UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FLAGSTAFF MEDICAL CENTER, INC.

and **Cases 28-CA-21509**
28-CA-21637
28-CA-21664

COMMUNICATION WORKERS OF AMERICA,
LOCAL UNION 7019, AFL-CIO

and **Case 28-CA-21548**

NATIONAL NURSES ORGANIZING COMMITTEE/
CALIFORNIA NURSES ASSOCATION (NNOC/CNA)

FLAGSTAFF MEDICAL CENTER, INC. and
SODEXHO, INC., as Joint Employers

and **Case 28-CA-21704**

COMMUNICATION WORKERS OF AMERICA,
LOCAL UNION 7019, AFL-CIO

GENERAL COUNSEL'S ANSWERING BRIEF

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GENERAL COUNSEL'S ANSWERING BRIEF

I. OVERVIEW

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board (Board), the General Counsel submits this Answering Brief to the Exceptions filed by Respondent Flagstaff Medical Center (Respondent or the Hospital) to the decision of Administrative Law Judge (ALJ) Gerald A. Wacknov, which issued on May 20, 2009 (the ALJD). Respondent's Exceptions are limited to disputing four findings by the ALJ of individual § 8(a)(1) allegations, as well as an arguing that the ALJ erred by proposing a standard cease and desist order. As discussed in more detail below, these disputed findings and the ALJ's proposed order are appropriate, proper, and amply supported by the credible

record evidence. Accordingly, the Board should sustain the ALJ's findings of fact, conclusions of law, proposed remedy and recommended order with respect to these violations, but should modify the ALJ's decision as set forth in General Counsel's exceptions and supporting brief.

II. PROCEDURAL BACKGROUND

On May 20, 2009, the ALJ issued a Decision in this matter, in which he recommended dismissal of the majority of allegations in this proceeding. He did, however, find that Respondent engaged in numerous, specific incidents of § 8(a)(1) conduct, including:

- interrogating employees about their union activity on behalf of the Communications Workers of America (Union);
- engaging in surveillance of employees' union activities;
- threatening employees by telling them that they should be careful about associating with Union advocates;
- informing employees that they should not discuss their wages with other employees;
- threatening employees that, if the Union negotiates a raise for employees, budgetary considerations would cause the layoff of recently hired employees; and
- prohibiting employees from engaging in Union activity in a break room.

(See ALJD at 40-41) In its Exceptions, Respondent takes issue with three allegations of interrogation and a single threat allegation, and challenges the propriety of the standard cease-and-desist language proposed by the ALJ. The Board should reject Respondent's arguments for the reasons set forth below.

III. RESPONDENT'S EXCEPTIONS LACK MERIT

A. Exceptions Regarding Respondent's Actions Towards Newly-Hired Employee Martinez Lack Merit

1. The Record Evidence

The undisputed record evidence established, and the ALJ found, that newly hired Nutrition Assistant Mattie Martinez had been employed only 1-2 days, and was in the middle of her new-employee training, when her new Department Director, Janine Drake, first approached her about the Union. (ALJD at 24; Tr. 56, 575, 727) Martinez had never been an open Union supporter, and Drake admittedly initiated the conversation about the Union. (Tr. 849-50, 2136) While touring Martinez around the Dietary Department in August, as the ALJ found, Drake told Martinez that "a lot of the things about the Union weren't necessarily true," that there were two sides to the issue, and that the Union would "claim a lot of things that aren't true." She then told Martinez:

> it's possible for a union to provide a raise to the people in the union that are also in the department, but there's just a certain budget that they have that they were going to have to let people go if that's the case.

