

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

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

**GENERAL COUNSEL'S OPPOSITION TO RESPONDENTS' MOTIONS
FOR RECONSIDERATION OF BOARD'S DECISION**

I. INTRODUCTION

On July 3, 2012, the National Labor Relations Board, hereafter Board, issued its decision in the captioned-matter.¹ In relevant part, the Board reversed the interlocutory decision of the Administrative Law Judge, hereafter ALJ, and found that to the extent that the challenged access rule provides Respondents² with broad discretion to

¹ Sodexo America LLC, et. al., 358 NLRB No. 79.

² Where applicable, Respondent-Hospital and Respondent-Sodexo are referred to collectively as "Respondents."

set the terms of off-duty employee access, it violated Section 8(a)(1) of the National Labor Relations Act.

The issue addressed by the Board was the legality of an off-duty employee access rule maintained and enforced by Respondent-USC University Hospital ("Respondent-Hospital"), and its food service provider, Respondent-Sodexo America ("Respondent-Sodexo").³

Respondents' off-duty employee access rule ("the Rule") states:⁴

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. . . Hospital-related business is defined as the pursuit of the employee's normal duties or duties as specifically directed by management. (GCX 5).

Citing Tri-County Medical Center, 222 NLRB 1089 (1976), and its more recent decision in Saint John's Health Center, 357 NLRB No. 170 (Dec. 30, 2011), the Board concluded that the third exception to the Rule, whereby off-duty workers are allowed access "to conduct hospital-related business," rendered the Rule unlawful because it "does not uniformly prohibit access to off-duty employees seeking entry to the property for any purpose." (Citation omitted). The Board decisively rejected the ALJ's explanation that the third exception was not, in fact, an exception at all, but merely a clarification of the circumstances under which an off-duty employee may re-enter the

³ The issue of the legality of resultant discipline of four workers who disobeyed the Rule and engaged in peaceful Section 7 activity was remanded to the ALJ.

⁴ The Rule was initially implemented in 1991 by a predecessor employer. (GCX 3). The predecessor's rationale for the Rule is not known or part of the record. Respondent-Hospital purchased the hospital on April 1, 2009, and has continued to maintain and enforce the Rule. (TR 30:1-13). In turn, Respondent-Sodexo announced the Rule to its employees and displayed the Rule on a bulletin board during the same applicable period. (GCX 2).

Hospital's facilities, as specifically directed by management, to conduct hospital-related business. The Board stated that:

[T]his interpretation renders the exception meaningless; employees who are at the facility to work are not off-duty and would not be subject to an off-duty access policy. And, to the extent that the rule is ambiguous, we construe it against the drafter for present purposes, the intent behind the rule is irrelevant. See Lafayette Park Hotel, 326 NLRB 824, 828 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999).

II. MOTIONS FOR RECONSIDERATION OF BOARD'S DECISION

Following the Board's decision, Respondent-Hospital and Respondent-Sodexo filed motions for reconsideration; Respondent-Sodexo filed a notice of joinder. Through their motions and insistence that the Board got it wrong, Respondents seek an unabashed second bite of the apple, which must be denied.⁵ The crux of Respondent-Hospital's motion is that the Board selectively interpreted the Rule and ignored the meaning of the word "duty" (and by extension its plural form) in the context of the American workplace. Other than its reiteration of arguments raised previously in its answering brief, the crux of Respondent-Sodexo's motion is that the Board's order is inconsistent with its decision and that the notice to employees is overbroad.⁶

⁵ Both motions for reconsideration note, in passing, that Respondents do not concede that the Board is properly constituted as two of its current members (Members Block and Griffin) joined the Board by recess appointment, and were not appointed in the manner required by the Constitution of the United States of America. Neither Respondent submitted a basis for said claim or argument in support thereof. See Respondent-Hospital motion at page 1, and Respondent-Sodexo motion at page 2. Any argument raised only in a footnote or perfunctory fashion, is waived. Harron v. Town of Franklin, 660 F.3d 531, 535 n. 2 (1st Cir. 2011). Respondents' constitutional challenge does not explain the basis for its bare conclusion. Thus, Respondents' bare assertion is insufficient to preserve their claims. Greenwood v. FAA, 28 F.3d 971, 977 (9th Cir. 1994). Accordingly, such claims should be rejected.

