

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

BOULDER CITY HOSPITAL, INC.

and

Case 28-CA-22283

**GENERAL SALES DRIVERS, DELIVERY
DRIVERS AND HELPERS AND
REPRESENTING THE PUBLIC SECTOR,
TEAMSTERS UNION, LOCAL 14,
affiliated with the INTERNATIONAL
BROTHERHOOD OF TEAMSTERS**

**GENERAL COUNSEL'S BRIEF IN SUPPORT OF
LIMITED CROSS-EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION**

**TO: Lester A. Heltzer, Executive Secretary
Office of the Executive Secretary**

Respectfully submitted,

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A. INTRODUCTION

Administrative Law Judge William G. Kocol (the ALJ) correctly decided most of this case concerning the conduct of Boulder City Hospital, Inc. (the Respondent) as it reacted to an organizing drive by General Sales Drivers, Delivery Drivers and Helpers and Representing the Public Sector, Teamsters Union, Local 14, affiliated with the International Brotherhood of Teamsters (the Union) seeking to represent Respondent's employees. However, the ALJ incorrectly concluded that Respondent had not violated the Act when it posted a portion of its lawful personnel policies (the October 1 Memo) admittedly in response to what Respondent concluded was harassment of its employees by another employee who supported the Union. It is to this conclusion that Counsel for the General Counsel (CGC) files these limited exceptions to the ALJ's decision.

B. STATEMENT OF FACTS

1. Events on October 1

On October 1, 2008,¹ around mid-morning, Respondent's Human Resources Director Carol Davenport stopped Emergency Room Registered Nurse Kevin Dale Slover (Slover) in the hallway and called him into her office. Present were Davenport and Slover. Davenport asked Slover if he was aware of any Union activity. Slover answered that he was not. Davenport then told Slover that an employee had told her that Slover had approached that employee on the job to sign a Union card. When Davenport asked Slover if that was true, Slover told her no. (43:9-25, 44:1-5)² Slover was attired in his scrubs and did not have any

¹ All dates are in 2008.

² GCX___ refers to General Counsel's Exhibit followed by exhibit number; RX___ refers to Respondent's Exhibit followed by exhibit number. (___:___) refers to transcript page followed by line or lines. ALJD ___:___ refers to page followed by line or lines of the ALJ's decision.

Union insignia on his person. Before this questioning, Slover had not made his views about the Union known to any officials of Respondent. (44:8-15) Slover saw the October 1 Memo posted later in the day. (45:1-4; GCX 2) The ALJ correctly credited this testimony of Slover (ALJD 3:49-52) and found that Respondent had coercively questioned an employee about his union activities. (ALJD 6:32-34)

Davenport testified that she met with her assistant, Human Resources Coordinator Leslie Ann Anderson (Anderson) before she issued the October 1 Memo. Anderson told her that that Environmental Services Manager Isabel Orvis (Orvis) had told Anderson that some of Orvis' employees felt they were being harassed to sign up for the Union. (17:25, 18:1-10; 22:1-23) Davenport conducted no investigation of the harassment and simply issued the October 1 Memo after consulting with Respondent's Chief Operating Officer Thomas Maher (Maher). (17:4-17; 18:14-18; 20:14-25, 21:1-12; GCX 2) Concerning the claim of harassment, Davenport testified, "[w]hether it was or not, I don't know." (22:20-21)

Like Davenport, Anderson did not undertake an investigation of Orvis' claim. (103:4-6) Anderson testified that Orvis told her she felt her employees were being harassed about the Union because they were asked more than one time. She did not determine how many times employees were asked by questioning either Orvis or the employees involved. (103:16-25, 104:1-5) While Anderson claimed that Orvis told her two of her employees, Edwin Reynoso (Reynoso) and Judith Herridia, were being harassed (102:6-10), Orvis testified that she told Anderson that one of her employees came and mentioned to her that employee Silvia Zavalas talked to them about the Union and he wanted nothing to do with it but she kept insisting on it. (109:9-14; 111:13-18; ALJD 3:13-16) On cross-examination, Orvis testified that Reynoso came and talked to her, that nobody else from the department came in and mentioned it to her,

and that it was only Reynoso. (110:2-25, 111:1-9) According to Orvis, Reynoso did not tell her how many times the respiratory employee had talked to him but that he did not feel “comfortable.” (111:2-7)