(ALJD at 24; Tr. 853) As the ALJ found, "Martinez, as the last person hired, understood Drake to be telling her she would be the first fired in this eventuality." (Id.; Tr. 853-54) Although Drake denied saying anything to Martinez regarding the possibility of job loss due to budgetary considerations as a result of unionization, the ALJ discredited this testimony. He instead found that Martinez had a "clear recollection of the facts" of this conversation. (ALJD at 24)

In this same conversation, Drake asked Martinez if anyone had spoken to her about the Union, and who had. (Tr. 850-51) Martinez testified that she lied when she answered this question, telling Drake the name of an employee whom she knew to be *anti*-Union and who

did not work in the Dietary Department. She did so because she "figured that wouldn't really get her in trouble or anything," because she "didn't want to state who had talked to [her] about the Union." (Tr. 851-52) As the ALJ found:

> [i]t is unlikely that Martinez would have fabricated a scenario that was as detailed, specific and plausible, even to the point of causing her consternation as she attempted to evade Drake's questions.

(ALJD at 24) Drake responded that she was surprised that the named employee had spoken to Martinez, because she knew her to be anti-Union. She then asked if any one *else* had spoken to Martinez about the Union, and Martinez said no. (Tr. 851-52) The ALJ found, "I credit the testimony of Martinez, who appeared to have a clear recollection of her conversation(s) with Drake." (ALJD at 24)

2. The ALJ Properly Found that Drake Illegally Threatened and Interrogated Martinez

The ALJ very properly found that Drake violated § 8(a)(1) of the Act by engaging in "coercive interrogation, and by threatening that unionization, resulting in wage increases for some employees, would cause the layoff of newly hired employees as a result of budgetary considerations." (ALJD at 24)

First, the ALJ reasonably credited Martinez' testimony, that Drake told her that, were a union to come in, she would be first in line to lose her job. (Id.; Tr. 853-54) The ALJ properly credited Martinez' testimony that the words spoken by Drake were:

> [t]hat it is possible for a union to provide a raise to the people in the union that are also in the department, but because there's just a certain budget that they have that they *were going to have to let people go if that was the case*.

ALJ at 24 (emphasis added).[1] As such, Drake's comments fell far outside the realm of a prediction carefully phrased on the basis of objective fact to convey the employer's belief as to probable consequences beyond the employer's control or to convey a management decision already arrived at to undertake certain action in the event of unionization. *NLRB v. Gissel Packing Co*., 395 U.S. 575, 618 (1969). Instead, Drake was simply coercively "musing" in front of Martinez over the fact that surely Respondent would engage in layoffs in the event their employees selected union representation. As such, the ALJ properly found that Drake's comments violated § 8(a)(1). See ALJD at 24; see also *Spirit Construction Services, Inc*., 351 NLRB No. 56, slip op. at 6 (2006) (citing *Consolidated Biscuit Co*., 346 NLRB 1175, 1175, n. 4&5 (2006), enfd. 2008 WL 4922425 (6th Cir. 2008)).

Second, the ALJ properly found that, after threatening Martinez' job (and explicitly expressing that she was herself anti-Union), Drake violated the Act by demanding to know who Martinez had spoken with about the Union. In this regard, the ALJ properly credited Martinez' testimony, including that Drake repeatedly asked Martinez who had spoken to her about the Union, and was not satisfied with Martinez' attempt to dodge the question by providing the name of an anti-Union employee. Applying long-settled standards, the ALJ correctly found this conduct coercive. See *Rossmore House*, 269 NLRB 1176 (1984), aff'd sub nom., *Hotel Employees Union Local 11 v. NLRB*, 760 F.2d 1006) (9th Cir. 1985); *Bourne v. NLRB*, 332 F.2d 47, 48 (2nd Cir. 1964); *Medcare Associates, Inc.*, 330 NLRB 935 (2000). Indeed, the Board has specifically held that questions about employees' union and/or

[1] In a bit of legerdemain, Respondent claims that Martinez testified that Drake actually said it was only "possible" that people could be let go, in the event of a "possible" raise occasioned by the Union's representation. (Resp. Br. at 11-12) This convenient re-characterization of Martinez' testimony is simply not supported by the record evidence. (See Tr. 852-54) Therefore, at best, Respondent is soliciting the Board to overturn the ALJ's clear credibility determination in favor of Martinez' recollection that Drake communicated to her that, should a Union represent Hospital employees, she, as the last hired, would lose her job. (See AJLD at 24)

protected concerted activities are inherently coercive "because of [their] natural tendency to instill in the minds of employees fear of discrimination and the basis of the information the employer has obtained." *The Loft*, 277 NLRB 1444, 1457 (1986); see also *Sunshine Piping, Inc*., 350 NLRB 1186 (2007) (supervisor questioning new employee about union membership during orientation is coercive conduct). That is precisely the case here, where the highest-ranking official in Martinez' department questions a newly-hired employee about her union contacts, immediately after suggesting that her continued employment was in jeopardy because of the Union.