⁶ Respondent-Hospital agrees and argues similarly.

III. ARGUMENT IN SUPPORT OF GC'S OPPOSITION TO RESPONDENTS' MOTIONS FOR RECONSIDERATION

Respondents' motions for reconsideration should be denied because they lack factual or legal basis, and address nothing that was not previously considered by the Board in its decision.

A. Respondent-Hospital's Argument that the Inclusion of the Word "Duties" Renders the Rule Lawful Should be Denied

Respondent-Hospital faults the Board for failing to take into account the Rule's definitional qualifiers for "hospital related business." However, the Board considered the record in its entirety, including the Rule's title or subject: "Off-Duty Access." And, its purpose: "This policy outlines the Hospital's guidelines regarding access to the Hospital's property by off-duty employees." (GCX 5) (Emphasis supplied). Nonetheless, Respondent-Hospital' moves for reconsideration, and argues that inclusion of the word "duties" in its Rule establishes the legality of its exception, which permits off-duty employees access for "hospital-related business;" and, that the Board erred by purportedly interchanging the word "activity" with the word "duties" in its analysis.

Respondent-Hospital's argument is flawed: the Board neither ignored the word "duties" nor substituted the word "activity." Rather, the Board noted that "[O]n its face, the Rule prohibits employee access for purposes of Sec. 7 activity while permitting access for any "activity" 'specifically directed by management.' " Clearly, duties are activities directed by management—to maintain otherwise is disingenuous.

More important, as noted by the Board in its decision, *if* the Rule's third exemption truly relates to only on-duty employees, it simply is unnecessary because "[E]mployees who are at the facility to work are not off-duty and would not be subject to

an off-duty access policy." Respondent-Hospital asserts that such is not the case at its facility, and provides us with a "walking tour" for its employees, which only serves to demonstrate the speciousness of its argument and strengthen the Board's decision. Off-duty employee access rules were never meant to apply to every employee about to come to, or leave from work. Respondent-Hospital's contention that its Rule applies to every threshold-crosser as she makes her way to the time clock is preposterous! On-duty employees have permission to be there pursuant to the work relationship, while off-duty employees in this case were not accorded such permission unless specifically granted access by the employer. As such, this portion of the Rule does not uniformly prohibit access by off-duty employees to the Hospital for any purpose and is therefore unlawful under Tri-County

Lastly, to the arguable extent that the word "duties" in the Rule may have created some ambiguity or confusion, it must be construed against the drafter, particularly if such ambiguities have the effect of infringing upon statutory rights. See Lafayette Park Hotel, 326 NLRB 824, 828 (1998), enfd. mem. 203 F.3d 52 (D.C. Cir. 1999).

B. Lutheran Heritage Village-Livonia Should Not Undermine Board's Findings in the Instant Case

In their motions for reconsideration, citing Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004), Respondents contend that the Board erred by reading the Rule unreasonably and viewing certain phrases in isolation; however, Respondents' contention is misplaced because the meaning of Rule's language, at best, falls short of being clear or precise, and gives Respondent significant discretion in determining which off-duty employees may enter its premises and when they may do so. As such, this argument for reconsideration is without merit and should be denied. Moreover, in

Lutheran Heritage, then members Liebman and Walsh wrote a persuasive dissent in which they stated in relevant part:

