the Respondent on August 28, 2017. Bruce Becque (chief steward for the nurses’ unit), a number of other unit members, and Todd Ricker (Union labor representative)⁴ presented the petition to Noah Lundy (regional director of human resources for EMHS) and Ardelle Bigos (chief nursing officer at Respondent).

The employee petition, which was signed by over 60 persons,⁵ stated:

We, the undersigned, again want to call attention to the lack of adequate nursing and laboratory staffing at the hospital. We have repeatedly requested better staffing levels and have yet to see substantial improvement. We are exhausted, demoralized, and are rapidly losing faith that the [Maine Coast Memorial Hospital (MCMH)] administration will ever respect our professional judgment about working conditions at the hospital and clinics. On a daily basis our departments work without adequate support from the administration: Charge nurse routinely have a patient care assignment; secretaries are frequently not scheduled; continuous telemetry monitoring in the ICU is not a given; the slightest increase in inpatient census taxes our nursing resources and puts our patients at risk. The emotional and physical toll created by these conditions is pushing us to our limits. In light of this daily struggle for professional survival, the rewards of working at MCMH are few and far between.

Inadequate staffing on Med/Surg is the focal point of nursing troubles at MCMH. Higher than average inpatient census stresses MCMH’s staffing resources. Med/Surg RNs end up with unsafe patient loads. ICU and OB RNs are required to float to Med/Surg, which increases their job dissatisfaction. Throughput from the ED is slowed and ED RNs effectively

⁴ At the time the time of trial, Ricker was the Union’s labor representative and lead labor representative for Maine, but at the time the petition was presented he was a labor representative, but not yet the lead labor representative.

⁵ Many, but not all, of the signers identified themselves on the petition as nurses. The record does not reveal whether the signers included employees who were not nurses.

become Med/Surg nurses, which increases their job dissatisfaction, too.

Therefore, we demand that you take immediate steps to better support staffing on Med/Stroke and ICU. Specifically: 1) In keeping with our contract language, that charge nurses not ordinarily take patient care assignments (ordinarily = not more than 50 percent of the time). They must be available to be a resource and to coordinate patient care. 2) Follow the Med/Surg and ICU staffing grids. 3. Restore full-time secretarial coverage to all units.

The Respondent did not provide the nurses with any response to the petition, either at the time it was delivered or thereafter. (Tr. 155–156.) Ronan testified that once he satisfied himself that the Respondent was in compliance with the staffing requirements in the nurses’ labor contract, he “left it at that.” (Tr. 264.)

While the Respondent was attempting to address problems with profitability, it was not only experiencing the previously discussed problems with employee morale, but also appears to have been experiencing problems with customers. Ronan testified that, prior to the time of the petition, the Respondent was “starting to see E[mergency] R[oom]” and “inpatient census . . . dropping” and had hired an external public relations firm to help communicate a positive image of the Respondent to the community. (Tr. 174, 176.)

C. *The Charging Party*

Young, the charging party in this case, was discharged by the Respondent on September 21, 2017, for violating an employer policy that prohibited employees from having contacts with the media relating to EMHS and its member organizations without the direct involvement of the EMHS Community Relations Department or of the chief operating officer responsible for that organization. Prior to her discharge, Young had been the Respondent’s activities coordinator for over 13 years. In that position, Young provided patients with activities intended to keep them stimulated during their hospital stays. Young did not supervise any employees, although at times she had overseen the work of volunteers. Young’s duties also included responding when patients activated their call lights and then conveying the patients’ requests to nurses or other staff who Young determined could best provide the requested assistance. (Tr. 29–30, 282–283.) In addition, Young interacted with registered nurses and physical therapists as part of a program in which she took patients for scheduled walks to help keep them physically active. She was responsible for helping patients in and out of their beds or chairs and for communicating with occupational therapists and physical therapists about changes she observed in patient condition. Young also worked with hospital physicians to obtain prescriptions for equipment such as canes and wheelchairs that patients would need when they were discharged from the hospital. Young was trained as a licensed practical nurse (LPN) and, while she was not employed as a nurse by the Respondent, Young credibly testified that part of her job was to help with nursing activities. (Tr. 84.) The evidence showed that, not long before the

Respondent discharged Young, it issued a performance evaluation that recognized Young for pro-actively offering assistance to the nursing department. (Tr. 302, 305.) According to Douglas Keith, the head of the department in which Young worked, when the nursing staff requested Young’s assistance, Young and her supervisor were expected to “discuss whether and how” providing assistance to the nurses “could fit into [Young’s] daily assignments.” (Tr. 303.)

Although Young was not herself a member of the nurse’s bargaining unit, she informed the Respondent that she had concerns about the adequacy of nurse staffing levels. She did this in two emails to Lundy on June 23, 2017—at a time when, according to Ricker, the Union had continuing concerns about staffing and about 3 months in advance of when representatives of the nurses presented a staffing petition to management. In her emails to Lundy, Young stated that “[n]urses have increased patient loads now for some reason,” and that she had seen “several safety issues,” including a patient “leaving the floor with his packed bag,” and “patients calling to use the bathroom but nurses tied up with other patients.” She stated that the medical/surgical unit “is very short staffed—nurses feel they have more patients than they can manage.” Young expressed the view that the Respondent should arrange for her to have more time to assist the nurses and suggested that this could be accomplished by using volunteers for some of Young’s more routine activities. Young credibly testified that all the staff in patient care areas worked together “as a team” and that when “one part of your team is short-staffed” it has “a ripple effect” that “everyone more or less feels.” (Tr. 49–50.) By way of example of this ripple effect, Young recounted that she had been “involved with situations where patients were in unsafe situations, and understaffing meant that there were no registered nurses close by to pull in because they were all with other patients.” Ibid. Young also credibly testified that, on a daily basis, certified nursing assistants told her that they were assigned “way too many patients to care for.” (Tr. 49.)

D. *Media Policy*

1. Version in effect until January 14, 2018

On April 1, 2016, not long after Respondent became part of the EMHS network, management made a number of EMHS system policies applicable to the Respondent and its employees. The Respondent notified employees that they could use an online portal to access these policies. Approximately 263 employer policies were available at that portal. Among the many EMHS policies made applicable to the Respondent in April 2016 was a one-page policy entitled News Release, External Publication and Media Contact (Media Policy).⁶ That policy includes the following prohibition:

No EMHS employee may contact or release to news media information about EMHS, its member organizations or their subsidiaries without the direct involvement of the EMHS Community Relations Department or of the chief operating officer responsible for that organization. Any employee receiving an inquiry from the media will direct that inquiry to the EMHS

⁶ This was designated EMHS system policy # 12-000.

Community Relations Department, or Community Relations staff at that organization for appropriate handling.

The policy includes the following statement of purpose: “To present EMHS and its various member organizations to the general public in a manner consistent with the brand and supporting the mission statement of EMHS.” Suzanne Spruce, EMHS chief communications officer, testified that the purpose of the policy was to control the company’s brand and reputation for being a place where it was safe to obtain care. She stated that its purpose was also to provide a “safety net” to employees by “prepar[ing]” them before they spoke to reporters. She noted that reporter’s inquiries sometimes implicated patient privacy concerns. Spruce testified that it was not the intent of the Media Policy to suppress union activity or prohibit employees from talking about their working conditions.

At trial, the Respondent and the General Counsel entered into a stipulation that Young’s termination was the only disciplinary action that the Respondent, and EMHS more generally, had ever taken at any EMHS facility for a violation of the Media Policy. An internal company document from September 20, 2017, recognized that “some [managers] may have never seen th[e media] policy,” General Counsel Exhibit Number (GC Exh.) 18, a fact that is not surprising given that there were well over 200 employer policies available through the Respondent’s on-line portal. Even Ronan had not been aware of the Media Policy until 3 or 4 months before he invoked it to terminate Young. (Tr. 233–235.) Young did not recall ever having seen the policy prior to when the Respondent told her she was being discharged for violating it.