Respondent's specific Exceptions with respect to Drake's interrogation strain credulity. According to Respondent, Martinez simply misunderstood the intent of Drake's questions, and that a "reasonable employee" would have known that Drake was only trying to determine if Martinez had attended a management training session about the Union. (Resp. Br. at 10) But Martinez' account of the conversation, as credited by the ALJ, simply provides no basis on which a reasonable employee would reach such a conclusion.[2] Drake never mentioned any management training session, and never asked Martinez anything to indicate that she was interested in whether anyone from management had spoken to her. (See Tr. 849-61) As such, the ALJ was correct in finding that Drake's questioning, under the totality of the circumstances, was coercive.

B. Exceptions Regarding Respondent's Repeated Interrogation of Employee Sandoval Lack Merit

1. The Record Evidence

It is undisputed that, as of 2007, Lydia Sandoval had worked in the Hospital's Nutrition Services Department for almost six years. (ALJD at 15; Tr. 1181) In March, Drake

[2] In fact, even Drake's discredited version of the conversation did not involve her explaining to Martinez that she wanted to know if anyone *from management* had spoken with her about the Union.

decided to probe whether Sandoval supported the current Union organizing drive at the Hospital – something Sandoval had never disclosed. Sandoval was working as a cashier in the Hospital's café, when Drake engaged her in a conversation about the Nurses' organizing campaign. As Sandoval rang up customers, Drake expounded on how "foolish" she thought the Nurses' organizing campaign was. Then she asked Sandoval two questions. First, she asked how she felt about the Union. Sandoval replied that she was "pro" and that she would support a union. Next, Drake asked what Sandoval thought the Union could do for the employees that the Hospital could not, or was not, already doing. Sandoval said that the Union would represent the employees and support them. (Tr. 1185-7, 1240)

The ALJ credited Sandoval's account of this conversation and additionally found that, as of this March conversation,

> Drake had no reason to suppose that Sandoval was a union advocate, and it is reasonable for Sandoval to have presumed that Drake's inquiry was calculated to discern whether Sandoval supported the Union.

(ALJD at 15)

Production Supervisor Augustine Robledo, who oversees catering and patient food, as well as the kitchen and the cafeteria, reports to Drake. (Tr. 56-57, 727) Shortly after Drake's questioning of Sandoval, Robledo took a run at Sandoval himself, using the "soft touch" approach. While Sandoval was in Robledo's office waiting on a work-related approval, Robledo said he wanted to ask her something, just between the two of them. During a 10 to 15 minute exchange, he "confided" that he had never worked in a unionized workplace and wanted to know what it was like. Sandoval was surprised, since she had never told him that she had worked a union job. (ALJD at 15) After he asked what specifically the Union did for the Hospital employees, in Sandoval's words, Robledo "just asked me if I felt it was necessary to bring in a union to the hospital, if we had that many problems or whatever."

Sandoval responded yes, and gave him an example of a difficult experience she had had with Human Resources that she felt a union could have helped her with. (Id.; Tr. 1190-92, 1234-35)

2. The ALJ Properly Found that Respondent's Supervisors Repeatedly Interrogated Sandoval about Her Union Support

The ALJ properly found that both Drake and Robledo illegally interrogated Sandoval. It is undisputed that, at the time of Drake and Robledo's questioning of Sandoval, that the latter had never disclosed to anyone in management that she supported the Union's organizing campaign at the Hospital. (ALJD at 14)

