

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

WALGREEN CO.

and

Case 28-CA-22651

BERNIE SANCHEZ-BELL, an Individual

**WALGREENS' REPLY TO THE GENERAL COUNSEL'S OPPOSITION TO
WALGREENS' MOTION FOR SUMMARY JUDGMENT**

While Walgreen Co. (“Walgreens”) has presented evidence and law in support of its position in favor of summary judgment, the General Counsel’ (“CGC”) has done nothing of the sort. Indeed, the CGC has done nothing more than assert it has undescribed contradictory evidence and that it will present that evidence at a hearing. Not only has the CGC not presented this supposed contradictory evidence, it has not even described what “evidence” it has, from whom it received the evidence, and what such “evidence” will show outside of the legal conclusions in the Complaint. In other words, the position of the CGC is, simply, “trust me.” That, plain and simple, is not enough to defeat this Motion which is supported by evidence in the form of the sworn testimony of the Charging Party and documents submitted by the Charging Party.

Similarly, the CGC’s attempt to defeat summary judgment must be denied as it has, in large part, ignored the relevant law presented by Walgreens and thus wrongly concludes that, notwithstanding the evidence, it is still able to prevail against the summary judgment motion.

I. Summary Judgment Standard.

Walgreens has no quarrel with the general proposition, as cited by the CGC, that summary judgment may be granted when the moving party can establish there is no genuine

issue of material fact that would warrant a hearing, and the merits of the case can be decided upon legal grounds. *See* Rules and Regs. § 102.24(b); *Eagle Ray Electric Company*, 354 NLRB No. 109, *1-2 (2009). Additionally, Walgreens agrees that the evidence must be viewed in the light most favorable to the non-moving party. *Edeco, Inc.* 336 NLRB 899, 900 (2001). However, CGC has grossly mischaracterized the law with respect to the citation of *Lake Charles Memorial Hospital*, 240, NLRB 1330 (1979), which it surprisingly claims allows it to defeat a summary judgment motion merely by claiming it disagrees with the evidence put forth by the moving party.

Lake Charles, in fact, stands for no such thing. In that case, unlike the instant case, the General Counsel moved for summary judgment, claiming that the respondent had “admitted all the elements of the unfair labor practices alleged in the complaint” *Id.* at 1330. In opposition to summary judgment, the respondent pointed out that the General Counsel was just factually wrong and that the respondent had denied all material allegations of the complaint. *Id.*

Unlike here, the moving party, in that case, the General Counsel, had not supported its motion with any admissible evidence. *Id.* at 1330 n.3. It merely stated that the respondent had admitted to the conduct alleged in the complaint. It is only in this context that the Board stated that the respondent’s “simple denial of unlawful conduct” was sufficient to raise a material issue of fact. *Id.*

However, where, as here, the Respondent has come forth with admissible *evidence* in the form of sworn testimony and documents authenticated by the Charging Party, the Board has very clearly held that the non-moving party cannot defeat summary judgment by mere disagreement. “[t]he Board has held that, in response to a Motion for Summary Judgment, an adverse party may not rest upon . . . its pleadings, **but must present specific facts which demonstrate that there are**

material facts in issue which require a hearing.” *Exxon Company, U.S.A.*, 253 NLRB 213, 217 (1980) (emphasis added) (citing *Our-Way, Inc./Our-Way Machine Shop, Inc.*, 247 NLRB No. 177 (1980)). Indeed, the Board applies the same standards found in Federal Rule of Civil Procedure 56 in determining the burden of each party on summary judgment. *See Exxon Company*, 253 NLRB at 217. Therefore, not only must the non-movant present specific facts showing that an issue of material fact exists, but it also must present *admissible evidence* supporting those facts. *See id.* Here, in every single instance the CGC has articulated no specific facts to dispute the Respondents statement of facts and it has *produced no evidence whatsoever* to demonstrate the existence of material facts in issue.