2. Language added to the policy on January 15, 2018

On January 15, 2018, after the Respondent terminated Young and she filed the charges that led to this litigation, the Respondent added the following sentence to the Media Policy:

This policy does not apply to communications by employees, not made on behalf of EMHS or a Member Organization, concerning a labor dispute or other concerted communications for the purpose of mutual aid or protection protected by the National Labor Relations Act.

Spruce testified that this was not a “substantive change,” but only a “clarification” of the policy. See also Brief of Respondent at Page 12 (new language in Media Policy did not constitute a “substantive change”). The Respondent, by email dated January 17, 2018, notified its department heads that a revision had occurred and stated: “Please ensure policy updates are shared as appropriate within your organization(s) and/or among your teams.” The email did not explain the modification or articulate any purpose for it. Douglas Keith, the manager of the rehabilitation department where Young had worked prior to her discharge, testified that he advised employees of the modification during a meeting with some, but not all, of the employees in the department. He himself had not been advised of the reasons for the modification and his communication to employees was simply that the policy had been revised and that they were responsible for reviewing the revision. The record does not establish the actions that other

department heads may, or may not, have taken to communicate with employees about the language added to the Media Policy.

E. Respondent Subject of Media Attention in the Ellsworth American

The Ellsworth American is a weekly local newspaper that has been in existence for at least 30 years. The Respondent is located in Ellsworth and at the end of August and beginning of September 2017 the Ellsworth American published a number of pieces that discussed reported dissatisfaction among the Respondent’s employees. On August 31, the paper ran a front-page article with the title “Rewritten contracts cause unrest at MCMH.” The article discussed reports that the Respondent’s decision to renegotiate its contracts with physicians had led a number of those physicians to resign. The article quoted physicians who had recently been providers at the Respondent as saying, inter alia, that “the biggest problem is that they don’t understand the value of good people” and that physicians were leaving for “places where they can get better hours and more pay.” Ronan was quoted in the article as recognizing that physician recruitment and retention was a problem and that some physicians had resigned. He was quoted as stating that “[a]s of yesterday we’ve got a plan in place to ensure we’ve got coverage for every shift” and that on some shifts the Respondent had been using temporary physicians, known as “locums,” who he recognized were generally “more expensive” for the Respondent than employee-physicians. The article also quoted the chairwoman of the Respondent’s Board, Debbie Ehrlenbach, as commenting favorably on the Respondent’s decision to affiliate with EMHS, and stating “We are pleased with the plans that Maine Coast’s senior leadership has developed, working in partnership with EMHS, to ensure we will have sufficient physician coverage to continue to deliver high-quality care.”

The next weekly issue of the Ellsworth American, published on September 7, 2017, included another front-page article regarding the Respondent, this one entitled “MCMH nurses cite staffing in petition.” The article reported on the staffing petition that the nurses had delivered to the Respondent 10 days earlier on August 28. As noted above, the Respondent had chosen not to make any response to its employees about their petition. The article reported that Becque said “many in the union are frustrated by what they say are unsafe and inappropriate staffing levels” and that the Respondent had been “cutting and cutting, and when people leave they don’t replace them.” The article also stated that Becque said he had “tried to follow the grievance process laid out in the nursing contract but hasn’t seen results.” One nurse was quoted as complaining that “It seems like shortsighted financial decisions for a quick impact, but it’s having long-term devastating results.” The article also reported that the Respondent had made changes that amounted to “an effective pay cut of about 30 percent” for certified registered nurse anesthetists and that half of those employees had left the Respondent as a consequence. In a written statement, the hospital responded that it was “abiding by all contractual obligations” regarding nurse staffing.

In the next issue of the Ellsworth American, on September 14, the newspaper published an editorial that recognized the concerns of both the nurses and hospital management and urged “the

two sides to resolve differences.” The editorial also noted that nurses have tried to address their perceived “lack of proper remuneration” and “respect” by seeking support from organized labor and the editors opined that “[w]hile these organized efforts may have improved their remuneration, tensions have altered dramatically employer/employee relationships . . . and also concerns from the public at large who must pay the higher costs incurred.” The same issue of the Ellsworth American included a letter to the editor from a physician who said he had stopped working for the hospital after 40 years providing services there. He expressed his agreement with the physician concerns discussed in the August 31 article about worsening morale and the adverse effects of physician departures.

F. Young’s Concerns and Letter to the Editor

Young has been a subscriber to the Ellsworth American for 3 decades and read the pieces in the newspaper about her employer. Young, who was both an employee and a customer/patient of the hospital, gave testimony indicating that the reports about employee dissatisfaction and staffing levels were consistent with her own observations. She knew that a number of long-serving physicians had departed from the hospital and, while she had no direct knowledge of the contract terms at-issue, she did know from her conversations with other employees that the physician departures were “very upsetting” for the staff. The Ellsworth American’s report that physicians felt they were not being valued by the administration was consistent with Young’s own experience of not feeling valued or listened to by the administration.

Regarding the nurses’ staffing, Young testified that she knew there were deficiencies in that regard based on her experience working in patient care areas as part of a team with nurses and other staff. In addition, certified nursing assistants told her on a daily basis that too many patients were being assigned to them. Indeed, as discussed above, even before the employees submitted their petition, Young had informed Lundy in writing on June 23, 2017, that she had experienced safety issues resulting from the fact that the nurses were “very short staffed.” Young also testified about the notes that were placed on the lockers of nurses who left and were not replaced and stated that she had observed a large number of such notes. Young testified that she “knew from” her “own experience working with the nurses that what they were saying was true.” Young had no direct knowledge regarding whether the Union had attempted to address the staffing issues through the grievance process, but she had read the September 7 Ellsworth American article which stated that Becque said he had “tried to follow the grievance process” in the contract prior to presenting the petition.

Young testified about her perception that there was a disconnect between what management was focusing on and what the hospital staff members who were providing direct patient care were focusing on. Young testified that she never saw Ronan on

the patient care floors of the hospital and rarely saw Lundy there. She recounted that she had tried to talk to Lundy, but he told her he had a meeting to go to. Ronan’s office was in the administrative building, not the building where patient care took place. Ronan testified that, after the Ellsworth American articles began to appear in late September, he met with employees and admitted to them that he had not been visible enough in the patient care areas of the hospital. He promised to be more visible and to round the patient care floors more frequently. Nevertheless, Ronan testified at trial that he had no concerns about a lack of communication between management and staff.

Although Young’s experience at the hospital was largely consistent with what was being reported in the Ellsworth American coverage, one thing she disagreed with was the implication in the newspaper’s September 14 editorial that the Union and the nurses’ demands were responsible for rising healthcare costs. In her view it was not fair to blame the nurses for increased healthcare costs when what they were seeking was safer staffing.

On September 3, after the first of the Ellsworth American articles, Young submitted a letter-to-the editor. That letter was not published by the newspaper. On September 10, after the second of the articles, Young submitted a revised version of her letter-to-the editor, and that version was also not published. On September 17, after the Ellsworth American published its September 14 editorial, Young once again revised and submitted her letter-to-the-editor.⁷ This time the Ellsworth American published Young’s letter—first in an on-line edition on September 20 and then in its print edition on September 21. Young’s published letter read as follows:

Dear Editor:

The headline of the front page article in the Aug. 31 edition of The Ellsworth American titled “Rewritten contracts cause unrest at MCMH” accurately describes the situation. I have worked at Maine Coast Memorial Hospital under the swing bed program and rehabilitation departments for the past 13 ½ years. Losing many of our experienced, trusted doctors is causing unrest, uncertainty and concern among the staff, patients and the community.

Back in October 2015, in another article in The American titled “Maine Coast is now part of Eastern Maine Healthcare Systems,” the MCMH Board chairman at the time, Adin Tooker, was quoted: “Our primary mission is to ensure that this resource is here and better going forward, and the affiliation with EMHS going forward will do that.” The article stated that the EMHS Board chairwoman, Evelyn Silver, assured the audience members that the Maine Coast Board of Directors “will have a very strong role to play” going forward. She is also quoted as saying: “Local input is critical in how decisions are made.”

