

**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

**REPLY MEMORANDUM IN SUPPORT OF MOTION BY RESPONDENT USC  
UNIVERSITY HOSPITAL FOR SUMMARY JUDGMENT**

BATE, PETERSON, DEACON, ZINN & YOUNG LLP  
LINDA VAN WINKLE DEACON (State Bar No. 60133)  
HARRY A. ZINN (State Bar No. 116397)  
LESTER F. APONTE (State Bar No. 143692)  
888 South Figueroa Street, Fifteenth Floor  
Los Angeles, California 90017  
Telephone: (213) 362-1860  
Facsimile: (213) 362-1861

Attorneys for Respondent  
USC UNIVERSITY HOSPITAL

Respondent USC University Hospital (hereinafter, the “Hospital”) files this memorandum in reply to Region 21’s opposition to its motion for summary judgment, dated February 4, 2011 (the “Opposition.”)

## I. INTRODUCTION

Region 21’s vitriolic and misleading opposition demonstrates why the expenditure of the parties’ and the agency’s resources on a full evidentiary hearing is not warranted. The Region attempts to shift gears on its until-now-consistent position that this complaint is a facial challenge to the legality of the Hospital’s Off-Duty Access Policy (the “Policy.”) But the nature of that challenge is quite clear from the allegations in the complaint, which emphasize respondent’s adoption and maintenance of the Policy. (See, Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, ¶¶ 10, 11, 14 and 15.) The Opposition, in fact, confirms that there is only one issue the Board needs to resolve:

These cases present the issue of whether an access rule, maintained and enforced by Respondent-USC University Hospital [ . . . ] and its food service provider, Respondent-Sodexo America [ . . . ] is unlawful because it does not prohibit access for “any purpose” as required by the third prong of Tri-County Medical Center, 222 NLRB 1089 (1976).

(Opposition, at p. 2.)

The other issue the Region asserts is present, i.e., “the legality of the *resultant* discipline of four workers who disobeyed the rule” (Opposition, at p. 2), disappears entirely if the rule is legal. Thus, the Region’s case, as the Region has pled it hinges only on the facial validity of the Off-Duty Access Policy.

The Region does not dispute that its challenge to the validity of the Policy based on the limited exceptions within the Policy is the same challenge and the same argument it litigated in

Garfield Medical Center v. NLRB, 2002 WL 31402769; and Region 32 litigated in San Ramon Regional Medical Center, Inc., 2003 WL 22763700, both without success. The Region does not even attempt to articulate why the ALJ's decisions in those cases were wrong or what has changed since 2003 that would warrant a different result. Instead, the Region maintains that the issue cannot be "fully litigated" and resolved unless it can continue to bring the same challenge again and again until an ALJ agrees with its position. Region 21's seemingly endless forum shopping shows a blatant disregard for the limited resources of this agency and the need for certainty in labor relations.

The Region justifies its opposition on the grounds that the Hospital has created factual disputes by 1) setting forth the business reasons why the Policy exists; and 2) explaining why the Region's insistence that the Hospital must adopt a blanket no access rule or abandon any attempt to control access creates a direct conflict with other federally mandated obligations the Hospital must meet. This position is frivolous. First as the Region well knows, why the Hospital enacted the Policy is NOT an element of the showing an employer must make under Tri-County, unless the off-duty access rule "denies off-duty employees entry to parking lots, gates, and other outside nonworking areas." Tri-County Medical Center, 222 NLRB 1089 (1976). That is not the case here. Second, the Region did not allege that the policy was adopted for an improper purpose. Therefore, the Region has no basis to litigate the reasons for the policy since it did not challenge those reasons in the Complaint. Indeed, the Region could not have done so since it affirmatively found that there was no such improper purpose. In any event, the Region can offer no evidence whatsoever to contradict the Hospital's asserted legal and business reasons for maintaining the Policy and has not attempted to do so.

As the General Counsel has found in analyzing the authorities on which the Region relies, the controlling factor under the third prong of Tri-County is whether an off-duty access policy was enacted or enforced for discriminatory reasons. The Region has already found there is no such evidence in this case. That finding was upheld on appeal. (Aponte Affidavit Exhibits 10, 11 and 13.) The Region, consistent with its findings, did not plead that the policy was enacted or enforced for discriminatory reasons. Since it is not raised in this complaint, it is not an issue in this case. The Region cannot defeat summary judgment on this Complaint by asserting unsubstantiated issues of fact pertaining to some other complaint that it did not bring and that it affirmatively found it had no basis to bring.