II. Sanchez-Bell’s Constructive Discharge Claim.

Because it provided no contrary evidence, the CGC has now admitted that at the time she quit, Sanchez-Bell was under no written warnings, had no performance issues, had no write-ups, *and* had no change in her job responsibilities. Instead her job conditions were exactly the same as when she started working under Sheryl Laidlaw. Moreover, despite claiming that such evidence exists, the CGC has presented absolutely nothing to support its claim that (1) Walgreens told Sanchez-Bell she was being watched and surveillance had increased; (2) Walgreens engaged in surveillance of Sanchez-Bell’s concerted activities; (3) Walgreens threatened Sanchez-Bell regarding her protected activities; and (4) Walgreens conditioned future employment on Sanchez-Bell’s abandonment of her section 7 rights. Given the CGC’s failure to present any evidence whatsoever that any of these “facts” actually occurred, the CGC has failed to establish, as a matter of law, that an issue of material fact exists as to whether Sanchez-Bell’s employment was so intolerable than no reasonable person could stand it¹.

¹ As Walgreens has stated in its Initial Brief at p. 13, under the NLRA, constructive discharge occurs “when an employee quits because his employer has deliberately made the working conditions *unbearable* and it is proven

Just as importantly, even assuming there is evidence somewhere supporting the CGC claims of surveillance and threats, the CGC has completely ignored *Central Casket Co.*, 225 NLRB 362, which specifically holds that even if evidence exists of unlawful threats or restrictions on section 7 rights, that alone ***does not give rise to a constructive discharge claim.*** *Id.* at 363. “The Act provides an appropriate and direct remedy for the infringement of rights protected by Section 7 and there is nothing in it which provides that all threats unlawful under Section 8(a)(1) should or can be converted through unilateral employee action into a discharge.” *Id.* This is especially true where, as here, Sanchez-Bell was not the subject of any discipline or harassment at the time of her resignation. Put simply, contrary to the bald assertion of the CGC, before a constructive discharge claim is actionable, the CGC must show more than a violation of 8(a)(1). The CGC must present evidence that the Charging Party’s working conditions changed for the worse in some intolerable way, such as the assignment of significantly more work, the assignment to a harder supervisor, or written warnings about job performance that was acceptable before. *See id.* at 363, and Walgreens’ Initial Brief at pp. 13-14. Here the CGC has not only failed to present evidence to show that the Charging Party was suffering from such intolerable conditions, it does not even allege such facts in its Complaint. Accordingly, for this reason as well, the constructive discharge claim must fail.

Similarly, the CGC cannot establish a constructive discharge under the Hobson’s choice theory it now alleges in its brief. Given the sworn testimony of the Charging Party, all of which the CGC has admitted by not contradicting Walgreens’ evidence with admissible evidence, there is frankly no possible evidence that the CGC can now submit to show that Walgreens threatened

that (1) the burden imposed on the employee caused and was intended to cause a change in the employee’s working conditions so difficult or unpleasant that the employee is forced to resign, and (2) the burden was imposed because of the employees [protected] activities.” *Scheid Electric and Int’l Brotherhood of Electrical Workers, Local 343*, 2009 WL 3824884 (NLRB Div. of Judges, 2009) (emphasis added) (citing *Grocers Supply Co.*, 294 NLRB 438, 439 (1989)).

to discharge Sanchez-Bell unless she abandoned her Section 7 rights. *See Sara Lee Bakery Group, Inc. v. N.L.R.B.*, 296 F.3d 292, 301 (4th Cir. 2002) (where an employee's promotional opportunity was conditioned on an abandonment of Section 7 rights, but employee's current position was not so threatened, there was no Hobson's choice); *see also Easter Seals Conn., Inc.*, 345 NLRB 836, 838-39 (2005) (where employee's subjective reasons for resigning employment were that she was unhappy for being disciplined and treated unfairly, even though she expressed unhappiness for being disciplined for speaking her mind in the workplace, this did not amount to a Hobson's Choice). The fact is that Sanchez-Bell was specifically asked how she was harassed in the month before she quit her employment of 5 months, but she stated nothing even close to a Hobson's choice of abandoning her Section 7 rights. *See* Initial Brief at pp. 9-10. Moreover, the fact of the matter is that in April 2009, the Charging Party was clearly exercising her section 7 rights by sending letters to Walgreens with another employee, Sheryl Laidlaw concerning her working conditions, (*see* Initial Brief at Exhibit M), and no one from Walgreens in any way, shape or form asked her to stop such exercise of her rights on threat of termination. *See* Initial Brief at pp. 9-10.