⁷ The Respondent has implied that Young submitted the letter published on September 20 out of frustration over a September 18 decision by the Maine Human Rights Commission (MHRC) to reject her unrelated claim against the hospital relating to a disability. Any suggestion that Young was motivated by the MRHC decision is rebutted by the uncontradicted evidence that Young first submitted a version of her letter

over two weeks before the MHRC decision and that even the final version, although published after the MRHC decision, was submitted by Young prior to it. Young credibly testified, moreover, that she did not know about the decision MRHC was going to make when she submitted her letter.

I have to wonder why our local hospital board is not vehemently protesting the actions taken by parent organization EMHS causing MCMH to change contracts with doctors. We were told back in 2015 that our local board would still “have a very strong role to play.” Current MCMH Board Chairwoman Debbie Ehrlenbach’s statement in the Aug. 31 article is as follows: “We are pleased with the plans that Maine Coast’s senior leadership has developed, working in partnership with EMHS to ensure we will have sufficient physician coverage to continue to deliver high-quality care for residents of Ellsworth and other Downeast communities.” This sounds like a complete allegiance to EMHS. What happened to loyalty to our local hospital, staff and the patients and communities that have benefited by the consistent, dedicated, experienced care given by trusted local doctors?

After I wrote the above paragraphs in a letter to *The American*, yet another article about MCMH was published in the Sept. 7 edition with the front-page headline “MCMH nurses cite staffing in petition.” I have to applaud the nurses for going public with their valid concerns of inadequate, unsafe staffing levels. The nurses followed the proper internal procedures for voicing their concerns in the grievance process, but little changed. Hospital management who work out of their offices and have meeting after meeting and who are not working where patients are being cared for, but who then make decisions about staffing levels should be listening to those who are actually caring for patients. Nurses at MCMH have valid reasons to be concerned about patient safety, and management needs to make the necessary changes.

The September 14 editorial “We need a healthy hospital” pointed out that unions have helped improve salaries of both unionized nurses and teachers and that this brings about increased tensions with management because the unions want better pay, working conditions, etc. for their members. The implication is that nurses getting a fair wage is a driver of increased health care costs, but your editorial is very deficient in analyzing the reasons why health care is so expensive. This topic would be better accomplished in an article of facts, not in an editorial opinion. Nurses and teachers have traditionally been mostly women, and this continues to be true nationwide. Women continue to earn less than men (gender pay gap does exist). Maine nurses’ and teachers, average salaries are lower than the national average. But salaries are not the issue in the MCMH nurses’ current petition. The MCMH nurses are using their strength in numbers in order to voice their valid concerns

about patient safety that is at risk because of inadequate staffing levels.

Nurses and other staff leave and are not replaced. Frustrated doctors leave and more expensive locums fill in temporarily until other expensive temporary locums arrive, driving costs up further. And management keeps going to their meetings or are in their offices in their administrative building, far from the doctors and nurses and other staff who are working on the Med/Surg floor, ICU, operating rooms, Emergency Department, maternity, etc.

No wonder there is unrest and uncertainty at our hospital.

Karen Jo Young

Corea

G. Respondent’s Investigation and Decision to Terminate Young

On September 21, 2017—the same day that Young’s letter-to-the-editor was printed in the *Ellsworth American* and the day after it had appeared in the newspaper’s on-line edition—the Respondent discharged Young. The reason given was that she had submitted that letter in violation of the Respondent’s Media Policy. The Respondent’s investigation prior to taking this action consisted of Ronan having Lundy determine whether Young had, in fact, written and submitted the letter. Management officials involved in the decision-making process testified and in none of their accounts did the Respondent make any efforts to determine whether the statements in Young’s letter were accurate or whether she had relied in good faith on her own observations or credible reports. Although, in the Respondent’s brief, counsel suggests that Young’s submission of the letter was unprotected because the letter contained intentionally, recklessly or maliciously false statements, the testimony of managers was decidedly less emphatic on that score. For example, Ronan testified that Young’s letter was “representing a *story* that *we didn’t believe* to be true.” (Tr. 181) (emphasis added). He stated that he terminated Young because she was “trying to represent what was actually going on at the hospital, *and in my opinion*, it wasn’t.” (Tr. 188) (emphasis added). He testified that the letter “offended” him. Similarly, Spruce (EMHS chief communications officer) stated that Young’s letter “portrayed” the hospital in “an unflattering light” by saying “things that *may or may not be true*.” (Tr. 390–391) (emphasis).⁸

Nor did the Respondent, prior to discharging Young, make any attempt to ascertain whether she was aware of the Media Policy or whether, like some managers and until recently Ronan, she had not previously seen the policy. As discussed earlier, the Media Policy was one of approximately 263 policies that the Respondent made available through an on-line portal and, in fact, Young had no awareness of the policy at the time she submitted

⁸ The Respondent states that in 2017 two outside entities (the Centers for Medicare and Medicaid Services and the Leapfrog Group) gave the hospital their highest performance category rating. To what extent these ratings would reflect the effects of resignations and staffing shortages occurring as late as September and October of 2017 was not explored at trial. At any rate, the opinions of these outside entities should not be confused with fact and, in any case, do not show that Young was lying when she expressed the view that nurses had valid concerns about unsafe staffing levels and that the hospital had suffered from the resignations of

long-tenured physicians. Indeed, it is hard to imagine that the staff shortages and the resignations of long-tenured physicians, neither of which is disputed, would not have a negative effect on patient care. Moreover, even assuming that the ratings referenced by the Respondent reliably reflect its overall performance at the time Long submitted her letter, that would still not establish that the hospital’s performance had not declined within the range represented by a particular rating category as a result of recent staff shortages and physician resignations.

the letter. When Young asked to see the Media Policy at the discharge meeting, Lundy refused to show it to her.

At approximately 8 a.m. on September 21, Ronan had a meeting about Young's letter with Glenn Martin (EMHS corporate counsel), and Paul Bolin (EMHS chief human resources officer). Within an hour after that meeting, Ronan asked Lundy to investigate whether Young had drafted and submitted the letter. As referenced above, Ronan did not ask Lundy to investigate any other circumstances relating to the letter. Ronan and Lundy agreed that, if Young had written and submitted the letter, the Respondent would discharge her. Later that day, there was a conversation between Ronan, Martin, Bolin and Lundy to "finalize" Ronan's decision to discharge Young. At that point Young had still not been interviewed by the Respondent about the letter. During the managers' conversation, Lundy told Ronan that there had been prior discipline against Young. This prior discipline consisted of two warnings that the Respondent issued in March and May 2016, and which were concerned with Young's potential and actual communications to the hospital's board of directors about employee dissatisfaction. As noted above, before the meeting at which Lundy informed Ronan of this prior discipline, Ronan had already decided that Young would be discharged if it was determined that she submitted the letter. Nevertheless, Ronan testified at trial that the reason for the discharge was both the letter and the fact that Young had previously received discipline. At any rate, the record leaves no doubt that the Respondent would not have disciplined Young at all on September 21 but for her submission of the Ellsworth American letter. The Respondent has not suggested otherwise.

Later that same day, the Respondent met with Young for the first time concerning her letter. Lundy and Keith were present at the meeting for the Respondent, along with a secretary who took notes. When Lundy started the meeting, he already had the letter terminating Young's employment with him. After Young confirmed that she had written and submitted the letter, Lundy told her that those actions were "in direct violation of the Media Policy and that she was terminated immediately." Lundy and Keith did not talk about any other reasons for the discharge decision. The discharge letter informed Young that she was being discharged "for violation of the EMHS Policy: News Release External Publication and Media and in accordance with the Maine Coast Memorial Hospital (MCMH) progressive disciplinary policy." As previously noted, Young is the only employee who either the Respondent, or EMHS more generally, has ever disciplined pursuant to the Media Policy.