In contradiction to its own findings, the Region now asserts that there is “unspecified evidence” that the Hospital has not consistently enforced the Policy. That “evidence” is not provided and that allegation is not the basis for this Complaint. Indeed, in dismissing part of the charge, Region 21 specifically stated “there was no evidence presented or revealed that the employers selectively enforced the access policy against the employees engaged in Union activities.” (Aponte Affidavit Exhibit 10.) It is true that a party opposing a motion for summary judgment is not required to rely on “affidavits or other documentary evidence.” Rule 102.24(b). However, where the Region examines the evidence, finds no evidence, dismisses the allegation, and makes no claim in the complaint of disparate or differential enforcement, it cannot defeat summary judgment by suddenly asserting that everything it said so far was untrue, and that unnamed, unknown accusations of unspecified differential enforcement that it did not plead must be considered. That is not reasoned argument, that is simply duplicity. If the Region chooses to rely on “evidence,” the rules of evidence obviously apply, and some showing of the evidence and its relevance to this complaint is required.

The Region then argues that an evidentiary hearing is necessary based on the denials in the Hospital's answer to the complaint. This is a misrepresentation of the pleadings. The Hospital did deny certain facts the Region may think are well established, such as its place of incorporation or the dates it has been in business. That is because those allegations were poorly pled and untrue as pled. None of those allegations are material to the issues in this motion, however, and "fully litigating" the employer's corporate status will shed no light whatsoever on the Policy in question.

Similarly, the Region argues that the Hospital has raised an issue of fact by setting forth the other reasons, aside from his violation of the Policy, why Michael Torres was suspended and later demoted. But as the moving papers explain and the opposition confirms, the real reasons why Torres was disciplined are immaterial for purposes of this motion. NUHW and the Region allege that he was disciplined for violating an "unlawful" policy. If the Policy is lawful, no further proceedings would be necessary. The Hospital simply meant to point out that, even if the policy were substantially found to be unlawful, the Hospital would still have issues to litigate.

## **II. ARGUMENT**

### **A. The Policy Is Clearly Valid Under the Board's Decision in Tri-County and Relevant Precedent.**

The Region admits that the Policy meets the requirements in Tri-County Medical Center, 222 NLRB 1089 (1976), in that it: "(1) limits access solely with respect to the interior of the plant and other working areas<sup>1</sup>; and (2) is clearly disseminated to all employees." Id., 222 NLRB at 1089.

---

<sup>1</sup> The Region appears to take issue with the Hospital's assertion that the cafeteria is not open to the public, citing some unspecified "evidence" to the contrary. The only evidence the Hospital is aware of is that the cafeteria is only open to on-duty Hospital employees, physician staff, and those who are visiting admitted patients. (Herberger Affidavit ¶ 11 and Exhibit 4.) The Region

The Region argues, however, that the Policy does not meet the third prong of the Tri-County test, that the policy not be applied “just to those employees engaging in union activity,” based on its tortured interpretation of that language. The Hospital more fully explained in its moving papers how the two cases the Region relies on, Baptist Memorial Hospital, 229 NLRB 45 (1977), and Inter-Community Hospital, 255 NLRB 468 (1981), are distinguishable on the facts and were not necessarily decided on the issue for which the Region cites them. In Baptist Memorial Hospital, the ruling was based on the employer’s Handbilling and Solicitation rules. The off-duty access rule was only discussed in a footnote. Unlike here, the policy prohibited access to outside areas. Moreover, the employer permitted access to employees for several purposes, “including picking up paychecks and visiting patients.” Id. In Inter-Community Hospital, 255 NLRB 468 (1981), the Board based its ruling on the exceptions the policy stated on its face, including a broad category of “official business with the hospital,” and also on testimony by employees that they were permitted to remain in the hospital after work while waiting for rides or carpools. Id. Moreover, the Board’s ruling in that case was based on both the off-duty access policy *and* or a no solicitation policy that the Board held was overbroad. Inter-Community Hospital, 255 NLRB at 474-75.

