

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**WALGREEN CO.**

**and**

**Case 28-CA-22651**

**BERNIE SANCHEZ-BELL, an Individual**

**GENERAL COUNSEL'S OPPOSITION TO  
RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

Pursuant to Section 102.24(b) of the Rules and Regulations of the National Labor Relations Board (the Board), Counsel for the General Counsel (CGC) respectfully submits this opposition to Respondent's Motion for Summary Judgment (Respondent's Motion), which was filed with the Board on January 5, 2010. Respondent asserts that there are no genuine issues of material fact presented and that the allegations set forth in the Complaint are not supported by such facts, nor are they actually violations of the Act. To the contrary, the pleadings in this matter present significant issues of material fact that require a hearing before an administrative law judge of the Board. More to the point, Respondent's Motion highlights and makes clear the numerous existing issues and disputes regarding the facts and is little more than a statement of Respondent's anticipated defenses. As discussed below, it is respectfully submitted that Respondent's Motion should be denied in its entirety.

**I. BACKGROUND**

On August 21, 2009, Charging Party Bernie Sanchez-Bell filed the charge in this matter, alleging that Respondent violated Section 8(a)(1) of the Act by, among other acts, promulgating an overly-broad rule prohibiting employees from discussing with each other their sexual discrimination claims. On October 28, 2009, the Charging Party filed an

amended charge alleging that on or about April 28, 2009, Respondent, in addition to other conduct independently violative of the Act, constructively discharged her in violation of Section 8(a)(1) of the Act. After a full investigation during which Respondent cooperated by submitting a position statement and exhibits, on October 30, 2009, the Regional Director for Region 28 issued the Complaint, alleging, inter alia, that Respondent violated Section 8(a)(1) of the Act by the following acts and conduct:

- During the period from on or about February 21, 2009, to April 28, 2009, the Respondent, by Len Mathieu, herein called Mathieu, Barb Liska, and Rhonda Snyder, at the Respondent's facility:

- (1) promulgated and has since maintained an overly-broad and discriminatory rule prohibiting employees from discussing their own and other employees' harassment complaints with other employees;

- (2) promulgated and since then has maintained an overly-broad and discriminatory rule prohibiting employees from engaging in concerted activities;

- (3) promulgated and since then has maintained an overly-broad and discriminatory rule requiring that employees may only discuss their complaints regarding harassment or discrimination with the Respondent's managers and Human Resources Department; and,

- (4) threatened employees with unspecified reprisals if employees engaged in concerted activities.

- During the period from on or about February 21, 2009, to April 28, 2009, the Respondent, by Mathieu, at the Respondent's facility:

- (1) created the impression among employees that their concerted activities were under surveillance by the Respondent;

- (2) created the impression among employees that their concerted activities were under surveillance by the Respondent by telling employees that the Respondent's security cameras were watching them; and,

- (3) threatened employees with unspecified reprisals by telling employees that the Respondent's security cameras were watching them.

- During the period from on or about February 21, 2009, to April 28, 2009, the Respondent, by the use of security cameras at the Respondent's facility, engaged in surveillance of employees engaged in concerted activities.
- During the period from on or about February 21, 2009, to March 19, 2009, the Respondent, by Casey Rogers, threatened employees by telling them that promotional opportunities would be withheld from them because they engaged in concerted activities.
- On or about March 19, 2009, the Respondent, by Mathieu, by e-mail, promulgated an overly-broad and discriminatory rule prohibiting employees from discussing with other employees any complaints or concerns regarding allegations of workplace harassment.
- In or around mid-April 2009, the Respondent, by the increased presence of security guards at Respondent's facility, engaged in surveillance of employees engaged in concerted activities.
- In or around mid-April 2009, the Respondent, by Mathieu, at Respondent's facility:
  - (1) created an impression among its employees that their concerted activities were under surveillance by the Respondent by telling employees that security in their work areas had been increased; and,
  - (2) threatened employees with unspecified reprisals by telling employees that security in their work areas had been increased.
- On or about April 28, 2009, by one or more acts described above, the Respondent caused the termination of its employee Bell.

By its Answer, filed by Respondent on November 12, 2009, Respondent denies the commission of any unfair labor practices, and specifically denies the following:

- the filing and service of the amended charge on October 28, 2009;
- that the Charging Party and other of its employees engaged in protected concerted conduct during the relevant period; and,
- that Respondent engaged in any of the acts and conduct specifically alleged as violations of Section 8(a)(1) of the Act.

A trial on the merits of the Complaint is scheduled to begin on February 2, 2010.

