

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
Washington, D.C.**

SODEXO AMERICA LLC

Case No. 21-CA-39086

and

PATRICIA ORTEGA, an Individual

SODEXO AMERICA LLC; AND  
USC UNIVERISTY HOSPITAL

and

Case No. 21-CA-39109

SERVICE WORKERS UNITED

USC UNIVERSITY HOSPITAL

and

Case Nos. 21-CA-39328  
21-CA-39403

NATIONAL UNION OF HEALTHCARE  
WORKERS

**MOTION BY RESPONDENT USC UNIVERSITY HOSPITAL  
FOR SUMMARY JUDGMENT**

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**Table of Contents**

I. INTRODUCTION AND SUMMARY OF POSITION ..... 1

II. STATEMENT OF FACTS..... 3

    A. The Hospital and the Bargaining Unit. .... 3

    B. Tenet Enacted The Off-Duty Access Policy In 1991 To Address  
    Issues With Employees Working “Off The Clock.” ..... 4

    C. The Events Leading Up to the Charges. .... 6

III. ARGUMENT ..... 9

    A. The Policy Is Clearly Valid Under Board’s Decision in Tri-County,  
    Which Set the Standard Regarding Off-Duty Access Policies. .... 9

    B. The Policy Falls Squarely Within All of the Tri-County Criteria. .... 10

        1. The Policy applies only to the interior and working areas of  
        the Hospital. .... 10

        2. The Policy was disseminated and is well-known to Hospital  
        employees. .... 10

        3. There is no evidence the Policy was adopted for  
        discriminatory reasons or applied in a discriminatory  
        manner..... 11

    C. The Authority On Which The Region Relies Does Not Support Its  
    Position That Off-Duty Access Rules Must Have *No* Exceptions..... 12

    D. The Policy Was Enacted And Has Been Enforced For Legitimate  
    Business Purposes..... 15

    E. The Board Has Upheld This Very Policy Twice Before and Those  
    Rulings Should Govern..... 17

        1. Tenet successfully defended the Policy in two separate  
        cases. .... 17

        2. The General Counsel is Collaterally Estopped by the Tenet  
        cases from Relitigating the Validity of the Policy. .... 19

IV. CONCLUSION ..... 21

## TABLE OF AUTHORITIES

Page(s)

### NATIONAL LABOR RELATIONS CASES

<u>Automotive Plastic Technologies,</u> 313 NLRB 462 (1993).....	12
<u>Baptist Memorial Hospital,</u> 229 NLRB 45 (1977).....	12, 13
<u>Clear Lake Hospital,</u> 223 NLRB 1 (1976).....	11
<u>GTE Lenkurt, Inc.,</u> 204 NLRB 921 (1973).....	9, 11
<u>Hudson Oxygen Therapy Sales Company,</u> 264 NLRB 61 (1982).....	18
<u>Inter-Community Hospital,</u> 255 NLRB 468 (1981).....	12, 14
<u>Southdown Care Center,</u> 308 NLRB 225 (1992).....	14
<u>TeleTech Holdings, Inc.,</u> 333 NLRB 402 (2001).....	10
<u>Tri-County Medical Center,</u> 222 NLRB 1089 (1976).....	passim

### FEDERAL CASES

<u>Albertson's Inc. v. NLRB,</u> 301 F.3d 441 (6th Cir. 2002).....	11
<u>Astoria Federal Savings &amp; Loan Association v. Solimino,</u> 501 U.S. 104 (1991) .....	20, 21
<u>Frye v. United Steelworkers of America,</u> 767 F.2d 1216 (7th Cir. 1985).....	20

**TABLE OF AUTHORITIES (Continued)**

Page(s)

**FEDERAL CASES (Continued)**

La Preferida, Inc. v. Cerveceria Modelo, S.A. de C.V.,  
914 F.2d 900, 906 (7th Cir.1990) ..... 20

N.A.A.C.P., Detroit Branch v. Detroit Police Officers Association,  
821 F.2d 328, (6th Cir. 1987) ..... 19

Paramount Transp. Systems v. Chauffeurs Local 150,  
436 F.2d 1064, 1065-66 (9th Cir. 1971)..... 20

Parklane Hosiery Company v. Shore,  
439 U.S. 322, 326 (1979) ..... 21

**UNPUBLISHED CASES**

Garfield Medical Center v. NLRB,  
2002 WL 31402769 ..... 1, 17, 19

Riesbeck Food Markets Inc v. NLRB,  
91 F.3d 132, 1996 WL 405224, (4th Cir. 1996) ..... 11

San Ramon Regional Medical Center, Inc.,  
2003 WL 22763700 ..... 1, 18, 19

**TABLE OF AUTHORITIES (Continued)**

Page(s)

**FEDERAL STATUTES**

National Labor Relations Act,  
29 U.S.C. § 157 ..... 11

Occupational Safety and Health Act of 1970,  
29 USC § 654 (a) (1) ..... 16

**FEDERAL REGULATIONS**

National Labor Relations Board, Statements of Procedures,  
29 CFR §101.12 (b) ..... 20

Regulations Implementing Health Insurance Portability and Accountability Act of 1996  
45 CFR, Part 164 ..... 16

NLRB Rules and Regulations, Section 102.24(b) ..... 1, 21

**SECONDARY SOURCES**

Fort Hood Shooting, by Ross Arrowsmith, December 15, 2010  
[http://en.wikipedia.org/wiki/Fort\\_Hood\\_shooting](http://en.wikipedia.org/wiki/Fort_Hood_shooting) ..... 15, 16

