

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD¹
REGION 32

ALTA BATES SUMMIT MEDICAL CENTER

and

Cases 32-CA-24459
32-CA-24469
32-CA-24470

NATIONAL UNION OF HEALTHCARE WORKERS

**COUNSEL FOR THE ACTING GENERAL
COUNSEL'S BRIEF IN REPLY TO
RESPONDENT'S ANSWERING BRIEF**

On June 16, 2010, Administrative Law Judge Burton Litvack, herein called the Judge, issued his Decision and Recommended Order in these cases, in which he found, *inter alia*, that Respondent Alta Bates Summit Medical Center violated Sections 8(a)(1) and (3) of the Act by disciplining, suspending and terminating employee Beverly Griffith.² The Acting General Counsel has filed limited cross-exceptions to the Judge's Decision on the basis that, in addition to analyzing the lawfulness of Respondent's discipline of Griffith under *Wright Line*, he should have also considered the lawfulness of that discipline under a *Burnup & Sims* and/or *Atlantic Steel* analysis. Respondent has filed an answering brief to those limited cross-exceptions and the following is Counsel for the Acting General Counsel's reply to that answering brief.

The core of Respondent's answering brief is that neither a *Burnup & Sims* nor *Atlantic Steel* analysis is appropriate because none of the conduct for which Griffith was

¹ Herein called the Board.

² References to the Judge's decision are listed as "ALJD _:_."

disciplined occurred during the course of protected concerted activity. Leaving aside the fact that the Judge properly rejected Respondent's sensationalized accounts of Griffith's alleged misconduct ("deliberately spilling water on a cafeteria guest," "blatant insubordination in refusing a direct order," "profane tirade"), Respondent's argument relies on a parsing of Griffith's conduct that is both artificial and illogical.

As established in the record, the February 17 water spilling incident occurred as Griffith was attempting to end a heated discussion that she was having with UHW representatives. Respondent's view (and the Judge's as well) is that because the water spill occurred "outside the conversation" (ALJD 33, fn. 93, ll. 48-51), it was not part of the preceding protected concerted activity and therefore cannot be the basis for a *Burnup & Sims* analysis. However, neither the Judge nor Respondent cited any case to support the proposition that because the water spill occurred "outside the conversation," that meant that it cannot be considered a part of the preceding protected concerted activity. Moreover, such a view is factually unsupportable, since the water spill occurred as Griffith was attempting to end her discussion with the UHW representatives and not after her encounter with them had ended. Further, such a view is particularly non-sensical in light of Respondent's insistence that Griffith had deliberately spilled the water onto the UHW representatives, an insistence that would logically make the alleged misconduct a continuation of Griffith's earlier aggressive and confrontational (but still protected and concerted) interaction with those UHW representatives.

Similarly illogical is Respondent's contention that Griffith's refusal to end her March 23 meeting in the cafeteria did not occur in the context of protected concerted

activity. Respondent's predicate for this argument is that the March 23 meeting itself was unprotected, a proposition which the Judge completely and flatly rejected. (ALJD 38: 39-41; 42:8-16) In such circumstances, and in a literal sense, Griffith's alleged refusal to end the cafeteria meeting on March 23 was her attempt to continue her protected concerted activity in the face of Respondent's unlawful order to end it. Whether or not Griffith's conduct in that regard constituted "blatant insubordination," it clearly occurred in the context of protected concerted activity and Respondent's contention that it did not is completely meritless.

Finally unmeritorious is Respondent's contention that Griffith's alleged "profane tirade" on March 24 occurred a full day after her last protected concerted activity and therefore cannot have occurred in the course of protected concerted activity because of that. This argument is initially flawed because it ignores the factual context in which Griffith engaged in the alleged misconduct. The Judge properly found that on the morning of March 24 Griffith met with fellow employees and reported to them what had transpired the day before and that she engaged in her limited profanity only after she was told that she been suspended and ordered to leave the building. In such circumstances, Griffith's pre-"tirade" discussions with employees was a continuation and extension of her earlier protected concerted activities in Respondent's cafeteria on March 23 and established the context for an appropriate *Burnup & Sims/Atlantic Steel* analysis.³

Respondent's argument is further flawed because it ignores the fact that Griffith's alleged

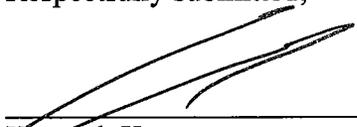
³ In this regard, see *Plaza Auto Center, Inc.*, 355 NLRB No. 85 (August 16, 2010), where the Board found that an employee's profane outburst against his employer during a meeting called by his managers to discuss his earlier protected concerted activities did not lose him the protection of the Act.

“tirade” was itself protected concerted activity, i.e., Griffith was protesting her just-announced suspension and expulsion from the premises and, therefore, was making a protected call to action to her fellow employees to join in her protest. See, e.g., *Cibao Meat Products*, 338 NLRB 934 (2003), *Whittaker Corp.*, 289 NLRB 933 (1988); *Enterprise Products*, 264 NLRB 946 (1982).

In summary, the record fully supports the conclusion that all of Griffith’s alleged misconduct occurred in the context of protected concerted activities and, therefore, that Respondent’s discipline of her for that alleged misconduct is also unlawful under a *Burnup & Sims* and/or *Atlantic Steel* analysis. Accordingly, the Board should reject Respondent’s arguments in its answering brief, find merit to the Acting General Counsel’s limited cross-exceptions, and find that Respondent’s discipline of Griffith violated Section 8(a)(1) and (3) on these additional grounds as well.

DATED AT Oakland, California this 6th day of October 2010.

Respectfully submitted,



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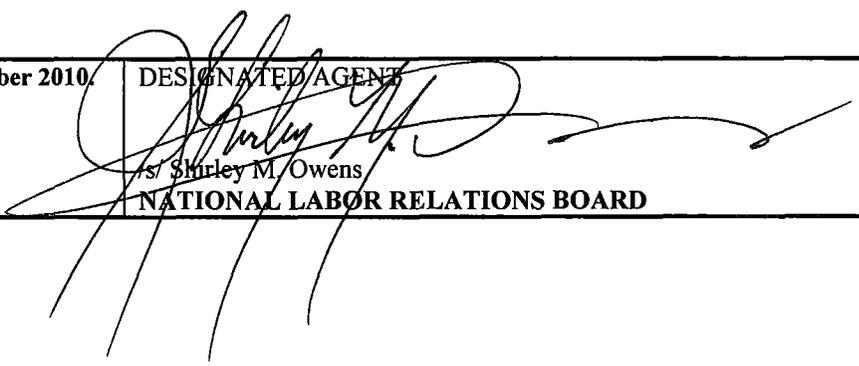
AFFIDAVIT OF SERVICE OF COUNSEL FOR THE ACTING GENERAL
COUNSEL'S BRIEF IN REPLY TO
RESPONDENT'S ANSWERING BRIEF

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by pos.paid mail upon the following persons, addressed to them at the following addresses:

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Subscribed and sworn to before me this 6th day of October 2010. DESIGNATED AGENT

/s/ Shirley M. Owens
NATIONAL LABOR RELATIONS BOARD