III. DISCUSSION

A. Section 8(a)(1) and (3): Discharge of Young

The General Counsel alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging Young for engaging in protected concerted and union activity when she submitted a letter to the Ellsworth American newspaper in which she made common cause with other employees who were seeking improved working conditions and expressed union support.

⁹ Sec. 7 of the NLRA provides in relevant part that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own

As discussed below, Young's right to submit the letter was protected by the NLRA both because it was concerted activity and because it was union activity, and nothing she did caused her to forfeit that protection. Therefore, the Respondent violated Section 8(a)(1) and (3) on September 21, 2017, when it discharged Young for submitting the letter.

Regarding protected concerted activity, the Board has repeatedly held that health care facility employees engage in concerted activity protected by Section 7 of the NLRA⁹ when, like Young did here, they use a letter to the editor or another 3rd-party channel to protest deficiencies in staffing levels or other working conditions that have an effect on patient care. See *Manor Care of Easton, PA*, 356 NLRB 202, 232–233 (2010), enf. 661 F.3d 1139 (D.C. Cir. 2011) (employee's letter to State representative regarding inadequate staffing is protected by the Act and not so disloyal as to forfeit protection), *Valley Hospital Medical Center*, 351 NLRB 1250, 1252–1253 (2007), enf. 358 Fed. Appx. 783 (9th Cir. 2009) (employee's letter to newspaper criticizing nurse workloads is protected and not so disloyal, reckless or maliciously false as to forfeit that protection), *Mount Desert Island Hospital*, 259 NLRB 589, 589 fn.1 and 593 (1981), aff. in relevant part and remanded 695 F.2d 634 (1st Cir. 1982) (employee's letter to newspaper, in which he "attack[ed] the hospital's safety levels and administration" is protected activity and not so extreme as to forfeit that protection); see also *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978) (the right to "seek to improve terms and conditions of employment . . . through channels outside the immediate employee-employer relationship" is essential to vindicate the guarantees of the NLRA); *Hacienda de Salud-Espanola*, 317 NLRB 962, 966 (1995) (NLRA protects employees' communications to newspapers about labor disputes). The Board explained that "[i]n the health care field, patient welfare and working conditions are often inextricably intertwined" such that when hospital employees protest that inadequate staffing is negatively affecting patient care they are effectively protesting their inability to carry out their duties and their conditions of employment. *Valley Hospital*, supra; *Holy Rosary Hospital*, 264 NLRB 1205, 1205 fn. 2 (1982); see also *Mount Desert Island Hospital*, supra. In the instant case, Young's letter included such a protest—making common cause with other employees seeking improved staffing, respect, and communication with management. Moreover, in Young's case the connection of the protest to employees' working conditions is especially clear since the employee petition that Young supported explicitly stated that the staffing shortages were causing them to be "exhausted" and had exacted an "emotional and physical toll." The employee petition asked that, among other things, the Respondent adhere to the staffing provisions of the nurses' labor contract. In her letter, Young also referenced a prior article regarding the hospital's physicians and that article discussed employee dissatisfaction with working conditions—stating that physicians were leaving the Respondent to obtain better hours and pay. Young, who was expected to provide various types of assistance to the nursing staff and who worked as part of a team with nurses and other

choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

staff providing care to patients, experienced the negative “ripple” effects of the nursing shortages and other problems in her own working conditions. Thus, Young’s letter addresses terms and conditions of employment not only because, as the Board has recognized, patient care is inextricably tied to hospital employees’ working conditions, but also because she referenced employees’ complaints about the burdens falling on them as employees.

In addition to being protected as concerted activity, Young’s submission of the letter was union activity protected by Section 8(a)(3) of the Act. In her letter, Young gave support to the Union by arguing in favor of the observations and objectives of the petition that union representatives had submitted to the Respondent and arguing more generally in support of union efforts to secure better working conditions for hospital workers. It is clear that an employee engages in protected union activity when he or she supports the efforts of a union even when, as in Young’s case, the employee is not in the bargaining unit that the union represents. *Pride Ambulance Co.*, 356 NLRB 1023 (2011) (discharge of nonbargaining unit employee violated Section 8(a)(3) because it was based on employee’s protected activity of refusing to perform work of unit employees engaged in a strike); *Beth Israel Medical Center*, 292 NLRB 497, 499 (1989) (employer violates Section 8(a)(3) and (1) by discharging a non-bargaining unit employee for refusing to cross the picket line of bargaining unit employees); *Signal Oil & Gas Co.*, 160 NLRB 644, 649 (1966), *enfd.* 390 F.2d 338 (9th Cir. 1968) (unrepresented employee engaged in protected union activity by expressing support for a potential strike by represented unit employees, since unrepresented employee was making common cause with the represented employees).¹⁰

The Respondent contends that, despite the facts and law discussed above, I should find that Young was not entitled to the Act’s protection when she submitted the letter. As discussed below, none of the Respondent’s contentions in this regard have merit. The Respondent asserts that Young’s activity in submitting the letter was not “concerted” because she did not discuss submitting the letter with other employees prior to doing so. This contention fails for a number of reasons, not the least of which is that Young was, in fact, party to prior discussions with other employees regarding their concerns over the staffing shortages and physician resignations that she discussed in her letter. Her submission of the letter was a logical outgrowth of those discussions with other employees and was therefore concerted. See *Hitachi Capital America Corp.*, 361 NLRB 123, 138-139 (2014), citing *Mike Yurosek & Son, Inc.*, 306 NLRB 1037 (1992) and *Salisbury Hotel, Inc.*, 283 NLRB 685, 687 (1987); *Mount Desert Island Hospital*, 259 NLRB at 589 *fn.* 1. Even absent those discussions, a finding of concerted activity would be compelled because the petition, signed by over 60 employees, was indisputably concerted activity, and Young, by submitting a

letter arguing in support of the observations and objectives of that petition, was “joining forces” with those employees in their group action. See *Ybarra Construction*, 343 NLRB 35, 40 (2004) (Activity is concerted where “the employee ‘at any relevant time or in any manner joined forces with any other employee, or by his actions intended to enlist the support of other employees in a common endeavor.’”), quoting *Meyers Industries*, 281 NLRB 882, 886-887 (1986), *affd.* sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987); see also *Office Depot*, 330 NLRB 640, 642 (2000) (“employees’ conduct on behalf of the employees of another employer who are engaged in protected concerted activity is itself protected concerted activity”). No reasonable reading of Young’s letter permits the conclusion that it reflects solely Young’s individual concerns about her own working conditions, and not those of other employees including nurses and physicians. It joins with the signers of the petition, the departing physicians, and other employees in the common endeavor of seeking improvements to working conditions at the Respondent. *Mount Desert Island Hospital*, 259 NLRB at 592 (employee’s letter to a local newspaper is concerted for purposes of the Act’s protection where, although written and submitted by a single employee, it references the concerns of a group of employees, not solely the writers’ own concerns or interests).

Next the Respondent argues that even if Young’s submission of the letter was protected activity, it forfeited any such protection because it contained disparaging and untrue statements. Although it is the case that an employee’s otherwise protected communication with a third party may be “so disloyal, reckless, or maliciously untrue [as] to lose the Act’s protection,” *Valley Hospital*, 351 NLRB at 1252, quoting *Emarco, Inc.*, 284 NLRB 832, 833 (1987), the Board has guaranteed that employees’ Section 7 protection is meaningful by setting a high threshold for forfeiture of that protection. Employees engaged in protected activity may use “intemperate, abusive, or insulting language without fear of restraint or penalty.” *Mount Desert Island Hospital*, 259 NLRB at 593 (emphasis in Board decision), quoting *National Association of Letter Carriers*, 418 U.S. 264, 283 (1974). “In determining whether employee conduct falls outside the realm of conduct protected by Section 7, the Board consider[s] whether ‘the attitude of the employees is flagrantly disloyal, wholly incommensurate with any grievances which they might have, and manifested by public disparagement of the employer’s product or undermining of its reputation’” *Five Star Transportation*, 349 NLRB 42, 45-46 (2008) (quoting *Vandeer-Root Co.*, 237 NLRB 1175, 1177 (1978)), *enfd.* 522 F.3d 1210 (1st Cir. 2008). For the reasons discussed below, I find that Young’s letter, by any reasonable standard, was a measured response to the workplace problems that she and other employees were finding increasingly pressing and does not even begin to approach the extreme level that would permit the Respondent to discharge her for submitting it.

refuse to cross a picket line maintained by their fellow employees have made common cause with the strikers, [and] are engaged in protected concerted activities as defined in Section 7 of the Act.”); *ABS Co.*, 269 NLRB 774, 774-775 (1984) (nonunit employee engages in protected concerted activity by refusing to cross the picket line of unit employees).