Guidelines for Preventing Workplace Violence for Health Care & Social Service Workers,  
<http://www.osha.gov/Publications/OSHA3148/osha3148.html#text4> ..... 15, 16

Hospital shootings rare, violence not, by Ross Arrowsmith, December 15, 2010.  
<http://workplaceviolencenews.com/2010/12/15/hospital-shootings-rare-violence-not/> .. 15

Preventing Violence in the Health Care Setting, Joint Commission on Accreditation of  
Healthcare Organizations (JCAHO) (Issue 45, June 3, 2010) ..... 16

Workplace Violence in Healthcare,  
[https://www.aohn.org/component/option,com\\_docman/Itemid,0/task,doc\\_view/gid,290/](https://www.aohn.org/component/option,com_docman/Itemid,0/task,doc_view/gid,290/)  
..... 16

Pursuant to Section 102.24(b) of the NLRB's Rules and Regulations, USC University Hospital (hereinafter, the "Hospital") files this motion for summary judgment on the grounds that there are no genuine issues of material fact and it is entitled to judgment as a matter of law on the four cases referenced above. The Hospital requests that the Board issue a notice to show cause why this motion should not be granted and that the hearing on this matter (currently scheduled for February 28, 2011) be postponed.

## **I. INTRODUCTION AND SUMMARY OF POSITION**

The complaint in this case consolidates four separate charges, which all arise from the allegation that the Hospital has promulgated and enforced an "illegal" Off-Duty Access Policy (the "Policy") that bars employees from the interior of the facility unless they are working under specific management direction. This Policy was originally promulgated by Tenet Healthcare Corporation (Tenet") when it owned the Hospital. This Policy was also promulgated by Tenet at its other hospitals.<sup>1</sup> Twice before, this Policy has withstood the exact same legal challenge that is being raised in this case. In 2002 and 2003, the General Counsel challenged the Policy as unlawful on its face, at two other Tenet facilities.<sup>2</sup> One of those cases was brought by Region 21. Two different Administrative Law Judges examined the Policy and independently concluded that, on its face, it is *not* in violation of the National Labor Relations Act (the "Act"). Region 21 is back for a third try before yet another Administrative Law Judge. Because this issue has already twice been decided as a matter of law, the Board's intervention is necessary before a hearing is held.

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<sup>1</sup> Eva Herberger, Human Resources Manager, describes the Tenet policies in Paragraph 5 of her Affidavit.

<sup>2</sup> See Garfield Medical Center, 2002 WL 31402769 (Region 21) and San Ramon Regional Medical Center, 2003 WL 22763700 (Region 32). For the Board's convenience, the Hospital is lodging copies of these two "Tenet decisions."

Even putting aside the Tenet decisions, the Hospital is entitled to summary judgment because the undisputed facts establish that the Policy is valid under Board precedent. The Policy has been in effect since the Hospital first opened its doors in 1991, long before any of the Hospital's employees were represented by a union. It has accomplished and continues to accomplish the goal for which it was originally enacted, eliminating claims for wages and overtime by employees claiming they had worked "off the clock." The Policy also serves the purpose of reducing the risk of workplace injuries. Moreover, in recent years, the Policy has become even more compelling and essential because controlling access to the Hospital is crucial to protecting employees and patients from workplace violence and terrorism--protections which are mandated by law-- and for which dangers health care facilities are particularly at risk. Controlling access is also necessary as a part of the Hospital's efforts to insure patient confidentiality, as required by federal law. Unsupervised, off-duty employees, whose badges and uniforms would allow them unfettered access to the Hospital, its patients and its records, simply cannot be allowed to wander the halls of this multi-story, over 530,000 square foot facility. (Affidavit of Eva Herberger "Herberger Affidavit" ¶ 12.)

In the course of the investigation into the underlying charges, the Region concluded that the Policy meets all but one of the standards set forth in Tri-County Medical Center, 222 NLRB 1089 (1976). The Policy, the Region admits, was not enacted for the purpose of interfering with union activity. The Region further admits that there is NO "evidence presented or revealed that the Employers selectively enforced their access policy against the employees engaged in union activity." (See, Exhibits 10, 11 and 13 to Affidavit of Lester F. Aponte, "Aponte Affidavit."). The Region concedes that the Policy has been well disseminated. The Region nonetheless objects that the Policy runs afoul of the final element in Tri-County, because it does not bar off-

duty employees from the facility for all purposes. The Policy allows for off-duty access in two very limited circumstances: (1) access to employees seeking treatment for their own acute conditions, and (2) access to employees to visit friends or relatives who are undergoing such treatment. The Region's position that these two, limited, exceptions invalidate the Policy is a misreading of Tri-County, which is clearly directed at preventing employers from enacting and enforcing rules based on union animus.

The Region's position is that if the Hospital wishes to have a policy that restricts access to off-duty employees, access must be denied in every circumstance. Tri-County does not stand for the proposition, as advocated by the Region, that the Hospital must either deny medical treatment to its employees or else allow thousands of employees unsupervised, facility-wide access on a 24/7 basis. Tri-County does not require the Hospital to either ignore its legal and ethical obligations to provide a safe workplace for its employees and visitors, or adopt a policy that denies its employees the opportunity to obtain medical care or visit seriously ill relatives. Such a position is ridiculous on its face, does nothing to advance the policies of the Act, and subjects the Hospital, its patients and its employees to unwarranted risks. Neither the applicable precedent nor the decisions on this same Policy require the Hospital to make such a Hobson's choice. In the past, the Board has upheld not just this Policy but similar policies as well. It must do so again.

