

**Labor and Employment Law—Uncertainty Over Burden of Proof for Mixed Motive Employee Discharge—*Hospital Cristo Redentor, Inc. v. NLRB*, 488 F.3d 513 (1st Cir. 2007)**

In 1977, the United States Supreme Court espoused a framework to determine whether impermissibly discharging an employee due to his or her union activities constitutes an unfair labor practice.<sup>1</sup> This framework requires that the employee first prove that his or her labor union activities were a substantial, motivating factor in the discharge; then the burden of proof shifts to the employer to show that the employee's union participation was immaterial to the discharge.<sup>2</sup> In *Hospital Cristo Redentor, Inc. v. NLRB*,<sup>3</sup> the Court of Appeals for the First Circuit analyzed whether the Hospital Cristo Redentor (Hospital) impermissibly fired its employee for his union involvement.<sup>4</sup> Once the General Counsel of the National Labor Relations Board (NLRB or Board) showed the employee's union activity was a motivating factor in his discharge, the Hospital bore the burden of proof to demonstrate that they would have fired the employee regardless of his participation in the labor union.<sup>5</sup> The court determined that the Hospital violated the National Labor Relations Act (NLRA) by firing an employee in retaliation for his union activities.<sup>6</sup>

Carlos Garcia Santiago started working for the Hospital as a registered nurse in February 1995.<sup>7</sup> In 1998, the NLRB allowed a union to exclusively negotiate for a group of registered nurses.<sup>8</sup> After becoming a union delegate in 1999, Santiago received his first disciplinary warning from his supervisor.<sup>9</sup> Between 1999 and 2000, the Hospital issued a series of disciplinary warnings

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1. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (setting framework for review in mixed-motive cases); see Thomas M. Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*, 51 ADMIN. L. REV. 531, 554 (1999) (detailing standard of proof in *Mt. Healthy*).

2. See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (espousing affirmative defense for employer); *Wright Line*, 251 N.L.R.B. 1083, 1090-91 (Nat'l Labor Relations Bd. 1980) (discussing motivating factor and shifting burden of proof), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981).

3. 488 F.3d 513 (1st Cir. 2007).

4. *Id.* at 517-19 (supporting proposition of impermissible discharge based on substantial evidence test).

5. *Id.* at 518 (characterizing employer's affirmative defense to overcome showing of union animus).

6. *Id.* at 524 (dismissing series of improper employee incidents as pretext for dismissal).

7. 488 F.3d at 519 (outlining employee's history as registered nurse).

8. *Id.* (acknowledging employee's extensive participation in union activities).

9. See *id.* (examining relationship between union membership and disciplinary action); *In Re Hosp. Cristo Redentor*, No. 24-CA-9069, JD-137-02, 2006 WL 2206803, at \*2 (NLRB Div. of Judges July 31, 2006) (describing Santiago's employment history prior to dismissal), *aff'd*, 488 F.3d 513 (1st Cir. 2007); *The Discipline Was Unlawful*, 24 No. 19 EMP. ALERT 6, Sept. 6, 2007 (reviewing events leading to Santiago's dismissal).

to Santiago noting attitude problems, specifically cautioning him to cease calling other employees' attention to poor working conditions.<sup>10</sup>

In March 2001, Santiago received another warning about his attitude after failing to follow Hospital protocol when correcting a mistake on a patient's chart.<sup>11</sup> On April 23, 2001, Santiago received further warnings regarding his conduct.<sup>12</sup> Apparently due to this series of warnings and Santiago's absence from a shift while he attended a family member's medical emergency, the Hospital suspended and eventually discharged Santiago on October 19, 2001.<sup>13</sup>

An administrative law judge for the NLRB Division of Judges determined that the Hospital had committed an unfair labor practice by violating sections 8(a)(1) and 8(a)(3) of the NLRA.<sup>14</sup> The NLRB affirmed this finding.<sup>15</sup> On appeal to the First Circuit, the Hospital alleged that the NLRB's finding was unsubstantiated.<sup>16</sup> The First Circuit held that the Board's decision was supported by the facts and that the Hospital did not prove it would have

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10. 488 F.3d at 519 (describing supervisor's reprimand for pointing out how employees' shifts were inequitably allotted). In 2000, a meeting between Santiago and the Hospital's management staff resulted in a formal written warning that acknowledged Santiago's role as a union leader. *Id.*

11. *Id.* at 519-20 (noting Santiago failed to follow medical procedures). At meetings between union delegates and the Hospital, Santiago expressed his view that the Hospital's admonishments were due to his union participation. *Id.* at 520.