By its Motion, Respondent reiterates its denial that it violated the Act, as alleged in the Complaint, and also specifically denies that Respondent interfered with the Charging Party's exercise of Section 7 rights; denies that its statements alleged in the Complaint as the promulgation of unlawful rules are violative of the Act; asserts that Respondent had the right to limit the people with whom the Charging Party could talk about claims of gender harassment; asserts that its alleged unlawful conduct is excused because the Charging Party asked Respondent to keep her sexual discrimination claims confidential; asserts that it was privileged to communicate with employees about security in the manner which is alleged in the Complaint as being unlawful; and asserts that selected excerpts of the Charging Party's deposition testimony in connection with a Title VII gender harassment and discrimination lawsuit does not support the Complaint allegations.

In support of its assertions, Respondent relies on exhibits, including limited excerpts of deposition testimony of the Charging Party that was given in connection with the Title VII litigation discussed above. That litigation, while involving the same parties, does not involve the same or similar issues as those presented by the allegations in the instant case.<sup>1</sup> The testimony provided -- or, in this case, not provided -- by the Charging Party in her Title VII lawsuit does not support Respondent's Motion, as discussed in greater detail below.

Moreover, Respondent's Motion itself makes clear that myriad issues of material fact remain on all of the Complaint allegations which have been denied by Respondent.

## **II. ARGUMENT**

Under the Board's well-established standards for evaluating motions for summary judgment, summary judgment may be rendered if the pleadings and supporting materials

---

<sup>1</sup> Respondent's frustration with having to respond to unfair labor practice charges instead of limiting litigation to the extant Title VII matter is palpable. Respondent goes so far as to assert that Sanchez-Bell should never have even brought her unfair labor practice charges to the Board. See Respondent's Motion at p. 20.

establish that there is no genuine issue requiring a hearing and that the moving party is entitled to judgment as a matter of law. *Stephens College*, 260 NLRB 1049 (1982); *Lakeview Convalescent Center*, 307 NLRB 563, 564 (1992). The adverse party has no obligation to respond until the moving party has met this burden. *Id.* at n. 3. In a summary judgment proceeding, the pleadings and evidence are viewed in the light most favorable to the non-moving party. *Eldeco, Inc.*, 336 NLRB 899, 900 (2001) (pleadings must be read in the light most favorable to the non-moving party); *Petrochem Insulation, Inc.*, 330 NLRB 47, 52 n. 20 (1999) (evidence evaluated in the light most favorable to the non-moving party). In addition, and particularly applicable to Respondent's Motion, the Board has held that "a simple denial of unlawful conduct is sufficient to raise a material question without requiring [General Counsel] to come forward with affidavits or other evidence." *Lake Charles Memorial Hospital*, 240 NLRB 1330, 1331 fn. 4 (1979) (citing *Florida Steel Corporation*, 222 NLRB 586 (1976)).

**A. Genuine Issues of Material Fact Exist Regarding the Promulgation of Rules Alleged as Violative of Section 8(a)(1) of the Act**

Respondent's contentions that its conduct does not amount to a violation of the Act are without merit. For example, Respondent denies that its directive to Sanchez-Bell to not discuss her sexual harassment claims with other employees is not unlawful because Sanchez-Bell asked Respondent to keep her complaints confidential. Respondent's Motion suggests that it intends to present evidence to dispute the Charging Party's assertions regarding her contacts with Respondent and, most importantly, fails to establish that its directive to the Charging Party to not speak with other employees about her harassment concerns is not, as a matter of law, violative of the Act.

More specifically, CGC intends to present evidence at hearing to establish that Respondent, by Mathieu's email dated March 19, 2009, in response to an email from the Charging Party in which she discussed incidents of harassment by Respondent, directed the Charging Party "to not discuss anything about this inquiry to anyone (including Sheryl [Laidlaw]) except for Rhonda [Snyder], Kori [Alderetti], or myself." Respondent, by paragraph 3 of its Answer, admits that Mathieu, Snyder, and Alderetti were at material times supervisors and agents of Respondent within the meaning of the Act. Respondent ignores the fact that CGC also intends to present testimony at trial showing that in addition to the email discussed above, during the relevant period, Respondent's supervisors and agents also orally promulgated and maintained such overly-broad and discriminatory rules.

In addition, CGC intends to present evidence at hearing that will show that Respondent advised employees, after Sanchez-Bell and other employees began making complaints of harassment and discrimination to Respondent, that such complaints were "private and internal" and not to discuss such complaints about harassment and discrimination with anyone other than Human Resources.