## **II. STATEMENT OF FACTS**

### **A. The Hospital and the Bargaining Unit.**

USC University Hospital (the "Hospital") is a private research and teaching hospital located near Downtown Los Angeles which specializes in acute care. (Herberger Affidavit ¶ 2.) First opened in 1991, the Hospital was originally owned and operated by Tenet Healthcare

Corporation (“Tenet”). (*Id.*; Decision and Direction of Election, dated April 26, 2010, at p. 3.)<sup>3</sup> From June 2004 through March 31, 2009, Tenet recognized SEIU United Healthcare Workers - West (“SEIU”) as the representative of a unit of service and maintenance employees and a unit of professional employees at the Hospital. (Herberger Affidavit ¶ 3; Decision and Direction of Election, at p. 3.)

On April 1, 2009, the University of Southern California (“USC”) purchased the Hospital from Tenet and began operating it. Neither USC nor the Hospital has signed any agreement relating to the bargaining unit at issue in these proceedings. Rather than overturn the status quo, however, the Hospital voluntarily complied with the wage schedules provided for by the last Tenet-SEIU contract, participated in the grievance process with SEIU, and provided benefits to members of the units that, where possible, are comparable to those called for in the Tenet-SEIU contract. (Herberger Affidavit ¶ 3; Decision and Direction of Election, p. 4.)

In May 2010, in anticipation of an election petitioned for by the National Union of Healthcare Workers (“NUHW”), SEIU disclaimed any interest in representing any Hospital workers. (Aponte Affidavit ¶ 3.) Pursuant to an election conducted on May 26 and 27, 2010, a majority of the employees in the service and maintenance unit elected to have NUHW as its representative, while the majority of the professional unit voted for no union. (Aponte Affidavit ¶ 3; Herberger Affidavit ¶ 4.) NUHW immediately called for negotiations on a new contract, which are ongoing. (*Id.*)

**B. Tenet Enacted The Off-Duty Access Policy In 1991 To Address Issues With Employees Working “Off The Clock.”**

From the time the Hospital first opened its doors through the present, it has maintained and enforced a policy barring access to off-duty employees from working areas of the Hospital

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<sup>3</sup> A copy of that order is attached to the Affidavit of Lester F. Aponte as Exhibit 8.

for all but very limited purposes. Tenet implemented the original version of the Policy in 1991, long before any of the Hospital employees were represented by a union. (Herberger Affidavit ¶¶ 5-6 and Exhibits 1, 2 and 3). From its inception, the Policy has been posted at the Hospital and contained in written materials available to every employee. (Herberger Affidavit ¶5). The Hospital also requires its subcontractors to enforce the policy. That includes Respondent Sodexo, which operates the cafeteria inside the Hospital and employs the cafeteria's workers.<sup>4</sup>

(Herberger Affidavit ¶ 11.)

The Policy has remained basically unchanged since its inception in 1991. It provides as follows:

Off-duty employees are not allowed to enter or re-enter the interior of the Hospital or any work area outside the Hospital except to visit a patient, receive medical treatment or to conduct hospital-related business.

1. An off-duty employee is defined as an employee who has completed his/her assigned shift.
2. Hospital-related business is defined as the pursuit of the employees' normal duties or duties as specifically directed by management.
3. Any employee who violates the Policy will be subject to disciplinary action.

(Herberger Affidavit ¶ 6 and Exhibit 1.)

Pursuant to the "Hospital-related business" language of the Policy, managers may hold over employees after their shift or call them in at times they are not scheduled to work in order to cover emergencies or other staffing shortages. (Herberger Affidavit ¶ 9.) At those times, the employees are at the Hospital for no other purpose than to perform their job duties. (Id.) The only other exceptions to the Policy are compassionate. Hospital employees who are in need of medical care may be admitted to the Hospital by following the same procedures as any other

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<sup>4</sup> In addition to being a working area for Sodexo employees, the Hospital cafeteria is not open to the general public. It was closed to reduce the risk to patient safety at the recommendation of the Los Angeles Police Department. It is only open to on-duty Hospital employees, physician staff, and those who are visiting admitted patients. (Herberger Affidavit ¶ 11 and Exhibit 4.)

patient. (Herberger Affidavit ¶¶ 9-10.) By doing so, they get the benefit of a waiver of the co-payment applicable to their admission to any other hospital. (Herberger Affidavit ¶ 10.)

Hospital employees can also visit friends or relatives who are admitted patients at the Hospital, on the same terms as any visitor. Except under these very limited circumstances, off-duty employees are not allowed in the interior of the Hospital. (Herberger Affidavit ¶ 9.) When employees come to the Hospital for these two limited non-job related reasons, they are required to use the visitor entrance and sign in with Hospital security as would any outsider. (Herberger Affidavit ¶ 9-10.) They may not wear their employee uniform and may not display their Hospital employee badge. (Herberger Affidavit ¶ 9.) Thus they come in only as members of the public, and have no special access to Hospital patients, records, or working areas.

The Policy is so well known and such a part of the Hospital's culture that as far as the Hospital's management can determine, employees rarely, if ever, violate it. (Herberger Affidavit ¶¶ 7-8.) The Hospital is not aware of any instance in which management knowingly allowed an employee to violate the Policy without consequence. (Herberger Affidavit ¶ 8.) Neither Region 21, SEIU, nor NUHW has offered evidence of any instances when that occurred.

