UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Region 21

SODEXO AMERICA LLC	
and	Case 21-CA-39086
PATRICIA ORTEGA, an Individual	
SODEXO AMERICA LLC; AND USC UNIVERSITY HOSPITAL	
and	Case 21-CA-39109
SERVICE WORKERS UNITED	
USC UNIVERSITY HOSPITAL	
and	Cases 21-CA-39328 21-CA-39403
NATIONAL UNION OF HEALTHCARE WORKERS	

SODEXO AMERICA, LLC'S
BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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STATUTES

Respondent Sodexo America, LLC timely submits its brief in the above-referenced matters.[1] This brief supplements the summary judgment motion Sodexo filed previously.

INTRODUCTION

In these consolidated proceedings, Counsel for the General Counsel ("General Counsel") alleges that Sodexo violated National Labor Relations Act § 8(a)(1), 29 U.S.C. § 158(a)(1). The sole basis for the allegation is that at some unspecified time after May 6, 2009, Sodexo orally announced to unidentified employees an off-duty access policy ("Policy") that was promulgated by Respondent USC University Hospital ("Hospital"). (GC. EX. 1(g); GC. EX. 2 AT ¶¶ 5, 6, AND 9). The Hospital requires that both Sodexo and Sodexo employees comply with the Policy. (T. 48, 52; HOSP. EX. 2). The record does not describe the circumstances under which Sodexo made the announcement.

The charge against Sodexo in Case No. 21-CA-39086 was filed by an individual named Patricia Ortega. (GC. EX. 1(a)). Ortega's relationship to Sodexo is unknown on the present record. Ortega did not testify at the hearing conducted on February 28, 2011.

The charge and amended charge against Sodexo in Case No. 21-CA-39109 was filed by Service Workers United ("Union"). (GC. EX. 1(d) AND 1(k)). The Regional Director dismissed portions of the Union's charge. (GC. EX. 1(am) AT EXS. 10, 11, AND 13). The Union requested that its charge be withdrawn. (GC. EX. 1(ay)). No Union representative appeared at the hearing.

The General Counsel alleges that the Policy is unlawful on its face under the National Labor Relations Board's ("Board") decision in *Tri-County Medical Center*, 222 NLRB 1089 (1976), and its progeny. Under the General Counsel's reading of Tri-County,

[1] "T." refers to the hearing transcript. "GC. EX." refers to the General Counsel's exhibit. "HOSP. EX." refers to the exhibits introduced by Respondent USC University Hospital ("Hospital").

in order to pass muster under section 8(a)(1), the Policy must prohibit off-duty access to the interior of the Hospital for any purpose. (T. 19-22).

In *Tenet HealthSystem Hosp., Inc.,* 2002 WL 31402769 (Oct. 16, 2002) (Case No. 21-CA-34307-1), a Region 21 case, the General Counsel lost this argument with respect to a virtually identical off-duty access policy. Indeed, this administrative law judge acknowledged in an earlier Region 21 case that the out-of-context language from *Tri-County* cited by the General Counsel is not to be applied literally. For example, off-duty employees can gain access to an employer's facility "to pick up paychecks, resolve benefit issues and like without tainting an otherwise valid no-access rule . . . ." *Citrus Valley Medical Center, Inc.*, 2008 WL 4657784, at 8-9 (Oct. 17, 2008) (Case No. 21-CA-37852) (Kocol, J.); see also *Perpetual Am. Savings & Loan*, 108 LRRM 1400 (1981) (third *Tri-County* factor focuses on whether the employer is discriminating against employees based upon union considerations).

Sodexo agrees with the arguments raised by the Hospital in its brief and does not intend to repeat them here. Sodexo is filing a separate brief to point out the following facts that pertain to the case against Sodexo.

ARGUMENT

In these cases, it is conceded that Sodexo is a subcontractor hired by the Hospital and that Sodexo operates the Hospital's cafeteria. It is also conceded that the cafeteria is located inside the Hospital's facility. (GC. EX. 2 AT ¶ 5). It is undisputed that Sodexo's employees work in the cafeteria. (T. 52). The Cafeteria is not open to the public. (T. 44-45; HOSP. EX. 2). Sodexo employees also deliver food to patients throughout the Hospital. (T. 52).