As Respondent acknowledges in its Motion, the Board, in *Phoenix Transit System*, 337 NLRB 510 (2002), found that an employer could not enact a broad rule prohibiting employees from discussing sexual harassment claims among themselves or with third parties, which is precisely what Respondent did in this case. The fact that employees were not disciplined, reprimanded, or terminated for disregarding Respondent's rule is, contrary to Respondent's assertions in its Motion, irrelevant to any determination that the rule is violative of the Act.

Moreover, the other cases relied upon by Respondent, including *Caesar's Palace*, 336 NLRB 271 (2001), a case involving a balancing-of-interests analysis during an ongoing drug investigation, require a fact-intensive analysis that can be completed (absent a stipulated record), only after the underlying facts are fully litigated before an administrative law judge of the Board. Respondent's Motion highlights the significant factual disputes that require resolution by an administrative law judge and fails to establish that, as a matter of law, the Complaint allegations are without merit. It is respectfully submitted that Respondent's Motion should be denied.

**B. Genuine Issues of Material Fact Exist Concerning Respondent's Alleged Creation of the Impression of Surveillance, Surveillance, and Threats**

Respondent contends that its facility has always maintained security cameras in the workplace and, therefore, any statements by its supervisors and agents to employees pointing out such cameras was "hardly news or coercive as everyone who has ever worked in the facility knows that there are cameras in the work area." See Respondent's Motion at 19. Respondent also contends that because employees discussed the Charging Party's claims of harassment "freely and without retaliation," such cameras apparently had no effect on the exercise of Section 7 rights by employees. Such arguments are merely statements of Respondent's anticipated defenses. As such, they should be presented in the form of admissible evidence to an administrative law judge of the Board. Such assertions, concerning which CGC intends to offer contrary and clarifying testimony, are not a proper basis upon which to grant Respondent's Motion.

As Respondent acknowledges, "[t]he Board's test for determining whether an employer has created an impression of surveillance is whether the employee would reasonably assume

from the statement in question that his [or her concerted] activities had been placed under surveillance.” *Tres Estrellas de Oro*, 329 NLRB 50, 51 (1999). As Respondent further acknowledges, “[c]reating an impression of surveillance” means “willful conduct and a justifiable impression.” *NLRB v. Simplex Time Recorder Co.*, 401 F.2d 547, 549 (1st Cir. 1968). Thus, Respondent’s Motion acknowledges that, as a matter of law, the evidence CGC intends to present will establish a *prima facie* showing that Respondent committed unfair labor practices.

More specifically, in the instant case, during the relevant period and after the Charging Party and other employees began to engage in concerted conduct, Mathieu told the Charging Party, in words and circumstances to be established at trial by witness testimony, that there were cameras in the workplace watching her. By these and similar statements Respondent created the impression that employees’ Section 7 activity was under surveillance and threatened employees with unspecified reprisals. Though Respondent contends that such statements were merely lawful reminders for the purpose of theft avoidance, CGC intends to show that in the circumstances presented, it is appropriate to conclude that such statements were coercive and violate the Act.

In light of Respondent’s anticipated defenses, as set forth in Respondent’s Motion, there are stark factual disputes presented that warrant a hearing before an administrative law judge. Moreover, Respondent has failed to show, as a matter of law, that such allegations are without merit. Accordingly, there are genuine issues of material fact, and of law, that preclude a finding that summary judgment is appropriate in this matter.

**C. There are Genuine issues of Material Fact Regarding the Charging Party's Constructive Discharge.**

Respondent also contends that summary judgment is warranted on the allegation that it unlawfully constructively discharged the Charging Party. In support of its Motion in this regard, Respondent makes bald assertions that are contrary to the evidence which CGC intends to present at trial and incorrectly asserts that certain, limited and partial excerpts from employees' Title VII deposition warrant dismissal of the Complaint. Such assertions are without merit and contrary to Board precedent, and further demonstrate the need for a hearing and determinations of fact by an administrative law judge of the Board.

Under Board law, constructive discharge involves the situation where an employer, because of its discriminatory conduct toward an employee, will be held legally responsible for that employee's decision to quit in response to such conduct. See *Crystal Princeton*, 222 NLRB 1068 (1976). The Board has traditionally held that an employer constructively discharges an employee in violation of the Act when, because of the employee's protected activities, it places burdens on the employee that cause, and are intended to cause, a change in working conditions so unpleasant as to force the employee to resign. *Smithfield Foods, Inc.*, 347 NLRB 1266, 1267 (2006). In addition, under the Board's "Hobson's choice" analysis, an employee's voluntary quit will be considered a constructive discharge when an employer conditions an employee's continued employment on the employee's abandonment of his or her Section 7 rights and the employee quits rather than comply with the condition. *Hoerner Waldorf Corp.*, 227 NLRB 612, 613 (1976); *Intercon I (Zercom)*, 333 NLRB 223, fn. 6 (2001). In the instant case, CGC intends to show that the Respondent constructively discharged the Charging Party under both a traditional *Crystal Princeton* theory as well as the Board's Hobson's choice analysis.