¹⁰ This is equally true with regards to the question of whether the non-unit employee’s action is protected as concerted activity. See *Office Depot*, 330 NLRB 640, 642-643 (2000) (nonunit employee made common cause with striking employees by calling another employee a “scab” and her comment was protected concerted activity); *Beth Israel Medical*, 292 NLRB at 507 (“It is well established that nonstriking employees who

The Respondent, in an effort to show that the letter contained statements that were so “reckless, or maliciously untrue” as to forfeit the Act’s protection, singles out two points Young made. What “Young wrote was false,” the Respondent asserts, because “it was not unsafe at the hospital and the nurses had not followed any grievance process before or after the petition.” (Br. of R. at p. 23.0 Regarding the former, I note that Young did not assert that the hospital had become generally or unacceptably unsafe or was guilty of any intentional malfeasance or mistreatment of patients. She merely expressed the opinion that the nurses had “valid concerns” about “unsafe staffing levels” and “valid reasons to be concerned about patient safety.” See *Professional Porter & Window Cleaning Co.*, 263 NLRB 136, 139 (1982) (Board is careful “to distinguish between disparagement of an employer’s product and the airing of what may be highly sensitive issues.”), *enfd.* 742 F.2d 1438 (2d Cir. 1983); compare with *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464, 469 (1953) (Employee statement unprotected as disloyal when made “at a critical time in the initiation of the company’s” business and where the statement constitutes “a sharp, public, disparaging attack upon the quality of the company’s product and its business policies, in a manner reasonably calculated to harm the company’s reputation and reduce its income.”) The Respondent has failed to demonstrate that Long’s opinion regarding the validity of the nurses’ concerns was maliciously or recklessly false, or even that it was false at all in the sense either of not being Young’s sincerely held opinion or in the sense that it was untrue that nurses had valid concerns about patient safety.

At any rate, the Respondent’s argument that Young’s expression of her opinion about unsafe staffing levels was so flagrantly disloyal or maliciously false as to forfeit protection cannot be accepted because her opinions are exactly the type of expression that the Board has repeatedly held, with consistent Courts of Appeal approval, to be both protected by the Act and not so disloyal, reckless or maliciously false as to forfeit that protection. See, e.g., *Manor Care*, *supra*; *Valley Hospital*, *supra*; *Mount Desert Island Hospital*, *supra*. Statements to the media about inadequate staffing have been held to retain NLRA protection even when those statements go well beyond Young’s in describing the deficiencies in patient care. For example, in *Valley Hospital* the Board found that the employees’ communications to the media about staffing levels were not so disloyal or maliciously untrue as to forfeit the Act’s protection even though that employee catalogued various patient care horror stories—e.g., patients “could be lying in their own excrement for who knows how long,” “don’t get medications . . . on time,” and, as a result of inadequate

monitoring “could have a heart attack and possibly die.” 351 NLRB at 1250–1251. Protection was retained for those inflammatory statements about staffing levels, and it is inconceivable that Young’s far milder opinion somehow forfeited such protection. Young did not advise the public against seeking care at the hospital, did not accuse the hospital of intentionally mistreating patients, and did not relate alarming episodes of poor patient care. Indeed, Young even refrained from publicly mentioning the instances of staffing-related safety problems that she had reported to management in an email 3 months earlier. Based on this record, I find that the purpose of Young’s letter was not to impugn the Respondent’s operation or to harm the Respondent’s reputation or income, but rather to encourage improvements to working conditions.¹¹ Where, as here, there is no “malicious motive, [an employee’s] right to appeal to the public is not dependent on the sensitivity of [an employer] to his choice of forum.” *Professional Porter & Window Cleaning Co.*, 263 NLRB 136, 139 (1982) (Board’s bracketing) (quoting *Richboro Community Mental Health Council*, 242 NLRB 1267, 1268 (1979), *affd.* 742 F.2d 1438 (2d Cir. 1983); see also *Manor Care of Easton, PA*, 356 NLRB at 232–233 (same). “[E]ven the most repulsive speech enjoys immunity provided it falls short of deliberate or reckless untruth.” *Phoenix Transit System*, 337 NLRB 510, 514 (2002), *enfd.* 63 Fed. Appx. 524 (D.C. Cir. 2003). “Federal law gives license in the collective-bargaining arena to use intemperate, abusive, or insulting language without fear of restraint or penalty if the speaker believes such rhetoric to be an effective means to make a point.” *Ibid.*; see also *Mount Desert Island Hospital*, 259 NLRB at 593.

The only demonstrated objective inaccuracy in Young’s letter is her statement that the “nurses followed the proper internal procedures for voicing their concerns in the grievance process” before delivering the staffing petition. The record shows that the nurses and Young herself had previously raised concerns about nurse staffing with the Respondent, but that the Union ultimately chose to submit a petition rather than use the grievance process to seek a remedy. As the Board has recognized, “[t]he mere fact that statements are false, misleading or inaccurate is insufficient to demonstrate that they are maliciously untrue” so as to forfeit protection. *Valley Hospital*, 351 NLRB at 1252. In the instant case, it is frivolous to contend that the Young’s misstatement in one sentence regarding a collateral issue was significant enough to obliterate the protection for her NLRA activity and free the Respondent to discharge her for seeking improvements to employees’ working conditions. I find, in any case, that Young’s misstatement was not malicious or reckless. Rather, she was reasonably relying on the September 7 article in the Ellsworth

¹¹ In *Valley Hospital*, the Board indicated that one factor that may indicate that an employee’s critical comment was intended to harm the company’s business, rather than to improve working conditions, is when the comment is made “at a critical time in the initiation of the company’s” business and where the comment constitutes “a sharp, public, disparaging attack upon the quality of the company’s product and its business policies, in a manner reasonably calculated to harm the company’s reputation and reduce its income.” 351 NLRB at 1252, quoting *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, *supra*. The Respondent emphasizes that it was facing financial challenges at the time Young submitted her letter, but the record shows that Young did not time

the letter to harm the Respondent at a critical time. Ronan testified that the Respondent had been losing money for a 7-year period, since 2010. A period of 7 years is too long to constitute a “critical time” in the sense that a suspicion of malicious intent attaches to the timing of employee criticism during that entire period. In this case the record indicates that Young’s letter was not timed to coincide with a financially critical period for the hospital, but instead that its timing was dictated by the burdens that Young and other employees argued that management was unfairly imposing on them as part of its response to longstanding financial problems.