### **C. The Events Leading Up to the Charges.**

From the time SEIU undertook the representation of the professional and technical units in 2004 through November 2009, it made no objection to the Hospital or its contractor, Sodexo, maintaining and enforcing the Policy. (Herberger Affidavit ¶ 8.) Following NUHW's election challenge, however, SEIU and Sodexo employee Patricia Ortega filed charges against Sodexo and the Hospital claiming that they were enforcing the Policy in a discriminatory manner and favoring NUHW. (Charges Nos. 39086 and 39109.)<sup>5</sup> Those cases have been consolidated into

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<sup>5</sup> Copies of relevant charges to which the Hospital is a party are attached to the Aponte Affidavit.

this complaint.<sup>6</sup> On May 26, 2010, Region 21 partially dismissed Case 21-CA-39109 and made the following findings:

With regard to the allegation that the Employers violated section 8(a)(3) of the Act, the Region concluded that there was no evidence presented or revealed that the Employers selectively enforced their access policy against the employees engaged in union activity. With regard to the claim that the Employers violated section 8(a)(5) of the Act by unilaterally changing the employee access policy without bargaining with the Union, the Region concluded that there was no evidence presented that the policy was recently implemented. Rather, the investigation revealed that the policy was implemented in 1991 and revised in 2008.

(Aponte Affidavit, Exhibit 10.)

The Office of Appeals affirmed this finding and the partial dismissal. (Aponte Affidavit, Exhibit 11.) After SEIU filed an identical amended charge, the Region again partially dismissed it, finding that there is no evidence that Sodexo or the Hospital selectively enforced the Policy against employees engaged in union activity. (Aponte Affidavit, Exhibits 12 and 13.)

On May 4, 2010, respiratory therapist Michael Torres was suspended with pay after he came to the Hospital without authorization while off-duty and was disrespectful and uncooperative with management and Hospital security. (Herberger Affidavit ¶13.) Even though he was advised that he was on suspension and not allowed on Hospital premises, he returned the next day and again engaged in disrespectful and insubordinate behavior. (Id.) Based on an investigation, including the results of an independent investigation conducted by an outside investigator, Michael Wolfram, the Hospital decided to demote Mr. Torres for insubordination,

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<sup>6</sup> The Hospital's counsel has repeatedly asked SEIU's counsel whether SEIU is still interested in pursuing the charges it filed before it renounced any interest in representing the Hospital's employees. They have made no response to that inquiry. (Aponte Affidavit ¶ 10.)

failure to cooperate in an investigation, exercising poor judgment, and violating the off-duty access policy.<sup>7</sup> (Herberger Affidavit ¶ 13 and Exhibits 6 and 7.) In Case 21-CA-39328, however, NUHW and Region 21 allege that that he was disciplined based on an “overly broad off-duty access policy.” (Aponte Affidavit, Exhibit 14.)

On June 25, 2010, NUHW organized a loud demonstration at the office of the Hospital’s CEO to protest what it wrongly thought was going to be the Hospital’s failure to grant scheduled pay increases. The Hospital did not interfere with this demonstration. However, three employees (Duran, Corea, and Aguirre) who were not scheduled to work that day but entered the Hospital for the demonstration without signing in and while wearing their employee badges were verbally warned for their violation of the Policy. (Herberger Affidavit ¶ 14.) Case No. 39403 challenges that discipline. (Aponte Affidavit, Exhibits 15 and 16.)

The complaint alleges that the Hospital has maintained and enforced an overly broad off-duty access policy. It further alleges that the Hospital violated the Act by disciplining Torres, Duran, Corea, and Aguirre for violating the Policy. (Aponte Affidavit, Exhibit 17.)

Throughout the investigations of the underlying charges, the Region has taken an unrealistic and uncompromising position. If the Hospital wishes to maintain an off-duty access policy, the Region maintains, that policy must have no exceptions, no matter how narrow and humanitarian in purpose. The Region has also insisted that the Hospital place Michael Torres

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<sup>7</sup> Michael Torres was suspended because of his insubordinate conduct towards several supervisors and demoted because he was uncooperative and less than truthful. (Herberger Affidavit ¶ 13 and Exhibit 6.) The demotion was also based on previous discipline for insubordinate behavior which had been upheld in arbitration. (Herberger Affidavit ¶ 13 and Exhibit 7.) The Region does not dispute any of these facts, and alleges only that Torres’ suspension and demotion violated the Act because the Policy is “over-broad.” Thus, if the Board finds the Policy is valid, no hearing on Torres’ discipline would be necessary.

back in his previous position, with back pay, regardless of the other independent valid grounds the Hospital had to discipline him. (Aponte Affidavit ¶ 16.)

### III. ARGUMENT

#### A. The Policy Is Clearly Valid Under Board's Decision in Tri-County, Which Set the Standard Regarding Off-Duty Access Policies.

The NLRB has long recognized the right of an employer to maintain a policy excluding employees from the interior of its facility when they are not on-duty, so long as that policy is known to the employees, has not been adopted for the specific purpose of excluding them based on union activity, and is not applied in a manner that discriminates against employees engaged in union activity. In GTE Lenkurt, Inc., 204 NLRB 921 (1973), the employer had promulgated several rules in an employee handbook “prior to the advent of the Union’s organizing campaign.” Among them, was a rule that “[a]n employee is not to enter the plant or remain on the premises unless he is on duty or scheduled for work.” The Board concluded that the off-duty access policy was “presumptively valid” because it was not directed at union solicitation but rather “prohibits off-duty employees from entering or remaining on the premises for any purpose.” Lenkurt, 204 NLRB at 921-22. Further, there was no evidence that it was “disparately applied against union activities.” Id.