In an Advice Memorandum dated September 30, 1981, the General Counsel analyzed the Intercommunity Hospital decision quite differently from Region 21 and specifically rejected a mechanical interpretation of the third prong of Tri-County:

A literal reading of the third criterion of Tri-County Medical Center might suggest that the rule here is invalid, since the Employer's rule does not apply to off-duty employees seeking access to the bank for any purpose but, rather, specifically allows access to off-

---

concedes that Sodexo operates the cafeteria. (Opposition, at p. 4.) It is, therefore, a working area for Sodexo’s employees.

duty employees for personal banking purposes alone. However, it was concluded that *the focus of the third criterion of Tri-County Medical Center is on whether an employer is discriminating among employees based on union considerations when they returned to the facility during a non-working time.*

Perpetual American Savings & Loan, 108 LRRM 1400, 1981 WL 25914, \*2 (1981) (Emphasis added). As set forth in the moving papers, the Region's own findings confirm that is not the case here.

While relying on a footnote in Baptist Memorial Hospital and a ruling which was equally supported by the findings on an entirely different policy in Inter-Community Hospital, the Region dismisses the significance of Southdown Care Center, 308 NLRB 225, 232 (1992), a case where the ALJ's findings contradict its position, because "the Board, in its discussion, never raised or discussed the access rule." (Opposition, at p. 7.) The blatant double standard the Region is engaging in when deciding what cases it should follow is a further reason why it is necessary for the Board to intervene and rule on the validity of the Policy and the Region's extreme position that off-duty access must be an all-or-nothing proposition.

**B. 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.**

The Region argues, on the one hand, that issues of working off the clock, work-related injuries, workplace safety, and patient confidentiality require a full evidentiary hearing. It then concedes the validity of the Hospital's concerns with one single exception. It "disputes that off-duty employees are more likely to engage in acts of violence." (Opposition, at p. 9.) The Region misses the point. Although the Hospital is not aware of any serious incident of workplace violence that did *not* involve an off-duty employee, its argument is far simpler. An

employee who is on-duty is being supervised and his location is easily ascertainable. Off-duty employees, on the other hand, are unsupervised and could be anywhere in the facility. This is a matter of simple logic. It is no coincidence then that both the Occupational Safety & Health Administration (“OSHA”) and the Joint Commission on Accreditation of Healthcare Organizations have included “controlling access” among their recommendations for addressing the threat of workplace violence. See, OSHA Guidelines for Preventing Workplace Violence for Health Care & Social Service Workers, p. 16 (recommending that health care facilities “control access to facilities other than waiting rooms.”) See also, “Preventing Violence in the Health Care Setting,” Joint Commission on Accreditation of Healthcare Organizations (JCAHO) (Issue 45, June 3, 2010) (“controlling access to the facility is imperative.”)<sup>2</sup>

**C. It Is Not True That The Motion Or The Hospital’s Answer “Reveal Disputed Facts.”**

The Region argues that the Hospital’s motion creates an issue of fact because the Hospital has not “admitted, plain and simple, that it suspended and demoted Michael Torres because he violated the access rule.” (Opposition, at p. 10.) The Hospital has simply stated the truth: Torres’ violation of the Policy is not the *only* reason it disciplined Torres. But it is *a* reason that is independently sufficient to justify the discipline. More importantly, it is the *only* reason with which the complaint takes issue. Thus, a ruling that the Policy is valid on its face

---

<sup>2</sup> The Region objects to the Hospital’s “sources” because it has cited a Wikipedia article on the basic facts regarding the Fort Hood shootings. Unspecified “scholars from all professional disciplines,” the Region argues, “discount” Wikipedia’s accuracy. The facts surrounding the Fort Hood incident are, of course, a matter of common knowledge, and articles in the New York Times, Washington Post, Los Angeles Times, Time, Newsweek, etc. *ad infinitum* could also be cited. In any event, the Hospital has also cited federal regulations, OSHA guidelines, and the official publication of the Joint Commission on Accreditation of Healthcare Organizations. The Region does not dispute the validity of any of those sources.

disposes of the allegations regarding Torres as well and the Board does not need to decide any other issues.