American, which reported that chief steward “Becque said he’s tried to follow the grievance process laid out in the nursing contract but hasn’t seen results.” The Ellsworth American is a long-established local news source in the community. Young herself has been a subscriber for 30 years. The Respondent makes no argument that Young did not reasonably believe that the reporting in the newspaper was reliable.¹² “Employees do not forfeit the protection of the Act if, in voicing their dissatisfaction with matters of common concern, they give currency to inaccurate information, provided that it is not deliberately or maliciously false.” *Universal Fuels*, 298 NLRB 254, 255 (1990); see also *Valley Hospital*, 351 NLRB at 1252–1253 (“Where an employee relays in good faith what he or she has been told by another employee, reasonably believing the report to be true, the fact that the report may have been inaccurate does not remove the relayed remark from the protection of the Act.”), citing *KBO Inc.*, 315 NLRB 570, 571 (1994), enfd. mem. 96 F.3d 1448 (6th Cir. 1996). It was neither malicious nor reckless for Long to credit what she had read in the Ellsworth American’s reporting regarding the Union’s use of the grievance process, and Long’s unintentional and minor misstatement on the subject does not free the Respondent to discharge her for otherwise protected activity. See *Richmond District Neighborhood Center*, 361 NLRB 833, 837 (2014) (“Protection is not denied to an employee regardless of the lack of merit or inaccuracy of the employee’s statements, absent deliberate falsity or maliciousness, even where the employee’s language is stinging and harsh.”); cf. *Simplex Wire & Cable Co.*, 313 NLRB 1311, 1315 (1994) (An employer may not “restrict employees in the exercise of their Section 7 rights by prohibiting statements which are merely false, as distinguished from those which are maliciously so.”). If employees lost their NLRA right to protest working conditions every time an employer could identify a minor misstatement of the type shown here, it would render that right a nullity in a large segment of instances and would profoundly chill employees from exercising their Section 7 rights at all.

The Respondent criticizes Young for the portions of the letter in which she suggests that employee dissatisfaction is attributable to management decision makers being out-of-touch with the experience of the direct providers of patient care, and to the hospital’s board chairwoman showing inordinate allegiance to EMHS management at the expense of “our local hospital, staff and the patients and communities.” Even one with paper thin skin cannot reasonably see these mildly expressed opinions, which directly related to employees working conditions and the labor dispute over staffing, as the type of “flagrantly disloyal” statements that are so “wholly incommensurate with any grievances,” *Five Star Transportation*, 349 NLRB at 46, that they forfeit employees’ NLRA protection for efforts to improve working conditions. See also *Emarco, Inc.*, 284 NLRB at 834 (employee’s name calling did not cause her to forfeit NLRA protection where

her statements were not “a personal attack unrelated to the employee’s protest,” but rather were “made in the context of and were expressly linked to the labor dispute”) and *Community Hospital of Roanoke*, 220 NLRB 217, 223 (1975) (Employee’s comment on television program were not disloyal so as to forfeit protection when the comment “was made in a context of, and was specifically related by her to, the employees’ efforts to improve wages and working conditions” and were not shown to be “deliberately intended to alienate the public by impugning the quality of the hospital’s patient care.”) enfd. 538 F.2d 2d 607 (4th Cir. 1976).

In other cases, the Board has found that statements more extreme than Young’s retained the Act’s protection. In *Springfield Library and Museum Association*, the employee’s letter-to-the-editor characterized the employer’s chief administrator as “a man who never ‘lost contact’ with working professionals because he never had it to begin with.” The letter in that case also included the claim that the chief administrator had been hired as a form of “welfare-for-the-rich courtesy of his friends on the Board of Trustees” after he was fired by his previous employer. 238 NLRB 1673 (1979). The Board noted that since the employee’s statements were positing these circumstances as a reason for work-related problems his statements retained the Act’s protection even if the “rhetorical hyperbole” “offended” management and the comments were “repulsive.” *Id.* at 1673–1674. Similarly, in *Harris Corp.*, 269 NLRB 733, 738–739 (1984), the Board found that an employee’s letter calling members of management “hypocritical,” “despotic” and “tyrannical” retained protection of the NLRA notwithstanding the “boorish, ill-bred and hostile” tone. In the instant case, Young was positing management’s lack of contact with direct patient care and what she saw as the hospital board chairwoman’s overly deferential attitude towards EMHS management as reasons for the employees’ work-related problems. She expressed this view in more measured terms than had the employees in other cases, quoted above, where the Board held that protection was retained. Young’s comments did not include unfounded accusations of scandalous behavior, extreme or intentional neglect of patients, or unlawful conduct, nor do they intrude upon the managers’ or the hospital board member’s privacy.¹³

Even if I believed that Young’s comments were “intemperate, abusive, or insulting”—and I find that they were not—that would not be enough to deprive Young of the Act’s protection. See *Mount Desert Island Hospital*, 259 NLRB at 593. Moreover, around the time of Young’s letter, Ronan himself expressed agreement with criticism that he was having insufficient contact with those directly providing patient care. Ronan conceded to employees that he needed to be more visible and present in-patient care areas, promised to round the floors more frequently, and said that management’s handling of the physician contracts was confusing and frustrating. Similarly, Young’s statement that

¹² No manifest reporting bias has been shown and, indeed, the newspaper’s editorial regarding unrest at the hospital called on *both sides* to work to resolve their differences and attributed problems, in part, to unionization.

¹³ It is telling that in arguing that Young’s statements were so disloyal as to forfeit NLRA protection, the Respondent finds it necessary to

invent rhetorically charged statements and then pretend that Young said them. For example, it describes Young as calling the hospital chairwoman a “traitor” and managers “ineffectual bureaucrats fiddling while the hospital was burning.” *Br. of R.* at p. 27. Young did not say either of those things and did not resort to any similarly intemperate rhetoric.

management was working in the administrative building, not where patient care was taking place, is consistent with the evidence that Ronan's office was, in fact, housed in a building separate from the patient care building and that Ronan told employees he needed to be more visible in the patient care areas. Young's criticism of how the hospital board's chairwoman was performing was based on an accurate recitation of the chairwoman's own public statement. Young's communication about factors that she believed were causing employees' work-related problems at the hospital were part and parcel of the efforts to improve working conditions and do not deprive her of the Act's protections.¹⁴

For the reasons discussed above, I find that the Respondent discriminated in violation of Section 8(a)(1) and (3) of the Act on September 21, 2017, when it discharged Young for engaging in protected concerted and union activity by submitting a letter-to-the-editor protesting employees' working conditions and making common cause with coworkers in their labor dispute with the Respondent.

B. Section 8(a)(1): Respondent's Media Policy

The General Counsel challenges the Respondent's Media Policy, which prohibits employees from releasing any information about the Respondent or EMHS to the news media without the "direct involvement" of the Respondent and also requires any employee who receives an inquiry from the media to refer that inquiry to the Respondent for an answer. The General Counsel alleges that this policy, although facially neutral, is overbroad and discriminatory under the analytical framework the Board announced in *Boeing Co.*, 365 NLRB No. 154 (2017), reconsideration denied 366 NLRB No. 128 (2018). In *Boeing*, the Board stated that, unless a rule is of a type that the Board has already designated as being uniformly lawful or unlawful, the lawfulness of a facially neutral rule will be evaluated using a balancing test. First the Board will determine whether the rule is one that employees would "reasonably interpret[]" as "potentially interfer[ing] with the exercise of NLRA rights." If it is,

¹⁴ The Respondent makes a novel argument that even if Young's letter is activity protected by the Act, the discharge was lawful because the Respondent would have discharged Young based on particular, allegedly unprotected, portions of the same letter. Brief of Respondent at Page 33, citing mixed motive analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983). This argument fails because the comments the Respondent attempts to separate out and rely on to justify Young's discharge – i.e., those about management being out-of-touch and the chairwoman's allegiance to management—were themselves protected for the reasons discussed above. Moreover, the negative statements in Young's letter about management and the chairwoman were part of the res gestae of her protected protest about working conditions and did not depart from that res gestae. Therefore, even assuming that those negative statements would be unprotected if they were made in isolation, the Respondent could not lawfully discharge Young based on those elements of the letter since they were not made in isolation, but rather as part of the res gestae of a protected protest regarding working conditions. *Cayuga Medical Center*, 365 NLRB No. 170, slip op. at 23 (2017), citing *Goya Foods*, 356 NLRB 476, 477 fn. 8 (2011).

¹⁵ The term "labor dispute" encompasses, inter alia, any controversy regarding employment conditions regardless of whether there is a union

the Board evaluates whether "the nature and extent of the potential impact on NLRA rights" outweighs the "legitimate justifications associated with" the rule. Slip op. at 3-4, and 16.