In Tri-County Medical Center, 222 NLRB 1089 (1976), a hospital promulgated a rule prohibiting off-duty employees from distributing union literature in the employee parking lot and, relying on that policy, prevented an employee from distributing union literature in front of the hospital and in the rear parking lot on a day when he was not scheduled to work. The Board held that a no-access rule concerning off-duty employees is valid if it: “(1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and

not just to those employees engaging in union activity.” Id., 222 NLRB at 1089. Additionally, the Board held that “except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid.” Id. Applying those principles, the Board found that the policy was invalid because there was no evidence that the medical center “ever communicated to employees the existence of any rule conforming to the above criteria.” Id., at 1089-90.

**B. The Policy Falls Squarely Within All of the Tri-County Criteria.**

**1. The Policy applies only to the interior and working areas of the Hospital.**

The Policy meets the first prong of the Tri-County test in that it limits access solely with respect to “the interior of the Hospital or any work area outside the Hospital.” (Herberger Affidavit ¶ 5 and Exhibit 1.) By contrast, the Board and the federal courts have applied Tri-County to invalidate policies barring off-duty employees from parking lots, sidewalks, and other outside nonworking areas. See TeleTech Holdings, Inc., 333 NLRB 402 (2001) (Board found employer’s rule against “unauthorized presence on the premises while off-duty” unlawful because it was overbroad and not supported by a legitimate business purpose. The employer had set forth no reason why off-duty employees should not be able to enter the parking lot area).

**2. The Policy was disseminated and is well-known to Hospital employees.**

Unlike the facts in Tri-County, there is no dispute that the Policy has been clearly disseminated to all employees. It has been both posted and contained in the Hospital’s Human Resources Manual for many years. (Herberger Affidavit ¶ 5 and Exhibits 1, 2, and 3.) It is also available to all employees on the Hospital’s intranet. (Herberger Affidavit ¶ 5.) In fact, the Policy is so well known and such a part of the Hospital culture that employees rarely, if ever, violate it. (Herberger Affidavit ¶ 8.) The Region does not dispute these facts.

**3. There is no evidence the Policy was adopted for discriminatory reasons or applied in a discriminatory manner.**

The third prong of the Tri-County test, that the policy not be applied “just to those employees engaging in union activity,” must be understood in the context of the purposes of the Act, *i.e.*, to protect the right of employees to engage in union activity. 29 U.S.C. § 157. It is obviously a prohibition on access rules that are designed to discriminate against union activity. This concept of anti-union discrimination has been more fully defined in cases involving non-employee union organizers. In such cases, the courts have defined discrimination as “favoring one union over another or allowing employer-related information while barring similar union-related information.” Albertson's Inc. v. NLRB, 301 F.3d 441, 451 (6th Cir. 2002). As the Fourth Circuit explained when it reversed the Board’s finding that the employer had discriminated against union campaigners, “[d]iscrimination claims inherently require a finding that the employer treated similar conduct differently.” Riesbeck Food Markets Inc v. NLRB, 91 F.3d 132, 1996 WL 405224, at \*3-\*4 (4th Cir. 1996) (unpublished disposition). When an access rule is not adopted or applied to bar employees engaging in union activity *because* they are engaging in union activity, no NLRA concern is implicated.

Cases relying on Lenkurt and Tri-County are consistent with this analysis. In Clear Lake Hospital, 223 NLRB 1 (1976), the employer escorted two employees who were handbilling on behalf of the union while off-duty off the premises. The Board, citing Lenkurt, found that no violation had occurred as there was no showing that the employer’s “prohibition against access by off-duty employees was limited to a prohibition against use of the premises for union activities and for no other purpose.” Clear Lake Hospital, 223 NLRB at 7. Further, that “there was no showing that this prohibition was discriminatorily applied.” Id.

By contrast, in Automotive Plastic Technologies, 313 NLRB 462 (1993), the employer refused to allow off-duty employees who were distributing union literature to remain on company property, based on the contention that it had a rule prohibiting off-duty employees from being on company premises. There was no evidence, however, that the alleged rule existed or was disseminated before the union tried to handbill. Furthermore, the employer did not offer any evidence of any legitimate business reasons why limiting access by off-duty employees to the company's premises was necessary, citing only to a general concern about "safety." The rule, the Board concluded, had been "discriminatorily motivated and disparately applied" to prevent union activity. Id., 313 NLRB at 462-63.

Here, the Policy was enacted long before any union activity occurred and, as the Region has recognized, there is no evidence that the Policy was enacted or has been applied in a discriminatory manner so as to prevent union activity. Thus, the Policy is valid under the third prong of Tri-County as well.

**C. The Authority On Which The Region Relies Does Not Support Its Position That Off-Duty Access Rules Must Have No Exceptions.**

In discussions with Respondents' counsel, the Region has taken the position that, under Tri-County, an enforceable off-duty access rule must contain a blanket prohibition upon the employees returning to the facility after their shift without exception. In making this claim, the Region relies upon Baptist Memorial Hospital, 229 NLRB 45 (1977), and Inter-Community Hospital, 255 NLRB 468 (1981). Neither case supports the Region's interpretation of Tri-County.