III. Walgreens Did Not Promulgate a Rule in Violation of Section 8(a)(1) When It Asked The Charging Party To Refrain From Discussing The Charging Party's Complaints.

As with other areas of CGC's Opposition, with respect to the alleged rule against discussing the Charging Party's claims of gender harassment/discrimination allegedly promulgated by Walgreens in violation of Section 8(a)(1) of the Act, the CGC has again only stated that at the hearing, it will produce evidence to substantiate the claims in the Complaint. No such evidence of any kind is produced here. As was the case with the constructive discharge claim, that is simply not enough to overcome the admissible evidence submitted.

Just as importantly, the CGC has not explained how Walgreens violated the Charging Party's Section 7 rights when it was the Charging Party herself who specifically requested and in the case of one email virtually demanded confidentiality. Essentially the CGC wants to hold Walgreens liable for violating the Charging Party's section 7 rights for allegedly promulgating a rule that the Charging Party's requested. The absurdity of the claim is so apparent that the CGC cannot even explain how such a set of facts violates the Act. Put simply, if, as clearly was the case here, Walgreens was responding to the Charging Party's own request that this matter be kept confidential, then it is factually impossible to say that by asking for that confidentiality, Walgreens was violating the Act in denying the Charging Party her section 7 rights.

Just as importantly, the CGC has not dealt with the admitted fact that when the Charging Party decided to abruptly change course and talk about her claims with others, *no evidence exists that any adverse action was taken against her or anyone else*. Despite the CGC's vague statements of what alleged evidence it has, the CGC has presented absolutely no evidence that anyone was warned, that anyone was disciplined or that anyone's job conditions were affected in any way despite evidence that the Charging Party's claims became the talk of the lunchroom. *See* Initial Brief at p. 9. By contrast, Walgreens has presented evidence from the Charging Party and from Sheryl Laidlaw, another employee who made similar complaints, that when they decided to start talking together, **nothing happened to them**. *See* Initial Brief at pp. 8-11.

Finally, the CGC has not responded at all to the issue of the interplay of Title VII and the NLRA, which are coordinate Federal statutes, both of which place upon an employer certain responsibilities. The CGC's failure to even address the notion that Walgreens is entitled – even obligated – to keep gender harassment investigations confidential to avoid retaliation is a

significant admission that there is no legal basis for their claim that Section 8(a)(1) was violated .
See Initial Brief, at pp. 4, 15-17.

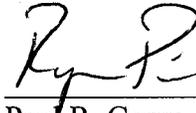
IV. Walgreens Did Not Create an Impression of Surveillance.

Once again, with regard to whether Walgreens created an impression of surveillance, CGC has simply argued that it intends to present evidence to contradict and clarify the evidence offered by Walgreens. This misses the point. Of course, Walgreens hotly contests the allegations in the Complaint related to whether it created an impression of surveillance. For purposes of its Motion, however, Walgreens assumes the truth of CGC's allegation that Mathieu made certain statements to employees regarding cameras and surveillance. However, the CGC has failed to address the requirement in the law outlined by Walgreens, *see* Initial Brief pp. 17-19, which states that where employees, in spite of statements from a supervisor indicating increased surveillance, continue to exercise their Section 7 rights freely and openly, "they were not in fact coerced or restrained from exercising their § 7 rights." *NLRB v. Int'l Typographical Union*, 452 F.2d 976, 978-79 (10th Cir. 1971.) Again, the only *evidence* submitted here shows that is exactly what happened. Not only did both Sheryl Laidlaw and the Charging Party testify that everyone was talking about their claims, *see* Initial Brief p. 9; not only did Sheryl Laidlaw and the Charging Party testify that they told Walgreens that they were discussing their claims, *see id.*; not only did the Charging Party and Sheryl Laidlaw admit that they were not retaliated against in any way, *see id.*; but also there is absolutely *no evidence submitted by the CGC* that anyone else was adversely effected in their job or working conditions. Thus, as a matter of law, this claim fails as well.

V. **Conclusion.**

For the reasons stated in Walgreens' Initial Brief and further outlined in this Reply, the Board should grant summary judgment on all counts of CGC's Complaint and dismiss Sanchez-Bell's charge.

Dated this 13th day of January, 2010.



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