"Employees have a clear right under the Act to publicize labor disputes," and this extends to efforts to do so "through channels outside the immediate employee-employer relationship." *Schwan's Home Services*, 364 NLRB No. 20, slip op. at 4 (2016); see also *Eastex, Inc.*, 437 U.S. at 565 (employees have the right "seek to improve terms and conditions of employment . . . through channels outside the immediate employee-employer relationship"). The Respondent's Media Policy would reasonably be interpreted to interfere with employees' exercise of that clear NLRA right. Moreover, in this case the interference is not speculative since, as already discussed, the Respondent invoked the Media Policy to discharge Young for exercising her NLRA rights by submitting her letter to the *Ellsworth American*. Indeed, not only was the Media Policy invoked to discipline Young for exercising her NLRA rights, but that was the *only* time the policy had been invoked to discipline *anyone* working at the Respondent or in the entire EMHS system. Thus, the Media Policy not only would reasonably be interpreted to interfere with the exercise of NLRA rights, but it has only ever been invoked to interfere with such rights.

The Media Policy significantly burdens the exercise of NLRA rights. The Board has repeatedly recognized the importance of employees' communications to the media and other third parties as a means of publicizing labor disputes¹⁵ and drawing an employer's attention to the need for improvements to working conditions. See, e.g., *Valley Medical Center*, 351 NLRB at 1252; *Hacienda de Salud-Espanola*, 317 NLRB at 962 and 966; *Mount Desert Island Hospital*, 259 NLRB at 589 fn. 1 and 593. Employees' rights to contact the media are unlawfully interfered with not only when the employer categorically prohibits all employment-related media contact, but also when, as here, it requires employees to obtain the employer's permission or use a

involved or ongoing activity such as a strike or picketing. *Endicott Interconnect Technologies*, 345 NLRB 448, 450 (2005), enf. denied, 453 F.3d 532 (D.C. Cir. 2006). The Respondent argues that its staffing levels were no longer the subject of an ongoing labor dispute at the time Young submitted her letter because the employees had not done anything else about the issue between the time they submitted their petition on August 28 and when Young submitted the final version of her letter 3 weeks later on September 17. This argument is frivolous. Even if the employee petition was the only evidence of an ongoing dispute regarding staffing there is no basis on which to condemn the labor dispute to so premature a death. This is especially true in light of the fact that the Respondent had not yet made a response to the petition. At any rate, the labor dispute over staffing levels consisted of more than just the employees' August 28 petition and Young's September 17 letter. As discussed earlier, staffing was a major bone of contention during the last round of contract negotiations and after the contract was reached the employees continued to raise concerns about the subject. Long herself had notified the Respondent of her concerns regarding staffing levels in a June 23, 2017, email to Lundy. Moreover, employees' concerns were not baseless since even Ronan conceded that there were staffing shortages during this period. Under these circumstances, the Respondent's argument that there was no ongoing labor dispute regarding staffing levels when Young submitted her letter is wholly without merit.

specific internal process before contacting the media. See *Trump Marina Casino Resort*, 354 NLRB 1027, 1027 fn. 2 (2009), *affd.* and adopted by 355 NLRB 585 (2010), *enfd.* 435 Fed. Appx. 1 (D.C. Cir. 2011); *Valley Hospital*, 351 NLRB at 1254; *Saginaw Control & Engineering, Inc.*, 339 NLRB 541, 546 and 553 (2003); and *Brunswick Corp.*, 282 NLRB 794, 794–795 (1987).

In this case, the magnitude of the Respondent’s interference with employees’ Section 7 rights is heightened by the breath of the rule. The Respondent’s restriction on employees’ communications with the media is not limited to circumstances in which the communication involves confidential or proprietary information, or those in which the employee purports to speak on the Respondent’s behalf. Rather the restriction pertains to *any* employee communication to the media “about EMHS or its member organization.” Cf. *Schwan’s Home Services, Inc.*, 364 NLRB No. 20, slip op. at 2, 4 (2016) (restriction on employees contacting the media is unlawful where it is not limited to circumstances where the employees are “speaking on the [employer’s] behalf”). One of the restrictions in the policy does not even include language explicitly limiting the restriction to employee communications about EMHS and its members, but rather states that any employee who receives “an inquiry from the media will direct that inquiry to [the Respondent] for appropriate handling.” Because the Respondent’s rule is not limited to communications about confidential or proprietary information, or to circumstances when the employees purport to speak on behalf of the Respondent, the burden that the rule places on the exercise of Section 7 rights is heavy.

The burden that the Respondent’s Media Policy restrictions impose on NLRA activity far outweighs any legitimate justification the Respondent has offered for the policy. The purpose of the restrictions, as stated in the policy itself, is: “To present EMHS and its various member organizations to the general public in a manner consistent with the brand and supporting the mission statement of EMHS.” At the hearing, the EMHS chief communications officer stated that the policy was designed to protect the hospital’s reputation as a safe place to come for care and also to protect the privacy concerns of patients. However, the policy is not limited to communications that relate to the hospital’s safety or to confidential or private information. Thus, even assuming that the Respondent is accurately describing the intended purposes of the Policy, the interference with NLRA activity is not tailored to address those purposes. Moreover, one may reasonably question whether a hospital’s desire to keep potential customers in the dark about even accurate negative reports regarding hospital safety is a “legitimate” justification for purposes of the *Boeing* analysis. Assuming that such a justification is legitimate, I find that it is outweighed by the health care employees’ need—long recognized by the Board and affirmed by the Courts of Appeal—to exercise their Section 7 rights by communicating with 3rd parties about staffing and other problems in an effort to improve working conditions. See, e.g., *Manor Care*,

supra; *Valley Hospital*, *supra*; *Mount Desert Island Hospital*, *supra*. Although the calculus might change in individual disciplinary cases if the employee communications are flagrantly disloyal or maliciously/recklessly false, that does not rescue the Respondent’s policy since that policy is not limited to such statements, but by its terms applies even to communications that are respectful, loyal, and accurate.

In considering the relative weight to give to, on the one hand, the rule’s interference with NLRA rights and, on the other hand, the justifications proffered by the Respondent, it is worth repeating that the only time the Respondent or EMHS has ever invoked the Media Policy against any employee was to punish Young for her NLRA-protected letter. This indicates that the Respondent’s supposed justifications are not very important to the Respondent *except* when the media contact is part of employees’ protected efforts to seek improvements to working conditions. Another piece of evidence indicating that the Respondent’s legitimate interests in the Media Policy are not particularly weighty is the laxity of the Respondent’s efforts to communicate and explain it. Young was not aware of the Policy before it was invoked as a basis for discharging her and even the Respondent’s president, Ronan, had only learned of the Policy a few months earlier. An internal company document from September 20, 2017—the day that Young’s letter appeared in Ellsworth American’s digital edition – concedes that some managers may never have seen the Policy. The Respondent’s apparent lack of interest, prior to discharging Young, in educating managers and employees about the Media Policy belies any claim that the Policy is so important to the Respondent that the need for the policy outweighs its substantial interference with employees’ exercise of their NLRA rights.

For the reasons discussed above, I conclude that from June 28, 2017, until January 14, 2018, the Respondent maintained a Media Policy that unlawfully interfered with employees’ exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act.¹⁶

On January 15, 2018, after Young filed the unfair labor practices charges that give rise to this litigation, the Respondent added “savings clause” language to the Media Policy. That language states that the policy’s restrictions on employee contacts with the media do not apply to communications “concerning a labor dispute or other concerted communications for purpose of mutual aid or protection protected by the National Labor Relations Act.” The Respondent argues that even assuming that the Media Policy violated the NLRA prior to the addition of this language, it may maintain the policy because it is lawful in its current form.