Respondent argues that there is insufficient evidence to support the Complaint allegation of constructive discharge in this case because the Charging Party testified, when deposed in connection with her Title VII lawsuit, that at the time of her separation, she was not under any written warning, had no performance issues, had no attendance issues, and had no write-ups. Respondent's fails to establish that such facts, even if true, preclude the finding of an unlawful constructive discharge under the Act. Respondent fails to establish, as a matter of law, that a finding of an unlawful constructive discharge requires a showing that the employee in question was disciplined, had attendances issues, or was issued write-ups. Respondent's argument also ignores the testimony and other evidence that CGC intends to present at hearing establishing the basis for the constructive discharge allegation. Moreover, Respondent's assertions fail to consider that a violation of the Act is established by elements and facts different than those that may be involved in an alleged violation of Title VII or other civil rights laws.

Respondent's Motion, again, highlights the need for a hearing before an administrative law judge to resolve the significant factual and credibility disputes evident from the parties' pleadings. CGC intends to present testimony at trial that will establish that in the weeks preceding the Charging Party's separation, Respondent repeatedly told her and other employees that they were being watched by cameras and increased security in the workplace, engaged in surveillance of the Charging Party's concerted conduct, threatened her regarding her Section 7 conduct, and imposed conditions so difficult or unpleasant as to force her to resign, including by conditioning future employment on the Charging Party's abandonment of her Section 7 rights. It is respectfully submitted that Respondent's Motion, including with respect to the constructive discharge allegation, is without merit.

### III. CONCLUSION

Respondent's Motion appears to be nothing more than a summary of its arguments in support of its defenses to specific Complaint allegations -- defenses which present the need for factual determinations made by an administrative law judge based on the record developed at an unfair labor practice hearing. As discussed above, Respondent, by its Answer, denies the commission of any unfair labor practices, and its reiteration of such denials in its Motion fail to establish that summary judgment is warranted. As stated above, "A simple denial of unlawful conduct is sufficient to raise a material question without requiring [General Counsel] to come forward with affidavits or other evidence." *Lake Charles Memorial Hospital*, supra, 240 NLRB at 1331, n. 4 (1979). Accordingly, it is respectfully requested that the Board consider this matter expeditiously, that the Board should deny Respondent's Motion in its entirety, and that the February 2 trial in the matter be held.

Dated at Phoenix, Arizona, this 11<sup>th</sup> day of January 2010.

Respectfully submitted,

/s/ Eva S. Herrera

Eva Shih Herrera  
Counsel for the General Counsel  
National Labor Relations Board, Region 28  
2600 N. Central Avenue, Suite 1800  
Phoenix, Arizona 85004  
Telephone: (602) 640-2135

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of **GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT** in WALGREEN CO., Case 28-CA-22651, was served via E-Gov, E-Filing, and E-Mail, on this 11<sup>th</sup> day of January 2010, on the following:

***Via E-Gov E-Filing:***

Lester A. Heltzer, Executive Secretary  
Office of the Executive Secretary  
National Labor Relations Board  
1099 14<sup>th</sup> Street NW – Room 11602  
Washington, DC 20570-0001

***One Copy via E-Mail on the following:***

Paul R. Garry, Attorney at Law  
Ryan G. Pierce, Attorney at Law  
Meckler Bulger Tilson Marick & Pearson LLP  
3101 N. Central Avenue, Suite 900  
Phoenix, AZ 85012  
E-Mail: [paul.garry@mbtlaw.com](mailto:paul.garry@mbtlaw.com)  
[ryan.pierce@mbtlaw.com](mailto:ryan.pierce@mbtlaw.com)

Walgreens Co.  
2400 Walgreens Street  
Flagstaff, AZ 86004-6103  
E-Mail: [len.mathieu@walgreens.com](mailto:len.mathieu@walgreens.com)

Bernie Sanchez-Bell  
6490 Cosnino Street  
Flagstaff, AZ 86004  
E-Mail: [berniesanchez-bell@q.com](mailto:berniesanchez-bell@q.com)

/s/ Eva S. Herrera

Eva Shih Herrera  
Counsel for the General Counsel  
National Labor Relations Board, Region 28  
2600 N. Central Avenue, Suite 1800  
Phoenix, Arizona 85004  
Telephone: (602) 640-2135