In Lafayette Park Hotel [citation omitted], the Board recognized that determining the lawfulness of an employer's work rules requires balancing competing interests. The Board thus relied upon the Supreme Court's view, as stated in Republic Aviation v. NLRB, 324 U.S. 793, 797-798 (1945), that the inquiry involves "working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments." [T]he majority loses sight of this fundamental precept. Ignoring the employees' side of the balance, the majority concludes that the rules challenged here are lawful solely because it finds that they are clearly intended to maintain order in the workplace and avoid employer liability. The majority's incomplete analysis belies the objective nature of the appropriate inquiry: "whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights." Our colleagues properly acknowledge that even if a "rule does not explicitly restrict activity protected by Section 7," it will still violate Section 8(a)(1) if—among other, alternative possibilities—"employees would reasonably construe the language to prohibit Section 7 activity," On this point, of course, the established test does not require the *only* reasonable interpretation of the rule is that it prohibits Section 7 activity. To the extent that the majority implies otherwise, it errs. Such an approach would permit Section 7 rights to be chilled, as long as an employer's rule could be reasonably read as lawful. This is not how the Board applies Section 8(a)(1). See, e.g., Double D Construction Group, Inc., 339 NLRB 303, 304 (2003) ("The test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction").

The majority asserts that it has considered the employees' side of the balance, in that it has found that the purpose behind the Respondent's rules—to maintain order and protect itself from liability—is so clear that it will be apparent to employees and thus could not reasonably be misunderstood as interfering with Section 7 activity. Although the Respondent's assuredly pure motive in creating such rules may be crystal clear to our colleagues, it may not be as obvious to the Respondent's employees. . . . [W]e find that the challenged rules are facially ambiguous. The Board construes such ambiguity against the promulgator. Norris/O'Bannon, 307 NLRB 1236, 1245 (1992), quoting Pacheco, 237 NLRB 299 fn. 8 (1978). The absence of evidence that the Respondent has actually enforced the rules against employees for engaging in protected activity does not, contrary to our colleagues' view, insulate them from the proscriptions of the Act. [T]he mere presence of overly broad rules

reasonably tends to discourage employees from engaging in protected activity that they could reasonably believe to be encompassed by the rules, regardless of the Respondent's motives or enforcement history. NLRB v. Beverage-Air Co. 402 F.2d 411, 419 (4th Cir. 1968).

C. The Board's Order and Notice is Not Inconsistent or Overbroad

Respondents' arguments attacking the Board's Order and Notice are largely without merit, and may be left to the Board's compliance procedures, if necessary. Further, in the instant case where the Board has ordered a remand to the ALJ for purposes of making findings of fact and conclusions of law pertaining to the issue of employee discipline or enforcement of the Rule, Respondents' arguments are baseless and premature.

Respondents contend the Notice is overbroad because after the boilerplate restatement of Section 7 rights, it reads, "We will not do anything that interferes with these rights." However, Respondents neglect to mention the sequential phrase "More particularly:" preceding the Notice's cease and desist provisions, which apply only to this case and Respondents' violations. Such cease and desist provisions serve to inform employees of Respondents' obligation to remedy specific misconduct. In the Notice's specific cease and desists provisions it states: "We will not in any like or related manner. . . ." This is not overly broad remedial language, and the Respondents' motions must be denied.

Finally, the Board should deny the Respondents' claim that the term "facilities" in the Notice is overbroad. For the Board's remedy to have any meaning it must reach Respondents' employees throughout their facilities and premises including, but not limited to, satellite buildings, multiple cafeterias or eating places; that is,

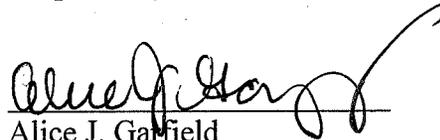
wherever Respondents' employees, who have been apprised of, or affected by the Rule, work.

IV. CONCLUSION

Respondents' motions for reconsideration are without basis in fact or law. Therefore, Counsel for the Acting General counsel requests the Board to deny them summarily.

Dated: August 2, 2012

Respectfully submitted,



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STATEMENT OF SERVICE

I hereby certify that a copy of Acting General Counsel's Opposition to Respondents' Motions for Reconsideration were submitted by e-filing to the NLRB's Office of the Executive Secretary on August 2, 2012. The following parties were served with a copy of the same document by electronic mail:

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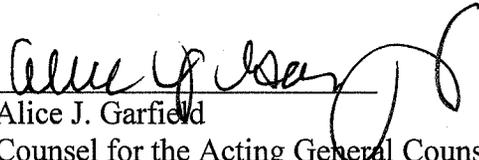
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Dated at Los Angeles, California
this 2nd day of August 2012



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