I find that the addition of the savings clause language does not remedy the unlawful character of the Respondent’s Media Policy. Savings clause language “may, in *certain circumstances*, clarify the scope of an otherwise ambiguous and unlawful rule,” *First Transit, Inc.*, 360 NLRB 619, 621–622 (2014) (emphasis

¹⁶ As discussed earlier in this decision, the Respondent discharged Young because she engaged in protected concerted and union activity and therefore the discharge violated Sec. 8(a)(1) and (3) of the Act. The General Counsel states that even if that were not the case, Young’s discharge would be a violation of Sec. 8(a)(1) of the Act because the

Respondent was applying its overbroad Media Policy. Br. of GC at p. 50, citing *Continental Group, Inc.*, 357 NLRB 409 (2011). Since I have already found that Young’s discharge violated both Sec. 8(a)(1) and 8(a)(3) of Act, I do not rule on this alternative basis for finding a violation.

added),¹⁷ but in this case the relevant circumstances do not change the result under the *Boeing* analysis. Specifically, the amended policy would still be “reasonably interpreted” by employees as “potentially interfer[ing] with the exercise of NLRA rights,” and the circumstances relevant to the *Boeing* balancing test are not meaningfully changed. Regarding potential interference, the most significant obstacle for the Respondent is that it has, in fact, applied the policy to unlawfully discharge an employee—Young—for exercising her NLRA-protected rights and it has not repudiated that action. In *First Transit*, the Board stated that one of the types of circumstances that bear on the success of savings clause language is whether the employer has enforced the overbroad rule in a way that shows employees that the savings clause does not safeguard their Section 7 rights. See also *Care One at Madison Avenue*, 361 NLRB 1462, 1465 fn. 8 (2014), enf. 832 F.3d 351 (D.C. Cir. 2016). Although the Respondent discharged Young for her NLRA-protected activity prior to adding the new language, the Respondent continues to maintain that Young was properly discharged pursuant to the Media Policy and that the savings clause language has not substantively changed the policy. Thus, despite the placement of the saving clause in the relatively brief Media Policy, the only logical conclusion is that the Policy still unlawfully prohibits NLRA protected activity such as that engaged in by Young. In addition, the Respondent’s savings clause language fails to address the “broad panoply of rights” that employees enjoy under the NLRA. See *First Transit*, supra. The savings clause does not, for example, reference union activity or state that employees will not be punished for contacting the media for the purpose of forming or assisting labor organizations. At best, the Respondent has “create[d] an ambiguity” about the meaning of the Media Policy, and that ambiguity “must be construed against the Respondent” as the “drafter” of both the prohibition and the savings clause. *Century Fast Foods, Inc.*, 363 NLRB No. 97, slip op. at 11 (2016).

Regarding the balancing test, the Respondent’s amendment does not narrow the Media Policy to address only its stated objectives or reduce the weight of the burden it places on employees’ exercise of their NLRA rights. For example, the Respondent has not made changes to limit the reach of the prohibition to communications that involve proprietary or confidential information, or that are flagrantly disloyal, or maliciously or recklessly false.

I find that the Respondent’s Media Policy, as amended on January 15, 2018, interferes with employees’ exercise of their Section 7 rights under the Act in violation of Section 8(a)(1) of the

¹⁷ The “certain circumstances” the Board considered in *First Transit* included: whether the language “address[es] the broad panoply of rights” protected by Sec. 7; the length of the document and the placement of the savings clause in relation to the ambiguous rules that it is claimed to remedy; whether the savings clause and the ambiguous rules reference each other; and whether the employer has enforced the overbroad rule in a way that shows employees that the savings clause does not safeguard their Sec. 7 rights. 360 NLRB at 621–622

¹⁸ Even assuming that the amended version of the media policy was lawful, that would not cure the violation the Respondent committed by maintaining the earlier version of the policy. In order to be relieved of responsibility for the violation based on the earlier version of the Media

Act.¹⁸

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.

2. The Maine State Nurses Association/National Nurses Organizing Committee/National Nurses Union (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent discriminated in violation of Section 8(a)(1) and (3) of the Act on September 21, 2017, when it discharged Young for engaging in protected concerted and union activity by submitting a letter-to-the-editor protesting employees’ working conditions and making common cause with coworkers in their labor disputes with the Respondent.

4. From June 28, 2017, until January 14, 2018, the Respondent maintained a Media Policy that unlawfully interfered with employees’ exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act.

5. Since January 15, 2018, the Respondent has maintained an amended Media Policy that unlawfully interferes with employees’ exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent, having discriminatorily discharged Karen-Jo Young, must offer her full and immediate reinstatement and make her whole for any loss of earnings and other benefits. Backpay 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). The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters and shall also compensate the discriminatee for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.¹⁹

ORDER

The Respondent, Maine Coast Regional Health Facilities

Policy, the Respondent would have to show that it repudiated its unlawful conduct in the manner the Board set forth in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). The Respondent has not repudiated, and does not claim to have repudiated, the violation. To the contrary, the Respondent continues to assert that the policy has always been lawful, was lawfully applied to discharge Young, and was clarified (not changed), by the addition of the new language.

¹⁹ 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.

d/b/a Maine Cost Memorial Hospital, the sole member of which is Eastern Maine Healthcare Systems, Ellsworth, Maine, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining or enforcing any unlawful work rule or system policy that prohibits employees from communicating with the news media about the Respondent or Eastern Maine Healthcare Systems (EMHS) or that requires employees to involve, or obtain permission from, the Respondent or EMHS before doing so.

(b) Applying rules or policies, including the Media Policy (EMHS system policy # 12-000), to restrict employees' Section 7 Activity.

(c) Discharging or otherwise discriminating against employees for engaging in protected concerted activities and/or for supporting Maine State Nurses Association/National Nurses Organizing Committee/Nation Nurses United, or any other labor organization.

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

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

(a) Rescind the EMHS Media Policy (EMHS system policy # 12-000) or revise it to make clear that it does not prohibit employees from communicating with the news media, with or without the involvement or permission of the Respondent, regarding employees' terms and conditions of employment or union activity.

(b) Advise all employees that work for EMHS member organizations that the Media Policy (EMHS system policy # 12-000) has been rescinded or revised and will not be used to discipline them for communicating with the news media, with or without the involvement of the Respondent, regarding employees' terms and conditions of employment or union activity.

(c) Within 14 days from the date of the Board's Order, offer Karen-Jo Young full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(d) Make Karen-Jo Young whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(e) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Karen-Jo Young in writing that this has been done and that the discharge will not be used against her 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) Within 14 days after service by the Region, post at its Ellsworth, Maine, facility and at all other facilities where the EMHS Media Policy has been in effect, copies of the attached notice marked "Appendix."²⁰ Copies of the notice, on forms provided by the Regional Director for Region 1, 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, including all bulletin boards in break rooms located on units where bargaining unit employees work. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the 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 June 28, 2017.

Dated, Washington, D.C. November 2, 2018.

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 do anything to prevent you from exercising the above rights.

WE WILL NOT maintain or enforce any unlawful work rule or system policy that prohibits you from communicating with the news media about Maine Coast Memorial Hospital or Eastern Maine Healthcare Systems (EMHS) or that requires you to involve, or obtain permission from, Maine Coast Memorial Hospital or EMHS before doing so.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected concerted activities or for supporting Maine State Nurses Association/National Nurses

²⁰ 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."

Organizing Committee/Nation Nurses United, or any other labor organization.

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

WE WILL rescind the EMHS Media Policy (EMHS system policy # 12-000), or revise it to make clear that it does not prohibit you from communicating with the news media, with or without the involvement or permission of the Maine Coast Memorial Hospital or EMHS, regarding employees' terms and conditions of employment or union activity.

WE WILL advise you in writing of the manner in which we have rescinded or revised the EMHS Media Policy (EMHS system policy # 12-000) and further advise you that the policy will not be unlawfully used to discipline you for communicating with the news media, with or without the involvement or permission of Maine Coast Memorial Hospital or EMHS, regarding employees' terms and conditions of employment or union activity.

WE WILL, within 14 days from the date of this Order, offer Karen-Jo Young full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Karen-Jo Young whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Karen-Jo Young for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Karen-Jo Young, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

MAINE COAST REGIONAL HEALTH FACILITIES D/B/A
MAINE COAST MEMORIAL HOSPITAL, THE SOLE
MEMBER OF WHICH IS EASTERN MAINE HEALTH