

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: August 9, 2000

TO : Rochelle Kentov, Regional Director
Region 12

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: St. Joseph's Hospital 512-5012-5001
Case 12-CA-20380 512-5012-6787-8300
512-5012-8380-5000

This case was submitted for advice as to whether the Employer violated Section 8(a)(1) and (3) of the Act by disciplining an employee for displaying a pro-Union computer screen saver message in a patient care area.

The facts are fully set forth in the Region's Request for Advice. In brief, this case involves a September 1999 warning given by St. Joseph's Hospital (the Employer) to registered nurse Patricia Elalem for displaying a computer screen saver message that stated "Look for the U," a reference to United Food and Commercial Workers Union, Local 1625 (the Union), which was attempting to organize the Employer's employees. The warning was ostensibly based on the Employer's no-solicitation policy, which prohibits solicitation during employees' working time and in patient care areas; the computer in question was in the corridor of the intensive care unit immediately adjacent to patient rooms. Since ICU nurses were given the capability to program their own screen savers in August 1999, they have displayed a variety of personalized messages, including messages unrelated to the Union's organizing campaign such as "Maine Nurse," "Joe's Bar & Grill," "1984," and "Byte Me" (or "Bite Me"), and campaign-related messages such as "Unionize Now," "AFL-CIO," "Ask Norma," and "Where's Jimmy." The Employer claims that it instructed the employee who posted the "Byte Me" message to remove it, but has not asserted that the employee was given any warning or other discipline due to the incident. The Employer also claims that it did not take any action against any employee other than Elalem for displaying Union campaign-related messages, or seek to have such messages removed, because it did not know which employees had posted the earlier messages.

We conclude that the Employer violated Section 8(a)(1) and (3) of the Act by issuing the warning to Elalem, as the warning arose from the Employer's disparate enforcement of its otherwise valid no-solicitation policy.

It is well-established that health care institutions may lawfully prohibit solicitation in patient care areas,¹ and that patient care areas may include corridors and sitting rooms on patient floors.² In the instant case, therefore, the Employer's no-solicitation policy is facially valid, as it is limited to patient care areas. It is also clear that the computers at issue are in a patient care area lawfully subject to the Employer's no-solicitation policy, as they are located in the corridor of the intensive care unit immediately adjacent to patient rooms, an area that "serve[s] important and direct functions in the care of patients."³

It is equally well-established, however, that a health care employer may not discriminatorily enforce a valid no-solicitation policy, even in patient care areas, so as to limit only union solicitation.⁴ The Board has found unlawful disparate enforcement where a hospital prohibited an "innocuous" union button, while permitting holiday-

¹ See, e.g., Beth Israel Hospital v. NLRB, 437 U.S. 483, 506 (1978).

² See, e.g., NLRB v. Baptist Hospital, Inc., 442 U.S. 773, 783-786 (1979); Baylor University Medical Center v. NLRB, 662 F.2d 56, 61 (D.C. Cir. 1981); Intercommunity Hospital, 255 NLRB 468, 471-472 (1981).

³ Intercommunity Hospital, 255 NLRB at 471.

⁴ See, e.g., Manchester Health Center, Inc., 287 NLRB 328, 345 (1987), remanded 861 F.2d 50 (2d Cir. 1988), supplemented 295 NLRB 525 (1989); Saint Vincent's Hospital, 265 NLRB 38, 39-40 (1982), enfd. in pertinent part 729 F.2d 730, 735 (11th Cir. 1984). It is clear that union buttons constitute a form of solicitation protected by Section 7; indeed, the seminal case upholding the Board's protection of employee solicitation, Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945), involved an employee discharged for wearing a union steward button, based upon a no-solicitation rule. Of course, as the Region set forth in its Request for Advice, another close analogue to computer screen saver messages is messages posted on bulletin boards to which employees have access. Such messages are similarly protected against discriminatory prohibition. See, e.g., Honeywell, Inc., 262 NLRB 1402 (1982). We are aware of no case, however, that involves discriminatory regulation of access to a bulletin board located in a patient care area.

related, sports-related, and other personal buttons.⁵ Similarly, the Board has found that a hospital acted in an unlawfully discriminatory manner when it prohibited employees from wearing a yellow ribbon alongside a union button, where it allowed other ribbons and buttons to be worn including the union buttons themselves.⁶

We conclude that the Employer has engaged in similar unlawful disparate enforcement by issuing the warning to Elalem. The Employer admits that it has allowed a variety of personalized screen saver messages on intensive care unit computers, including "Maine Nurse," "Joe's Bar & Grill," and "1984," while prohibiting Elalem's pro-Union message.

The only message, other than Elalem's, against which the Employer has taken any action was the "Byte Me" (or "Bite Me") message, which the Employer found "offensive."⁷ Elalem's innocuous "Look for the U" message was not similarly offensive and could not be deemed offensive by the Employer merely because of its pro-Union content. Thus, the Employer's discriminatory action against Elalem based upon her pro-Union message was not a legitimate exercise of a hospital's right to prohibit solicitation in patient care areas, but instead was an unlawful restraint of Elalem's Section 7 rights and a violation of Section 8(a)(1) and (3) of the Act.

⁵ Fairfax Hospital, 310 NLRB 299, 307-308 (1993), enfd. mem. 14 F.3d 594 (4th Cir. 1993), cert. denied 512 U.S. 1205 (1994). In Fairfax Hospital, the rule itself was also found to have been discriminatorily motivated. Id.

⁶ Holladay Park Hospital, 262 NLRB 278, 279 (1982). As in Holladay Park Hospital, our conclusion that the Employer unlawfully enforced its policy disparately is not weakened by the Employer's claim that it did not remove the earlier pro-union screen saver messages, or impose any discipline based on them. The enforcement of the no-solicitation policy against Elalem was nonetheless unlawfully discriminatory, as she was prohibited from displaying her pro-Union message while other messages were permitted.

⁷ [FOIA Exemption 5

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) and (3) of the Act by issuing the warning to Elalem, as the warning arose from the Employer's disparate enforcement of its otherwise valid no-solicitation policy.

B.J.K.