12. *Id.* at 520. Santiago repeatedly left an understaffed emergency room and kept the narcotics key, rendering aides unable to administer medication to a convulsing patient. *Id.* (highlighting Santiago's behavior used as primary justification for his dismissal). Santiago also reported over the loudspeaker that there was a shortage of employees in the emergency room, which the Hospital contended was offensive. *Id.* (accounting for improper conduct).

13. *Id.* (reviewing Santiago's final discharge). Regarding Santiago's absence that ultimately led to his dismissal, the Hospital claimed that he had not received permission from his supervisor to leave the Hospital; Santiago later proved, however, that he had received such permission. *Id.* The Hospital also stated that Santiago was justifiably released because he had inappropriately told a mother that her daughter, a patient, had attempted suicide. *Id.*

14. *In Re Hosp. Cristo Redentor*, No. 24-CA-9069, JD-137-02, 2006 WL 2206803, at \*3 (NLRB Div. of Judges July 31, 2006) (finding union activity substantial or motivating factor in dismissal), *aff'd*, 488 F.3d 513 (1st Cir. 2007). An employer violates section 8(a)(1) of the NLRA by questioning employees about their union activities or by threatening them directly or indirectly. *NLRB v. Horizons Hotel Corp.*, 49 F.3d 795, 804 (1st Cir. 1995). Furthermore, a court will look into the employer's motives under section 8(a)(3) to determine whether the discharge was impermissibly due to the employee's union activities. *See Holsum de P.R., Inc. v. NLRB*, 456 F.3d 265, 269 (1st Cir. 2006).

15. *See In Re Hosp. Cristo Redentor*, No. 24-CA-9069, JD-137-02, 2006 WL 2206803, at \*1 (NLRB Div. of Judges July 31, 2006) (summarizing finding of wrongful firing due to union participation), *aff'd*, 488 F.3d 513 (1st Cir. 2007). Under the NLRA, an employee can file a claim with the NLRA Division of Judges against his employer for an impermissible discharge. *See id.* Either party can appeal the finding of the administrative judge to the NLRB and then to the appropriate circuit court of appeals. *See* 488 F.3d at 516-17.

16. 488 F.3d at 520; *see First Circuit Affirms NLRB Order to Reinstate Hospital Nurse*, 21 No. 24 ANDREWS EMP. LITIG. REP. 10, June 19, 2007 [hereinafter *First Circuit Affirms NLRB Order*] (emphasizing evidence indicating Hospital discharged Santiago due to union involvement). The First Circuit had jurisdiction to review the Board's finding under the Prevention of Unfair Labor Practices statute. *See* 29 U.S.C. § 160 (e)-(f) (2006) (conferring jurisdiction upon United States Courts of Appeals). The Hospital argued that it fired Santiago due to his improper behavior. *See First Circuit Affirms NLRB Order, supra* (describing defenses proffered by Hospital).

dismissed Santiago irrespective of his participation in a union.<sup>17</sup>

Precedent concerning the mixed-motive employer originated in *Mount Healthy City School District Board of Education v. Doyle*.<sup>18</sup> In *Doyle*, the Court described the employee's burden of proof to show that his constitutionally protected activity was a substantial, motivating factor of his discharge.<sup>19</sup> If the employee can show that his or her protected activity was a motivating factor, the burden then shifts to the employer to prove that it would have reached the same decision and fired the employee regardless of the protected involvement.<sup>20</sup>

The NLRB adopted the *Doyle* test in a subsequent case, *Wright Line*,<sup>21</sup> in which it found that the employer had not satisfied its burden of proof.<sup>22</sup> The Board's use of *Doyle*'s burden-shifting framework continued and has become known as the *Wright Line* test.<sup>23</sup> Although the First Circuit rejected the *Wright Line* burden-shifting approach, the Supreme Court upheld the *Wright Line* test

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17. 488 F.3d at 522. The Hospital's management threatened Santiago, cautioning that his situation would improve if he ceased his union activities and that those activities were the reason he was consistently in trouble. *Id.* (articulating evidence in support of First Circuit's determination). The Hospital administrator also acknowledged that many of Santiago's offenses were minor and not typically treated as serious infractions. *Id.*; see *Requirement that Employer Show Valid Reason for Discharge*, 10 EMP. COORD. LAB. REL. § 26:188 (2008) (articulating evidence in support of First Circuit's determination).