The Region then argues that an evidentiary hearing is necessary because, in its answer, the Hospital “has denied commerce facts,” that NUHW and SEIU are labor organizations, and that specified individuals are “supervisors” within the meaning of the Act. (Opposition, at pp. 2, 10.) This is both a smokescreen and a misrepresentation of the pleadings. The Hospital denied certain allegations or asserted a lack of knowledge because the complaint is so poorly drafted. (See, Exhibits 17 and 18). Thus, for instance in Paragraph 2(a), the Region alleges that the Hospital is a Delaware corporation. That is not true. The Hospital is a California corporation. In Paragraph 2(b), the Region alleges a “representative period” from March 2009 to March 2010 in which the Hospital engaged in commerce. (Exhibit 17.) But the Hospital did not exist as a separate entity from Tenet Healthcare Corporation prior to April 1, 2009, a fact well known to the Region. The Hospital did *not* deny that SEIU and NUHW are labor organizations. It stated that it lacks sufficient knowledge to admit or deny that allegation. (Exhibits 17 and 18, ¶¶ 6, 7.) In Paragraph 8, the complaint alleges that four specified individuals are “supervisors” under the meaning of the Act. This is a conclusion of law and the Hospital is not required to admit it. None of the denials cited by the Region are material to the allegation that the Hospital has implemented an invalid off-duty access policy. As the Region’s own description of the issues demonstrates, that is the only material question this case presents.

**D. The Tenet Cases Should Guide the Board’s Analysis.**

The Region argues that Garfield Medical Center, 2002 WL 31402769 and San Ramon Regional Medical Center, 2003 WL 22763700 (the “Tenet cases”) are irrelevant because they “involved different respondents and different charging parties.” (Opposition, at p. 3.) In reality, the Garfield case was brought by Region 21 and the SEIU, two of the same parties challenging

the Policy now. In fact, the complaint in that case was brought by Jean C. Libby, the same attorney who signed the complaint in *this* case. Both Garfield and San Ramon involved the Policy as enforced by the entity that created it and first enforced it at the Hospital, i.e., Tenet.

Thus, far from irrelevant, the Tenet cases are the most relevant authority and they must control the Board's analysis. Moreover, by focusing on the logical, instead of the literal meaning of the third prong of the Tri-County rule, i.e., anti-union discrimination, Judges Kennedy and Parke ruled consistently with the General Counsel's own analysis of the issue in Perpetual American Savings & Loan, 108 LRRM 1400 (1981). If the Tri-County rule is to be applied in a logical fashion that is consistent with the reality of the 21<sup>st</sup> century workplace, the Board must follow their lead.

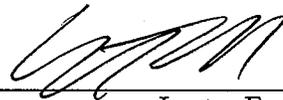
### III. CONCLUSION

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 the controlling issue in the Consolidated Amended Complaint: whether the Off-Duty Access Policy is legal under the third prong of Tri-County.

DATED: February 8, 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 February 8, 2011, I caused to be served the foregoing documents described as REPLY MEMORANDUM IN SUPPORT OF 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 OVERNIGHT COURIER SERVICE** as follows: I caused such envelope to be delivered by overnight courier service to the offices of the addressee(s). The envelope was deposited in or with a facility regularly maintained by the overnight courier service with delivery fees paid or provided for.

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

Executed on February 8, 2011, at Los Angeles, California.

  
Zelda Davis

Mark T. Bennett, Esq.  
Mark, Golia & Finch, LLP  
8620 Spectrum Center Boulevard, Suite 900  
San Diego, CA 92123

Antonio Orea  
National Union of Healthcare Workers  
8502 East Chapman Avenue, Suite 353  
Orange, CA 92869

Florice O. Hoffman, Esq.  
Law Offices of Florice Hoffman  
8502 East Chapman Avenue, #353  
Orange, CA 92869

Ms. Patricia Ortega  
2107 Commonwealth Ave., #D-369  
Alhambra, CA 91803

SEIU-United Healthcare Workers-West  
5480 Ferguson Drive  
Los Angeles, CA 90022

Bruce A. Harland, Attorney at Law  
Weinberg, Roger, & Rosenfeld  
1001 Marina Village Parkway, Suite 200  
Alameda, CA 94501