In Baptist Memorial Hospital, an employee was prevented from handbilling in the hospital lobby across from the cafeteria during his lunch break. After both sides filed exceptions, the Board affirmed the ruling of the Administrative Law Judge that the employer's

handbilling and solicitation rules violated the Act. In a footnote, the Board noted that the Administrative Law Judge had also stated that the employer's rule against employees returning to the hospital during off-duty time did not meet the requirements of Tri-County. His reasons for reaching that conclusion do not exist in this case. First, the ALJ noted that "the employer prohibited access not only to the interior of the hospital, but also to sidewalks and other outside areas." Baptist Memorial Hospital, fn. 4. That is not the case here. The Policy prohibits access only to the interior and working areas of the Hospital. Second, the ALJ noted that the employer permitted access to employees for several purposes, "including picking up paychecks and visiting patients." Id. There was no further discussion or analysis of these observations and no factual discussion of the circumstances under which these examples might occur. In this case, however, the facts are clear, and the Policy is very restrictive. Off-duty employees cannot enter the Hospital for the mere convenience of picking up their paychecks or for any other purpose other than as specifically directed by management to perform their job duties or for two very limited humanitarian reasons under very strict conditions.

The Hospital does allow employees to obtain medical treatment or to visit friends and relatives who are receiving medical treatment, both of which necessarily must occur while off-duty (unlike getting a paycheck). In those circumstances, employees come to the Hospital, not in their capacity as employees, with unfettered access to all parts of the facility, but as members of the public. They do not wear uniforms or badges. They must check in at the visitor entrance. They are limited to the express purpose of the visit. (Herberger Affidavit ¶ 9.) Since the Hospital is an acute care facility, any other rule would be inhumane. A person ought not to be forbidden from being at his mother's deathbed simply because he also happens to work at the hospital in which she is being treated. Nor should a person be prevented from receiving the very medical

care that his insurance pays for simply because he works for the hospital in order to earn the insurance. The legitimacy of such exceptions, in fact, has been recognized by the Board. For instance, in Southdown Care Center, 308 NLRB 225, 232 (1992), a health care facility's policy allowed off-duty employees to come if they "[have] family or friends in the home [to] visit ... but [they] must follow visitor rules." In that case, the ALJ held that "on its face, [the home's] limited-access rule complies with the Tri-County conditions." The Board affirmed his rulings.

The other case the Region has cited is equally unavailing. In Inter-Community Hospital, 255 NLRB 468 (1981), the employer's rule stated that "When you are off-duty, visits to the hospital should be limited to friends or relatives who are patients or on official business with the hospital." The Board noted that this rule "does not prohibit access for all purposes." 255 NLRB at 474, but it based its finding partly on testimony by employees that they were permitted to remain in the hospital after work while waiting for rides or carpools. Id. There was no further discussion of the facts. Again, the Policy here is far more restrictive. Rather than allowing access for a broad, undefined, category of situations which could be characterized as "official business," the Policy defines hospital business as situations when an employee is actually working at the direction of his or her supervisor. (Exhibit 1.) Unlike in Inter-Community Hospital, employees are not allowed to mill around waiting for their rides or for any other similar convenience while off-duty. Moreover, in Inter-Community Hospital, the Board also noted that, in each incident cited by the General Counsel, the employer's action could have been based on either the off-duty access policy or a no solicitation policy that was overbroad. Inter-Community Hospital, 255 NLRB at 474-75. There is no allegation in this complaint regarding a no solicitation policy, nor is there any evidence that the discipline imposed on Torres or the other employees was based on such a policy.

**D. The Policy Was Enacted And Has Been Enforced For Legitimate Business Purposes.**

The Hospital has at least four distinct legitimate business reasons for enforcing the Policy. First, the Policy was implemented and has been enforced in order to reduce claims for wages or overtime based on “off-the-clock work” performed by employees staying at, or coming onto, the facility outside their scheduled work hours. (Herberger Affidavit ¶¶ 6-7.) This is accomplished by barring access to employees outside of their scheduled work hours except for performing their own job duties “as specifically directed by management.” (Herberger Affidavit ¶ 9 and Exhibit 1.) Second, the Policy serves the bona fide business purpose of reducing workers’ compensation liability. (*Id.*) Third, the Policy addresses the ever-growing threat of workplace violence and terrorism. Limiting access to the Hospital is an essential tool in minimizing the risk of violence toward employees and visitors alike. Health care facilities have been shown to be at great risk for workplace violence, including terrorism.<sup>8</sup> In fact, in one of the most horrific recent incidents of workplace violence, an off-duty Army psychiatrist at Fort Hood accessed his workplace, wearing his work uniform. He worked at the Soldier Readiness

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<sup>8</sup> In its Guidelines for Preventing Workplace Violence for Health Care & Social Service Workers, the Occupational Safety and Health Administration (“OSHA”) explains that “workplace violence” means “violent acts (including physical assaults) directed towards persons at work or on duty,” including “terrorism.” Further, that “[f]or many years, health care and social service workers have faced a significant risk of job-related violence.”