18. 429 U.S. 274, 279 (1977) (using causation test in mixed-motive cases). A mixed-motive employer discharges an employee based on an unlawful motive, such as an employee's union membership, and a lawful motive, such as absenteeism. Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 163, 188 (2007) (reviewing mixed-motive analysis in *Doyle*). In *Doyle*, a public school employer alleged that a teacher's contract was not renewed because he directed obscene gestures at students and circulated an official memorandum to the media. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 282-83 (1977) (reviewing mixed motive of employer in firing teacher due to his protected and unprotected activity). The United States Supreme Court determined that the release of the school's official memorandum was constitutionally protected, unlike the obscene gestures. *Id.*

19. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (elucidating causation test in cases involving termination for protected union activity); see Leona Green, *Mixed Motives and After-Acquired Evidence: Second Cousins Benefit from 20/20 Hindsight*, 49 ARK. L. REV. 211, 235 (1996) (explaining how burden of proof shifts from employee to employer).

20. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (creating rebuttable presumption employer must disprove).

21. 251 N.L.R.B. 1083 (Nat'l Labor Relations Bd. 1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981).

22. *Wright Line*, 251 N.L.R.B. 1083, 1091 (Nat'l Labor Relations Bd. 1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981). In *Wright Line*, the employer allegedly fired the employee for falsifying his timesheets even though it had approved this pattern of behavior for two years. *Id.* at 1091-92. The Board concluded that the motivating factor for the employee's dismissal was his participation in a union. *Id.* The Board approved of the test used in *Doyle* because while the employee must only show that his or her protected activity was a factor in his or her dismissal to shift the burden of proof, the formal framework allows employers to establish their motivations. See Green, *supra* note 19, at 235-36 (describing reasoning for adopting burden shifting framework). The NLRB now refers to *Doyle*'s burden of proof shift from the employee to the employer as the *Wright Line* test. *Id.*

23. *Wright Line*, 251 N.L.R.B. 1083, 1091 (Nat'l Labor Relations Bd. 1980) (solidifying *Wright Line* test for mixed-motive employer cases), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981); see *NLRB v. Hosp. San Pablo, Inc.*, 207 F.3d 67, 69-70 (1st Cir. 2000) (affirming use of burden-shifting framework as *Wright Line* test).

for all future mixed-motive cases in *NLRB v. Transportation Management Corp.*<sup>24</sup> The Court noted that the General Counsel's burden of proof is a burden of production, not persuasion, that shifts the burden of proof to the employer when satisfied.<sup>25</sup> Despite noting that the First, Second, and Third Circuits failed to employ the test used in *Wright Line*, the Court solidified this mixed-motive test in *Transportation Management* by instructing courts to use the *Wright Line* test in future mixed-motive cases.<sup>26</sup>

The meaning of burden of proof in *Wright Line* and *Transportation Management*—specifically whether it referred to the burden of persuasion or burden of production—came under scrutiny in *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*.<sup>27</sup> The Court set aside its

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24. 462 U.S. 393, 403 n.4 (1983) (upholding *Wright Line* test). The Transportation Management Company discharged an employee after he left his keys in a bus and took two unauthorized breaks, yet the employer's supervisor had earlier threatened to fire him for his union activities. *Id.* at 396. The Board found that the employer would not have discharged the plaintiff in the absence of union participation, but the First Circuit refused to shift the burden of proof onto the employer and instead remanded. *Id.* at 397. After granting certiorari, the Supreme Court held that while the Board must prove every element of an unfair labor practice charge, the employer may have to prove that the discharge would have occurred despite the protected conduct. *Id.* at 401-02.

25. *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 403 n.4 (1983) (requiring Board meet burden of production to shift burden of proof to employer).