2. The October 1 Memo

Respondent issued the October 1 Memo to its employees by posting it at the time clocks. (21:14-17) The October 1 Memo reads:

Please be reminded that harassment or threatening behavior in any degree by or between employees will not be tolerated at Boulder City Hospital.

We would like to remind you of our Hospital Wide Policy 195.1³ *Illegal Harassment* and 105.2 *Dealing with Allegations of Discrimination and/or Illegal Harassment*.

If you feel that you are being harassed or threatened in any way, you have the right to talk with Human Resources regarding your treatment. (GCX 2)

The referenced policy of Respondent described in the October 1 Memo is Policy 105, Discrimination. Policy 105.1 defines and lists examples of prohibited conduct under the caption *Illegal Harassment*. Examples include verbal conduct, visual conduct, physical conduct, threats, and retaliation. Under the caption *Dealing with Allegations of Discrimination and/or Illegal Harassment*, Policy 105.2, Respondent explains the Process, Employee Responsibilities, Supervisor/Manager Responsibilities, Prohibition Against Retaliation, and Investigation. (GCX 7, pp 4-5) Investigation provides, in part:

Upon being made aware of any allegations or complaints of discriminatory conduct and/or illegal harassment, the Hospital will ensure that such allegations or complaints are investigated promptly.

...If it is determined that discrimination and/or illegal harassment has occurred, the hospital will take remedial action commensurate with the severity of the

³ 195.1 is a typographical error and should read 105.1. (99:7-13)

offense. Such remedial action may include, but is not limited to, a verbal and/or written reprimand, counseling, suspension without pay, and/or termination. The Hospital will also initiate action to deter the potential for any future discrimination or harassment. (GCX 7, pp 5-6)

The ALJ concluded that Respondent posted the October 1 Memo in response to the report Anderson had received from Orvis. (ALJD 7:5-6) The ALJ also concluded that Respondent did not violate the Act by simply reminding employees of Respondent's lawful rule. (ALJD 7:2-3) It is this latter conclusion to which CGC excepts.

C. ARGUMENT

The October 1 Memo issued by Respondent, admittedly in response to the Union activities of its employees, violates Section 8(a)(1) of the Act. As the Board explained in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004):

If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

Here, Respondent has applied its lawful harassment rule in an unlawful manner in three ways: treating any Union activities as harassment, inviting employees to report the Union activities of their co-workers, and failing to conduct any sort of investigation of the harassment complaint it received.

When considering claims of harassment in the context of an organizing campaign, the Board has recognized that the Act "does not give employees an unlimited right regardless of the circumstances to repeatedly solicit coworkers who have asked them to desist." *Lutheran Heritage Village-Livonia*, supra at 648 fn. 13. See also *Stanadyne Automotive Corp.*, 345 NLRB 85, 87 (2005) where the Board, before remand by the United States Court of Appeals

for the Second Circuit,⁴ found the employer's no harassment rule lawful in an organizing campaign marked by "vandalism in the parking lots, graffiti on restroom walls (such as the written message 'Kill [the employer's president and CEO]'), and an incident involving an employee who called the police to report another employee who, while distributing union literature, allegedly grabbed her arm."

On the other hand, the Board has long held that equating solicitation of union support with harassment interferes with employees' Section 7 rights to form, join, and assist unions. In *W. F. Hall Printing Company*, 250 NLRB 803, 804 (1980), the Board recognized the problem of employees complaining about harassment by employee authorization card solicitors "who in any way approach employees in a manner subjectively offensive to the solicited employee." The Board explained that inviting employee complaints concerning such "subjectively offensive" conduct has the "potential dual effect" of encouraging employees to report on the union activities of their co-workers and "discouraging card solicitors in their protected organizational activities."