<http://www.osha.gov/Publications/OSHA3148/osha3148.html#text4> The Bureau of Labor Statistics estimates that, on average, 48 percent of all non-fatal injuries from occupational assaults and violent acts occurred in healthcare and social services. Most of these occurred in hospitals, nursing and personal care facilities, and residential care services. See, “Workplace Violence in Healthcare,”

[https://www.aaoan.org/component/option.com\\_docman/Itemid.0/task.doc\\_view/gid.290/](https://www.aaoan.org/component/option.com_docman/Itemid.0/task.doc_view/gid.290/) Researchers have also found that workplace assaults in health care settings are four times more common than in other industries. “Hospital shootings rare, violence not.”

<http://workplaceviolencenews.com/2010/12/15/hospital-shootings-rare-violence-not/> For the Board’s convenience, the Hospital is lodging copies of each of the articles cited in this motion.

Center, where personnel receive routine medical treatment immediately prior to and on return from deployment. He killed 13 people and wounded 29 more. See, Fort Hood shooting, [http://en.wikipedia.org/wiki/Fort\\_Hood\\_shooting](http://en.wikipedia.org/wiki/Fort_Hood_shooting).

Federal law requires employers to provide a workplace that is “free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees.” See, Occupational Safety and Health Act of 1970, 29 USC § 654 (a) (1). Under this provision, OSHA will cite employers “if there is a recognized hazard of workplace violence in their establishment and they do nothing to prevent or abate it.” Guidelines for Preventing Workplace Violence for Health Care & Social Service Workers, p. 3.

Tight controls on who comes in and out of the building are essential to addressing the real danger of workplace violence. Thus, OSHA’s guidelines for preventing workplace violence in the health care industry recommend that health care facilities “control access to facilities other than waiting rooms.” Guidelines for Preventing Workplace Violence for Health Care & Social Service Workers, p. 16 (emphasis added). Likewise, in its alert on “Preventing Violence in the Health Care Setting,” the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) explains that “controlling access to the facility is imperative.” (Issue 45, June 3, 2010) (Emphasis added.)

Fourth, the Policy helps to protect federally mandated patient privacy rights. Under the federal Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), the Hospital is required to develop and implement policies and procedures to reasonably limit access to uses and disclosures of protected health information. 45 CFR §§ 164.502(b), 164.514(d). The Hospital’s HIPAA policies explain that it “will make reasonable efforts to limit access” by persons authorized to receive confidential patient information to “only” the categories of information

they are authorized to have. (Herberger Affidavit ¶12 and Exhibit 5.) Unrestricted and unsupervised access by off-duty employees to the Hospital's facilities would severely hamper the Hospital's ability to control access to confidential patient information. (Herberger Affidavit ¶ 12.)

**E. The Board Has Upheld This Very Policy Twice Before and Those Rulings Should Govern.**

**1. Tenet successfully defended the Policy in two separate cases.**

This is not the first time Region 21 has challenged the Policy based on its flawed interpretation of Tri-County. In Garfield Medical Center v. NLRB, 2002 WL 31402769, Region 21 alleged that Garfield Medical Center, a Tenet facility, violated Section 8(a)(1) of the Act by “promulgating, enforcing and maintaining an overly broad rule denying off-duty employees access to the interior of [the Hospital] or any work area outside.” Id., at p. 1. The policy was the same that is at issue here. (Compare Garfield, at p. 12, with Exhibit 1.) As here, Region 21 contended that the policy was “overbroad on its face.” Administrative Law Judge Lana Parke flatly rejected the claim that Tenet's off-duty access policy was overbroad:

Respondent's access rule specifically permits off-duty employees access to outside nonworking areas of the hospital, and its prohibition is within the guidelines of Tri-County. The rules are extant in employee handbooks and have been posted on Respondent's bulletin boards and have thus been clearly disseminated. The rules apply to all off-duty employees except those visiting a patient, receiving medical treatment, or conducting hospital-related business and are thus not protected-activity exclusive.

Garfield, at p. 13 (emphasis added).

The same conclusion is mandated here. The Policy does not bar employees from outside nonworking areas of the Hospital and it has been clearly disseminated. Moreover, it does not

just apply to employees seeking to engage in protected union activity, i.e., it is “not protected-activity exclusive.” The Hospital is not aware of any legal developments since 2002 which would make Region 21’s analysis more compelling today than it was nine years ago.

Similarly, in San Ramon Regional Medical Center, Inc., 2003 WL 22763700, Region 32 alleged that the Tenet off-duty access policy was “overbroad as it bars off-duty employees from the facility, thereby prohibiting employees from communicating with one another regarding matters protected by §7.” Id., at p. 2. ALJ James Kennedy disagreed. “Treating Respondent’s no-access rule in the abstract, as one must when determining whether a rule on its face is lawful or unlawful,” he found that it “me[t] the requirements of Tri-County” and was lawful on its face:

Respondent's rule meets the test. It governs only the hospital's interior and interior working areas; has been widely and clearly disseminated, for it is set forth in the employee handbook which is routinely given to all employees; and is not limited to those off-duty employees who wish to engage in union activity; nor does it bar off-duty employees access to areas outside the building(s) such as parking lots, planted areas, walkways and the like. Indeed, it specifically permits such access. Moreover, the limited exceptions allowed by the rule “visiting a patient, receiving medical treatment, or conducting hospital-related business” are the types of exceptions which the Board has permitted and which do not render it unlawful through an uneven-handedness theory.

San Ramon, at pp. 2-3 (emphasis added).