26. *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397 (1983); *see, e.g.*, *Royal Dev. Co. v. NLRB*, 703 F.2d 363, 367 (9th Cir. 1983) (applying *Wright Line* test); *Zurn Indus., Inc. v. NLRB*, 680 F.2d 683, 686-87 (9th Cir. 1982) (using *Wright Line* test); *NLRB v. Fixtures Mfg. Corp.*, 669 F.2d 547, 550 (8th Cir. 1982) (citing *NLRB v. Nevis Indus., Inc.*, 647 F.2d 905 (9th Cir. 1981) (concluding *Wright Line* "protects . . . employees while preserving an employer's right to discharge an employee"); *Borel Rest. Corp. v. NLRB*, 676 F.2d 190, 192 (6th Cir. 1982) (applying *Wright Line*); *Red Ball Motor Freight, Inc. v. NLRB*, 660 F.2d 626, 627 (5th Cir. 1981) (noting applicability of *Wright Line*); *Peavy Co. v. NLRB*, 648 F.2d 460, 461 (7th Cir. 1981) (enforcing burden of proof shift); *Green*, *supra* note 19, at 237-38 (addressing how majority of courts of appeals apply *Wright Line* test in mixed-motive cases). Other circuit courts, however, namely the First, Second, and Third Circuits, retained reservations about shifting the burden of proof. *See Green*, *supra* note 19, at 241 (noting dissenting courts of appeals applying new standard of review); *see also NLRB v. Webb Ford, Inc.*, 689 F.2d 733, 739 (7th Cir. 1982) (maintaining burden of proof on claimant); *Behring Int'l, Inc. v. NLRB*, 675 F.2d 83, 84 (3d Cir. 1982) (applauding but-for causation test but declining to implement burden shift to employer). Nevertheless, the majority of circuits that previously disagreed with the *Wright Line* test applied its framework after *Transportation Management* affirmed its applicability. *See Holo-Krome Co. v. NLRB*, 947 F.2d 588, 592 (2d Cir. 1991) (refusing to enforce Board order due to lack of *Wright Line* test application); *NLRB v. Horizon Air Servs.*, 761 F.2d 22, 22 (1st Cir. 1985) (upholding order to reinstate employee in accordance with Board finding using *Wright Line* test).

27. 512 U.S. 267, 277-78 (1994) (concluding burden of proof only refers to burden of persuasion). In *Greenwich Collieries*, the plaintiff sued for benefits under the Black Lung Benefits Act after mining coal for thirty-one years. *Id.* at 731. The administrative law judge, using the true doubt rule, which gives the plaintiff the benefit of the doubt in cases under Black Lung Benefits Act, determined that when faced with contradictory medical evidence the court will lean towards the plaintiff. *Id.* at 269-70; *see Rachel Courtney, Note, Director, Office of Workers' Compensation Programs v. Greenwich Collieries: The Reasons for and Ramifications of Eliminating "True Doubt,"* 49 ADMIN. L. REV. 223, 225-26 (1997) (characterizing use of true doubt rule as shifting burden of proof to defendant). Nevertheless, the Court of Appeals for the Third Circuit found that the "true doubt" rule as applied by the administrative law judge was inconsistent with section 7(c) of the Administrative Procedure Act. *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 270 (1994). Section 7(c) of the APA requires that, "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. § 556(d) (2006). Prior to *Greenwich Collieries*,

conclusion in *Transportation Management* that burden of proof meant burden of production, and determined that burden of proof means burden of persuasion under section 7(c) of the Administrative Procedure Act.<sup>28</sup> The First Circuit also uses the burden-shifting language from *Greenwich Collieries* to require that the Board show union participation was a motivating factor of the employee's dismissal, and if so, to shift the burden of proof to the employer to show that it would have discharged the employee irrespective of union activity.<sup>29</sup>

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there was uncertainty about whether burden of proof meant burden of production or persuasion, and courts typically employed both meanings. Dir., Office of Workers' Comp. Programs v. Greenwich Collieries, 512 U.S. 267, 271-73 (1994) (Souter, J., dissenting) (noting inconsistency in function of burden of proof); see Courtney, *supra*, at 225-26 (describing development of burden of production/persuasion application). In *Transportation Management*, the Court stated that the burden of proof in section 7(c) of the Administrative Procedure Act referred to the burden of production. NLRB v. Transp. Mgmt. Corp., 463 U.S. 393, 403 n.7 (1983). The Court, however, declined to follow *Transportation Management* because the issue of burden of proof had not been directly addressed in that case. Dir., Office of Workers' Comp. Programs v. NLRB, 512 U.S. 267, 273 (1994); see Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U.L. REV. 1023, 1024 (1998) (describing Supreme Court's analysis in determining congressional intent).