W. F. Hall Printing, supra at 804.

Here, the ALJ concluded that Respondent posted the October 1 Memo in response to the report of harassment of two employees by another employee who was asking them to sign up for the Union. (ALJD 3:13-16) The October 1 Memo that followed Orvis' complaint to Anderson about this conduct (ALJD 7:5-6) was designed to chill employees' Union activities by granting other employees the right to complain about those Union activities under the guise of Respondent's harassment policy. In addition, the October 1 Memo urged employees to report those Union activities to Respondent.

⁴ 352 NLRB 1002 (2008)

Even though the ALJ concluded that Respondent had not posted the October 1 Memo in response to Davenport's unlawful interrogation of Slover, the posting surely chilled Slover's Union activities, coming as it did on the heels of her questioning of him about his involvement with the Union and telling him that an employee reported to her that he had asked that employee to sign a Union authorization card while at work. Respondent applied its lawful policy on harassment in an unlawful manner by treating any union solicitations, regardless of how unobtrusive, as harassment. By this application, Respondent violated Section 8(a)(1) of the Act under the third prong of *Lutheran Heritage Village*, supra.

Further, Respondent's invitation to its employees to report the Union activities of their co-workers under the guise of harassment represented an additional unlawful application of Respondent's harassment policy. The ALJ missed the full effect of this invitation by concluding that there was no specific request to report the Union activities of employees, while acknowledging that Respondent may have harbored such a "subjective hope." (ALJD 7:14-15) As described above, the full effect of this invitation was to stifle the Union activities of Respondent's employees such as Slover, whom CEO Maher identified as one of the two employees that was "primarily promoting" the Union at Respondent. (134:4-7; 140:4-23) Confronted by the October 1 Memo, Slover and other Union supporters surely would be unwilling to risk a harassment complaint being solicited by Respondent by continuing their Union activities at Respondent.

Finally, by failing to conduct any sort of investigation, Respondent effectively categorized any Union activities, including merely asking an employee to sign a Union authorization card, as harassment since Respondent left it up to solicited employees or those employees' supervisor to determine what was "subjectively offensive" to them. This is the

vice recognized by the Board in *W. F. Hall Printing*, supra. Davenport admitted that she had not talked to the employee who complained and could not say “[w]hether it was or not [harassment], I don’t know.” (22:20-21) While the ALJ rejected this argument because the October 1 Memo does not refer to Union activities, he failed to discuss or consider the treatment of the conduct that prompted the October 1 Memo in the first place where Orvis reported that two of her employees had been asked more than once to sign up for the Union. (ALJD 3:16-17) With this bare report and with no investigation to determine if harassment, such as that which took place in *Lutheran Heritage Village*, supra, had occurred, Respondent immediately concluded that this conduct was harassment under its policy. Thus, Respondent effectively repudiated its harassment policy by ignoring its promise to promptly investigate claims of harassment and treating the mere mention of Union solicitation and a claim that the employees solicited felt uncomfortable as harassment.

Respondent posted the October 1 Memo in response to employee Union activities without determining if any harassment occurred under Respondent’s policy and invited employees to report on the Union activities of their co-workers if they “subjectively” felt harassed or not comfortable or had complained to their supervisor. This was an unlawful application of a lawful harassment rule in violation of Section 8(a)(1) of the Act, and the Board should so find.

D. CONCLUSION

Based on the forgoing, it is respectfully requested that the Board reverse the conclusion of the ALJ and find that the posting of the October 1 Memo, in response to Union activities by Respondent’s employees, violated Section 8(a)(1) of the Act.

Dated at Las Vegas, Nevada, this 5th day of August 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the **GENERAL COUNSEL'S BRIEF IN SUPPORT OF LIMITED CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION** in Case 28-CA-22283, was served via E-Gov, E-Filing, facsimile and regular mail on this 5th day of August 2009, on the following:

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