Drake's questioning of Sandoval was especially coercive, particularly where she had just finished lecturing Sandoval on how "foolish" she thought the Nurses' prior campaign was. See, e.g., *Research Management Corp. and Service Employees Intern. Union, Local 36,* AFL-CIO, 302 NLRB 627, 648 (1991) (finding coercive supervisor's question to employee as to why he supported the Union and what good he felt that the Union could do, especially where supervisor had previously expressed that he would never support the Union and that the Union was wrong and was not in employees' best interest). The cases cited by Respondent in this regard are inapposite. For example, Respondent argues that this case is analogous to *Bates Nitewear Co.,* 283 NLRB 1128, 1128 (1987), in which a *first-line* supervisor, in the absence of any other coercive statements, asked an employee what he thought of the union. Here, by contrast, Drake – the Director of Sandoval's entire department – began her interrogation by announcing how "foolish" she thought a prior organizing campaign was. This is most certainly not how a "friendly chat" begins. (See Resp. Br. at 10) See *Research Management Corp. and Service Employees Intern. Union, Local 36, AFL-CIO,* 302 NLRB at 648.

Even though Robledo's approach was intended to appear less heavy-handed, he "directly asked her if she felt it was necessary to bring a union into the hospital." As such, his questioning was coercive as well. See *Hospital Service Corporation,* 219 NLRB 1, 12 (1975) (supervisor's asking employees why they thought a union was necessary violated § 8(a)(1) of the Act). Here, Respondent seems to suggest that, because (1) Robledo's comments occurred outside of any other coercive conduct and (2) Robledo had previously worked with Sandoval, and, as an older Latina, she had sometimes called him, in Spanish, "my son," he was entitled to interrogate her. (See Resp. Br. at 7, "Robledo's casual and innocuous question placed Sandoval in the role of teacher and Robledo in the role of student") These arguments, unsupported by any relevant authority, ignore the fact that Sandoval had just been interrogated by Drake, who characterized unions as "foolish." These arguments also ignore the fact that the interrogation took place in Robledo's office during work time while Sandoval was waiting on a work-related approval from him, and that the entire conversation was initiated by Robledo, not Sandoval. Under the circumstances, the ALJ correctly ascertained that Robledo's questioning of Sandoval was anything but an "off the cuff" conversation among "equals." Id.; cf. *Abramson, LLC,* 345 NLRB 171, 172-73 (2005) (supervisor's informal question, "what about this Union?" not unlawful).

C. The ALJ's Proposed Cease and Desist Order Properly Addressed the Violations He Found Meritorious

Respondent argues that the ALJ improperly expanded the scope of his proposed cease-and-desist order by not limiting it to the facts of the specific § 8(a)(1) violations he found. For example, Respondent would have the Board find that the ALJ mistakenly ordered Respondent to cease and desist from engaging in activities such as "interrogating employees" and instead order that it simply cease and desist from "interrogating Mattie Martinez," etc. This reductionist view of liability, of course, is contrary to the Board's long-standing view of

the proper manner in which § 8(a)(1) violations are both alleged and remedied. Indeed, the two circuit court cases cited by Respondent both deal with cease-and-desist provisions for § 8(a)(3) or § 8(b)(1)(A), not § 8(a)(1), allegations. See Resp. Br. at 14 (citing *NLRB v. Consolidated Machine Tool Corp.*, 163 F.2d 376, 379 (2d Cir. 1947); *NLRB v. Theatre & Amusement Janitors Union*, 996 F.2d 1226, slip op. at * 1-4 (9th Cir. 1993) (table). The ALJ's proposed notice is precisely in accord with the Board's practices, and Respondent's exception should be rejected.

V. CONCLUSION

With respect to the allegations subject to Respondent's Exceptions, the ALJ's decision was wholly correct and in accord with current law. Based upon the foregoing, it is respectfully submitted that, with respect to the allegations, the Board should adopt the ALJ's findings of fact and conclusions of law, as well as his recommended Order.

Dated at Phoenix, Arizona, this 29th day of July 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of GENERAL COUNSEL'S ANSWERING BRIEF in FLAGSTAFF MEDICAL CENTER, INC., Cases 28-CA-21509 et al., was served by E-Gov, E-Filing and by E-mail, on this 29th day of July 2009, on the following:

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