28. Dir., Office of Workers' Comp. Programs v. Greenwich Collieries, 512 U.S. 267, 273 (1994). The majority found no conclusive evidence from the congressional record to put the burden of proof on the defendant. *Id.* at 274-75 (finding congressional support for plaintiff bearing burden of production and persuasion inconclusive). The Court also noted that it had previously determined in *Steadman v. SEC*, 450 U.S. 91, 95 (1981), that burden of proof meant burden of persuasion by a preponderance of the evidence. Dir., Office of Workers' Comp. Programs v. Greenwich Collieries, 512 U.S. 267, 277-78 (1994). The dissent criticized the majority's interpretation of legislative intent and abandonment of the decision in *Transportation Management*. *Id.* at 288 (Souter, J., dissenting). By determining that Congress expressed unambiguous intent to have the burden of persuasion rest on the claimant, the majority firmly declared that section 7(c) of the Administrative Procedure Act is controlling and undermines the use of the true doubt rule. See Courtney, *supra* note 27, at 232-33 (tracing methodology for discarding true doubt rule). Thereafter, most circuits recognized that *Transportation Management*'s rule on burden of proof was overruled or abrogated. See, e.g., *Holsum de P.R., Inc. v. NLRB*, 456 F.3d 265, 269 (1st Cir. 2006) (recognizing abrogation of *Transportation Management*); *Citizens Publ'g & Printing Co. v. NLRB*, 263 F.3d 224, 237 (3d Cir. 2001) (failing to apply *Transportation Management*); *USF Red Star, Inc. v. NLRB*, 230 F.3d 102, 106 (4th Cir. 2000) (suggesting *Transportation Management* no longer applies). *But see* *NLRB v. Allied Aviation Fueling of Dallas, LP*, 490 F.3d 374, 379 (5th Cir. 2007) (declining to follow *Transportation Management*); *Maher Terminals, Inc. v. Dir., Office of Workers Comp. Programs*, 992 F.2d 1277, 1281 (3d Cir. 1993) (distinguishing burden of proof determination in *Transportation Management*). See generally *Health Care Employees Union, Local 399 v. NLRB*, 463 F.3d 909, 919 (9th Cir. 2006) (indicating *Transportation Management* overruled); *Brandeis Mach. & Supply Co. v. NLRB*, 412 F.3d 822, 835-36 (7th Cir. 2005) (deferring to abrogation of *Transportation Management*); *NLRB v. Main St. Terrace Care Ctr.*, 218 F.3d 531, 543 (6th Cir. 2000) (refusing to apply *Transportation Management*).

29. See, e.g., *Holsum de P.R., Inc. v. NLRB*, 456 F.3d 265, 269 (1st Cir. 2006) (upholding employer burden of proof); *E.C. Waste, Inc. v. NLRB*, 359 F.3d 36, 42 (1st Cir. 2004) (applying shifting burden of proof framework to employer); *NLRB v. Hosp. San Pablo, Inc.*, 207 F.3d 67, 70 (1st Cir. 2000) (requiring employer point out non-union employee behavior warranting dismissal). The Board's General Counsel bears the burden of proving "that the employee's protected conduct was a substantial or motivating factor" for the discharge. *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 401 (1983); see *Holsum de P.R., Inc. v. NLRB*, 456 F.3d 265, 269 (1st Cir. 2006). The First Circuit also requires the General Counsel to show that the employee's activity is protected, that the employer knew of this protected activity and disapproved, and lastly that the activity and dismissal were causally connected. See, e.g., *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 401 (1983) (espousing employee's burden of proof); *Holsum de P.R., Inc. v. NLRB*, 456 F.3d 265, 269 (1st Cir. 2006) (using three-part test for NLRB); *E.C. Waste, Inc. v. NLRB*, 359 F.3d 36, 42 (1st Cir. 2004) (requiring NLRB prove employer knew of protected activity). The Board is not required to accept "a seemingly plausible

In *Hospital Cristo*, the First Circuit considered whether the General Counsel of the NLRB had met its burden of proof under *Wright Line* and *Greenwich Collieries*.<sup>30</sup> After reviewing the record of anti-union animus against Santiago, the First Circuit determined that the General Counsel successfully demonstrated that Santiago's union activities were a substantial or motivating factor of his dismissal.<sup>31</sup> The court then placed the onus on the Hospital to establish that it would have discharged Santiago regardless of his union involvement.<sup>32</sup> Although the Hospital stressed how Santiago's improper behavior was more than adequate grounds for termination, the court concluded that its arguments were a pretext for discrimination and insufficient in light of the Hospital's anti-union animus.<sup>33</sup>