In these cases, there is no issue of selective enforcement or that the Policy was not disseminated to employees. (T. 19-20, 74-75; GC. EX. 2 AT ¶ 8). Further, there is no suggestion in the record that Sodexo's off-duty employees have returned to the Hospital

for any purpose. In particular, there is no suggestion in the record that Sodexo's off-duty employees have returned to the Hospital facility to pick up their paychecks, although, under *Citrus Valley, supra*, such a practice would not taint an otherwise valid policy. There is no evidence that Sodexo ever enforced the Policy against any employee.[2]

At the hearing in these cases, the General Counsel conceded that the Policy could lawfully prohibit off-duty employees from returning to working areas. "Ms. Garfield: I would say that they – off-duty employees should not be allowed access to the interior of the hospital's working areas." (T. 21 (emphasis added)). The General Counsel argued that the cafeteria, however, is not a working area. (T. 21). Again, the General Counsel has already lost the argument that *Tri-County* does not apply to interior cafeterias and break rooms. *Citrus Valley Medical Center, Inc.*, 2008 WL 4657784, at 8 (*Tri-County* applies to an interior cafeteria); *San Ramon Regional Med. Center*, 2003 WL 22763700, at 2-3 (Nov. 12, 2003) (Case No. 32-CA-19917) (same). Moreover, the cafeteria is a working area for Sodexo employees. (T. 52). Given General Counsel's concession the Policy can apply to interior working areas, she has necessarily conceded that Sodexo did not violate section 8(a)(1) when it announced the Policy.

More importantly, there is no evidence that Sodexo announced the Policy in connection with employees exercising their rights under NLRA § 7, 29 U.S.C. § 157. In order to establish a prima facie violation of section 8(a)(1), the General Counsel must prove that the employer's conduct interfered with Section 7 rights. *Holling Press, Inc.*, 343 NLRB 301 (2004). Absent such proof, the Consolidated Complaint here must be dismissed.

In *Townsend Culinary, Inc.,* 1998 WL 1985307 (Nov. 20, 1998) (Case No. 5-CA-26185) (Kocol, J.), this administrative law judge dismissed the allegation that the

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[2] The alleged discriminatees in these cases are Hospital employees. (T. 20; GC. EX. 1 AT ¶¶ 12, 13, AND 14).

employer violated section 8(a)(1) under *Tri-County.* In that case, after a union election, certain employees sat on a bench on the employer's property. The employees were asked to leave. When they refuse to do so, the employer called the police. The General Counsel, relying upon *Tri-County*, argued that the employer violated section 8(a)(1). As here, the General Counsel did not allege the employer's policy had been disparately enforced. The charge was dismissed based upon the following reasoning:

> While I recognize that off-duty employees may not generally be excluded from the outside areas of an employer's facility, in order to establish a violation of the Act there must be an impact on Section 7 rights. Here, the General Counsel does not make a case that [the employer] disparately enforced any rule, nor has he shown that the employees were engaged in union activity at the time they were told to leave the [employer's] property. The General Counsel, in his brief, does not articulate an argument to support this allegation in the complaint.

Townsend Culinary, 1998 WL 1985307, at 17 (citations omitted).

The same is true here. There is no evidence that employees were engaged in the exercise of Section 7 rights when Sodexo announced the Policy. There is no evidence that Sodexo enforced the Policy with respect to employees who were engaged in exercising Section 7 rights. Sodexo did not violate section 8(a)(1).

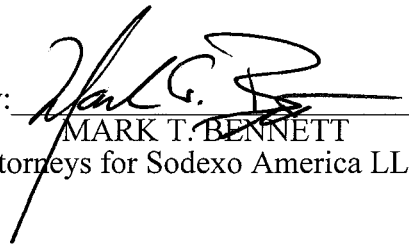
CONCLUSION

Based upon the foregoing and the arguments raised by the Hospital the Consolidated Complaint must be dismissed in its entirety.

DATED: March 28, 2011

Respectfully submitted,

MARKS, GOLIA & FINCH, LLP

By: 
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21-CA-39403

NATIONAL UNION OF HEALTHCARE
WORKERS

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Executed on March 28, 2011.

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