Judge Kennedy also rejected Region 32’s contention that Tri-County had been superseded in cases where there are “non-work areas” inside the employer’s facility, such as a lunch room. Region 32 had cited Hudson Oxygen Therapy Sales Company, 264 NLRB 61 (1982), in support of this proposition. Judge Kennedy found Hudson “easily distinguishable”:

General Counsel relies on what in my opinion is an inconsequential portion of the facts there. Indeed, the rule itself barred access to the lunchroom and the

administrative law judge, accordingly, noted it as a fact. Even so, that portion of the rule had nothing to do with the rule's unlawfulness. The rule had been discriminatory from the outset, having been promulgated as a response to union organizing; moreover, it also barred off-duty employees from the grounds as well as the interior of the plant. Not only was it unlawful on discrimination grounds, being promulgated as an antiunion tactic, it never met the Tri-County test in the first place. The judge's reference to the lunchroom in Hudson is only a non-dispositive, somewhat tangential, fact having no bearing on the rule of law to be applied either there or in subsequent cases such as this.

San Ramon, at p. 3.

In the present case, Judge Kennedy's analysis is squarely on point. He correctly focused on the logical meaning of the third prong of the Tri-County rule: anti-union discrimination. Here, as in Garfield and San Ramon, there is no evidence that the Policy was enacted as an anti-union tactic. As those decisions make clear, the two limited humanitarian exceptions to the off-duty access policy do not render it invalid.

## **2. The General Counsel is Collaterally Estopped by the Tenet cases from Relitigating the Validity of the Policy.**

The Board decisions in Garfield Medical Center and San Ramon Regional Medical Center are not only instructive; they are binding on the General Counsel under the equitable doctrine of collateral estoppel. "The doctrine of collateral estoppel dictates that once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case."

N.A.A.C.P., Detroit Branch v. Detroit Police Officers Association, 821 F.2d 328, 330 (6th Cir. 1987). For collateral estoppel to apply, four elements must be present: "(1) the issue sought to be precluded must be the same as that involved in the prior litigation, (2) the issue must have been actually litigated, (3) the determination of the issue must have been essential to the final

judgment, and (4) the party against whom estoppel is invoked must be fully represented in the prior action.” La Preferida, Inc. v. Cerveceria Modelo, S.A. de C.V., 914 F.2d 900, 906 (7th Cir.1990).

Administrative agency decisions will be given preclusive effect under the collateral estoppel doctrine if “(1) the original action was properly before the agency, (2) the same disputed issues of fact are before the court as were before the agency, (3) the agency acted in a judicial capacity, and (4) the parties had an adequate opportunity to litigate the issue before the agency.” Frye v. United Steelworkers of America, 767 F.2d 1216, 1219 (7th Cir. 1985). See also Astoria Federal Savings & Loan Association v. Solimino, 501 U.S. 104, 107 (1991) (“We have long favored application of the common-law doctrines of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of administrative bodies that have attained finality.”).

Collateral estoppel applies in this case. Twice in the last decade the General Counsel challenged the Tenet off-duty access policy as overbroad. Full evidentiary hearings were held and an ALJ made final findings of fact and law. Because no exceptions were filed in either case, the decisions of the ALJs became the decisions of this Board. 29 CFR §101.12 (b). In such circumstances, the ALJ’s decision is a final order and may be accorded collateral estoppel effect. See Paramount Transp. Systems v. Chauffeurs Local 150, 436 F.2d 1064 (9th Cir. 1971) (Giving collateral estoppel effect to a determination by a NLRB trial examiner that an unfair labor practice had occurred).

Region 21 yet again improperly challenges the same Policy on precisely the same grounds upon which it relied before, no doubt hoping for a different result. However, neither the Policy nor the applicable law has changed. Continuing to relitigate the exact same issue in hopes

of finding a sympathetic Administrative Law Judge is precisely the kind of conduct the collateral estoppel doctrine was designed to prevent. See Parklane Hosiery Company v. Shore, 439 U.S. 322 (1979) (collateral estoppel doctrine serves “dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation.”) See also Solimino, 501 U.S. at 107 (“a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise.”)

#### IV. CONCLUSION

Based on the foregoing, the Hospital respectfully submits that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law on each issue raised in the Consolidated Amended Complaint. Pursuant to Rule 102.24(b), the Hospital requests that the Board issue a notice to show cause why its motion should not be granted and that the hearing on this matter be postponed.

DATED: January 31, 2011

BATE, PETERSON, DEACON, ZINN & YOUNG LLP

By: \_\_\_\_\_



Lester F. Aponte

Attorneys for Respondent  
USC UNIVERSITY HOSPITAL

**PROOF OF SERVICE**

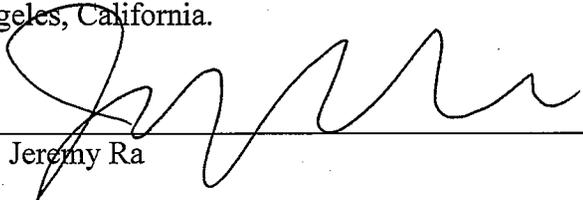
I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 888 S. Figueroa Street, 15th Floor, Los Angeles, California 90017.

On January 31, 2011, I caused to be served the foregoing documents described as MOTION BY RESPONDENT USC UNIVERSITY HOSPITAL FOR SUMMARY JUDGMENT on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed per the service list below.

By MAIL as follows: I am "readily familiar" with Bate, Peterson, Deacon, Zinn & Young LLP's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of party served, service shall be presumed invalid if postal cancellation date or postage meter is more than one (1) day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the state of California that the above is true and correct.

Executed on January 31, 2011, at Los Angeles, California.

  
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