The First Circuit in *Hospital Cristo* incorrectly applied *Greenwich Collieries* by failing to definitively place a burden of persuasion on the NLRB General Counsel.<sup>34</sup> Although the First Circuit strongly condemned the *Wright Line* test

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explanation" for the employee's dismissal if the employer's justifications are insufficient or pretextual. E.C. Waste, Inc. v. NLRB, 359 F.3d 36, 42 (1st Cir. 2004).

30. 488 F.3d at 520 (considering whether NLRB provided substantial evidence). Using the *Wright Line* test, which the court in *Transportation Management* upheld, the court sought evidence showing that retaliation for union participation provided a substantial or motivating factor for Santiago's discharge. *Id.* at 520; see *The Discipline Was Unlawful*, *supra* note 9 (articulating standard for determining union animus as motive for employee dismissal).

31. 488 F.3d at 521 (stressing evidence of discrimination for union involvement over course of employment). The court deferred to credibility assessments by the administrative law judge, who also found that the supervisors had penalized Santiago for being a union delegate. *Id.* at 520-21. The court noted several instances in which Santiago was discriminated against for union involvement; as a result of these evidentiary "smoking guns," the court held the General Counsel had met the requisite burden of proof. *Id.* at 518, 521.

32. *Id.* at 521-22 (summarizing Hospital's arguments stating dismissal inevitable due to improper behavior). The court noted that evidence of a supervisor interrogating Santiago about his union activities alone was sufficient evidence of improper dismissal. *Id.* at 522. The Hospital, however, pointed to evidence of Santiago's mistakes during his employment that warranted dismissal. *Id.*

33. *Id.* at 525 (holding NLRB's findings more persuasive than those of Hospital). "If the Board supportably finds that the reasons advanced by the employer are either insufficient or pretextual, the violation is deemed proven." E.C. Waste, Inc. v. N.L.R.B., 359 F.3d 36, 42 (1st Cir. 2004). At the time of dismissal, the Hospital only named three incidents as support for Santiago's discharge: leaving the hospital emergency room for a family emergency without permission; leaving the hospital with the narcotics key and making an announcement over the loudspeaker; and the improper diagnosis of a patient. 488 F.3d at 522. All three incidents were not typically severe enough to warrant dismissal under the Hospital's policies. *Id.* The court further stated that although the "sum, it is true, may be greater than the total of its parts," the Hospital did not plausibly demonstrate that the incidents referenced cumulatively provided a legitimate reason for dismissal. *Id.* at 523-24; see *The Discipline Was Unlawful*, *supra* note 9 (examining how Hospital failed to meet burden of proof). As a result, the court held that the employer violated the NLRA by firing Santiago due to his union activities. 488 F.3d at 525; see 29 U.S.C. §§ 8(a)(1), (a)(3) (2006). The court also declined to apply Puerto Rico law in its *Wright Line* analysis when determining whether the Hospital would have discharged Santiago irrespective of his union activities. 488 F.3d at 524-25. The Hospital argued that it had complied with Puerto Rico's Law 80, requiring that layoffs be according to seniority, which means they did not violate the NLRA. *Id.* at 524. Emphasizing that the federal NLRA trumps Puerto Rico law, the court summarily rejected the argument that acting in accordance with Law 80 provides a defense to the charge of unfair labor practices. *Id.*

34. 488 F.3d at 518 (espousing support for *Wright Line* burden-shifting test upheld in *Transportation Management*).

prior to *Transportation Management*,<sup>35</sup> the court had to apply its elements in *Hospital Cristo*.<sup>36</sup> The court noted that the General Counsel of the Board must show, but not persuade, that a motivating factor of discharge was union involvement.<sup>37</sup> Thus, the court imposed the burden of production on the General Counsel to merely produce evidence showing that union animus *could* be a motivating factor, in accordance with *Transportation Management*, but not the burden of persuasion to prove that union animus actually *was* a motivating factor, in accordance with *Greenwich Collieries*.<sup>38</sup> The First Circuit's decision in *Hospital Cristo* conflicts with *Greenwich Collieries*, which equated burden of proof with burden of persuasion.<sup>39</sup>

