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

Advice Memorandum

DATE: April 3, 2000

TO : F. Rozier Sharp, Regional Director
Region 17

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

SUBJECT: Visiting Nurse Association
of Research Medical Center 506-6060-5000
Case 17-CA-20524

This case was submitted for advice on whether the Employer discriminatorily disciplined an employee who used the Employer's email system to criticize the Employer.

Employee Jones is a nurse whose duties included performing a chart audit for Medicare billing purposes. On December 29, 1999, Jones learned that the Employer was probably going to have to write off some of its therapy visits because those visits lacked prior written physicians orders. Jones immediately left numerous voice-mail messages with hospital therapists. These messages stated that Jones had just learned that the therapists sometimes were not receiving prior written physicians orders; that this should not be happening; that their licenses were on the line; and that Jones would email Employer supervisors and managers that, if things didn't improve, the therapists should organize as a group to do something about it.

Jones then emailed various Employer supervisors complaining about the lack of distribution of prior written physicians orders to therapists. Jones' email described the situation as "intolerable . . . [with] professional licenses to operate under and protect just like the nurses!" Jones also stated "WHY DO THE THERAPISTS ALLOW THIS TO CONTINUE? THEY SHOULD FILE A GRIEVANCE AS A GROUP AND GET THIS RESOLVED." (Capitalization in original).

On January 19, 2000, Jones made a recognitional demand upon the Employer on behalf of the Union.

One week later on January 26, four weeks after Jones' email, the Employer issued Jones a written "Notice of Corrective Action." Attached were (1) Jones' email to the supervisors and managers; and (2) the Employer's characterization's of Jones' email. In this attachment, the Employer was critical of the email's "tone" as "angry"

because it used "capital letters, exclamation points and words/phrases such as 'intolerable' and 'never'."

We conclude, in agreement with the Region, that this discipline was unlawful because it was retaliatory against both Jones' protected email message, and also her subsequent Union activity. With respect to the first theory, that the Employer was retaliating against the protected nature of Jones' email, we note that the language used in Jones' email was not so egregious as to have lost the protection of the Act.[1]

B.J.K.

[1] "[W]hen an employee is discharged for conduct that is part of the res gestae of protected concerted activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act, or of such a character as to render the employee unfit for further service." Consumer Power Co., 282 NLRB 130, 132 (1986). The Board has found that even foul language and epithets directed to a member of management are an insufficient basis for forfeiture of the Act's protection. See., e.g., Crown Central Petroleum Corp., 177 NLRB 322 (1069); Thor Power Tool Co., 148 NLRB 1379, 1380 (1964); Burle Industries, 300 NLRB 498, 503-505 (1990); and Marion Steel Co., 278 NLRB 897 (1986).