The record in *Hospital Cristo* clearly indicated that the Hospital repeatedly targeted and ultimately discharged Santiago for participating in a labor union.<sup>40</sup> Nevertheless, under the standard set forth in *Greenwich Collieries*, the General Counsel should have had the burden of persuasion to show that the union connection was a motivating factor in his discharge in order to shift the burden of proof.<sup>41</sup> Here, the court maintained that the Board did not have to accept plausible explanations proffered by the Hospital for the discharge before shifting the burden of proof, allowing the General Counsel to merely provide evidence of union animus rather than persuade the Board that it was actually a factor in the dismissal.<sup>42</sup> As a result, the First Circuit merely imposed a burden of production on the General Counsel before shifting its focus to the Hospital.<sup>43</sup>

While the First Circuit required that the General Counsel only present evidence that union involvement was a motivating factor of the dismissal, the court's analysis indicated that the Hospital had the burden of persuasion to demonstrate that other non-protected activities were the motivation for

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35. See *NLRB v. Transp. Mgmt. Corp.*, 674 F.2d 130, 131 (1st Cir. 1982) (per curiam), *rev'd*, 462 U.S. 393 (1982).

36. 488 F.3d at 518 (portraying *Transportation Management* as controlling burden-shifting test).

37. *Id.* (analyzing facts only for substantial or motivating factor for discharge); see *Holsum de P.R., Inc. v. NLRB*, 456 F.3d 265, 269 (1st Cir. 2006) (focusing on motivating factor of discharge).

38. See 488 F.3d at 518 (declining to require burden of production).

39. *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 275 (1994) (dismissing true doubt rule in favor of burden of persuasion); see *supra* note 27 (describing burden of proof requirements set forth by *Greenwich Collieries*).

40. 488 F.3d at 519-20; see *supra* notes 10-14 and accompanying text (describing history of Hospital discrimination).

41. *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 271-73 (1994); see Courtney, *supra* note 27, at 228-30 (describing Court's dismissal of true doubt rule and test used in *Transportation Management*).

42. 488 F.3d at 518-19. The First Circuit stressed that the Board can rely upon "circumstantial evidence and inferences reasonably drawn from the totality of the evidence" to conclude that the employer acted in violation of the NLRA. *Id.* at 518 (contending substantial evidence supporting one finding not inconsistent with ability to draw two different conclusions); *accord* *E.C. Waste, Inc. v. NLRB*, 359 F.3d 36, 42 (1st Cir. 2004).

43. 488 F.3d at 521 (seeking persuasive evidence of Hospital's permissible motivations in firing Santiago).

Santiago's dismissal.<sup>44</sup> Since the Hospital did not list many of Santiago's improper acts in the dismissal letter or consider his behavior extreme, it failed to persuade the court that its rationales were anything but a pretext for discrimination.<sup>45</sup> Given the Hospital's clear record of union discrimination, the court required the Hospital to satisfy the burden of persuasion in accordance with *Greenwich Collieries*, but the court neglected to first enforce that same standard against the Board.<sup>46</sup>

In *Hospital Cristo*, the First Circuit considered how to apply the burden-shifting framework in *Greenwich Collieries* to determine whether union participation was an impermissible motive for Santiago's discharge. The factual record in *Hospital Cristo* supported the court's conclusion that the explanations given by the Hospital were pretextual. The First Circuit, however, failed to recognize the impact that the burden of persuasion requirement from *Greenwich Collieries* could have on future cases with a less persuasive record. The court's analysis could shift the burden to the employer even when the Board has not truly met its burden of persuasion.

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44. *Id.* at 521-22 (describing Hospital's burden of proof as affirmative defense).

45. *Id.* at 523 (focusing on "after-the-fact" nature of Hospital's arguments).

46. *See id.* at 518 (neglecting to discuss burden of proof in detail). The First Circuit failed to articulate how the burden of proof must be met by the employee claiming a violation of the NLRA since *Greenwich Collieries* abrogated *Transportation Management*. *See id.* at 518-19 (failing to observe implications of *Greenwich Collieries* on burden of proof); *see also* Dir., Office of Workers' Comp. Programs v. *Greenwich Collieries*, 512 U.S. 267, 271-73 (1994) (rejecting *Transportation Management's* discussion of burden of production).