

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

**EL PASO HEALTHCARE SYSTEM, LTD.
d/b/a LAS PALMAS MEDICAL CENTER**

and

Case 28-CA-23368

**NATIONAL NURSES ORGANIZING COMMITTEE -
TEXAS/NNU**

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

Counsel for the Acting General Counsel (General Counsel) respectfully files this opposition to the Motion for Partial Summary Judgment (Motion) filed by El Paso Healthcare System, Ltd. d/b/a Las Palmas Medical Center (Respondent) on May 27, 2011. Respondent claims with respect to the allegations contained in paragraphs 5(f), 5(g) and 5(h) of the Complaint and Notice of Hearing (Complaint) which issued in this matter on April 29, 2011, that it is entitled to summary judgment as to these allegations "because there are no material facts in dispute and the material facts conclusively establish that Respondent did not violate the Act." Respondent makes this claim despite denying in its Answer to Complaint (Answer), filed May 11, 2011, the very facts forming the basis for those allegations. General Counsel submits that Respondent's Motion relies upon inadmissible evidence to support its Motion. Moreover, in the hearing that is scheduled before the Administrative Law Judge, General Counsel will introduce evidence related to Respondent's unlawful conduct as alleged in the Complaint. Accordingly, it is respectfully submitted that Respondent's Motion should be denied in its entirety as the pleadings and supporting material establish that genuine issues of fact exist requiring an administrative hearing before the Administrative Law Judge.

I. BACKGROUND

On February 11, March 25 and April 29, 2011, the Union filed the underlying Section 8(a)(1) charge, amended charge, and second amended charge, respectively, in this matter alleging that Respondent has unlawfully denied employees their *Weingarten* rights, interrogated employees, and made coercive statements concerning employees' Union activities. The Complaint issued on April 29, 2011, and on May 11, 2011, Respondent filed its Answer wherein it denied the substantive allegations of paragraphs 5(f) through 5(h), and paragraphs 6 and 7 of the Complaint.

In this connection, Respondent denied in its entirety paragraph 5(f) of the Complaint which alleges that on or about October 13, 2010, Respondent, by Arleen Casarez-Aguilar denied employee Ida Catherine Toth's request to be represented by the Union during an interview. Respondent also denied in its entirety paragraph 5(g) of the Complaint which alleges that Toth had reasonable cause to believe that this interview would result in disciplinary action being taken against her. Respondent further denied in its entirety paragraph 5(h) of the Complaint which alleges that Casarez-Aguilar conducted the interview with Toth even though Respondent had denied Toth's request for Union representation. Finally, Respondent denied the legal conclusions of the factual allegations it denied. In its Answer, Respondent offered no affirmative defenses. The hearing in this matter is scheduled to commence on June 28, 2011.

II. ARGUMENT

Summary judgment may be rendered if the pleadings and supporting materials establish that there is no genuine issue requiring a hearing and, that the moving party is entitled to judgment as a matter of law. *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 nonmoving party. *Eldeco, Inc.*, 336 NLRB 899, 900 (2001) (pleadings must be read in the light most favorable to the nonmoving party); *Petrochem Insulation, Inc.*, 330 NLRB 47, 52 n. 20 (1999) (evidence evaluated in the light most favorable to the nonmoving party). It is well settled that for a matter to be appropriate for summary judgment it must affirmatively appear in the record that (1) there is no genuine issue as to any material fact, and (2) the moving party is entitled to a judgment as a matter of law. *Stephens College*, 260 NLRB 1049 (1982). In addition, 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 n. 4 (1979) (citing *Florida Steel Corporation*, 222 NLRB 586 (1976)). For this matter, Respondent has done this very thing.

In support of its Motion, Respondent relies on the two-page Declaration of Casarez-Aguilar, which is attached to its Motion, and, in turn, has documentary exhibits attached to it. Casarez-Aguilar’s “Declaration” is clearly offered as irrefutable testimony, and the documents attached to it consist of virtually unreadable e-mail exchanges and other internal personnel documents, all of which are hearsay, lack proper foundation, and are not properly authenticated. Notwithstanding the glaring defects in these exhibits, Respondent relies on them to pronounce factual and legal conclusions that remain very much in dispute.

Rule 801(c) of the Federal Rules of Evidence states that, “Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. A document submitted to assert the truth of

its written content is hearsay and inadmissible.” *Fed. R. Evid.* 801(c). Inasmuch as Respondent relies on and cites these attachments as proof of the truth of the facts it asserts in its Motion, which are contrary to the facts set forth in the Complaint, the documents attached to Respondent’s Motion are clearly hearsay.

Respondent claims that, with respect to paragraphs 5(f), 5(g) and 5(h) of the Complaint, “. . . there are no material facts in dispute. . . “. Respondent submits a summarized recitation of facts and, based on such, asserts that it “is entitled to summary judgment because there are no material facts in dispute and the material facts conclusively establish that Respondent did not violate the Act.” Respondent’s claim is disingenuous, particularly given its Answer wherein it denies the facts regarding these same allegations. Without clear admissions of the allegations related to the specific complaint allegations, Respondent cannot argue there is no material issue with regard to the facts alleged in the Complaint. Further, Respondent has not amended its Answer to admit the allegations in paragraphs 5(f), 5(g), 5(h), 7 and 8 of the Complaint. Consequently, it is clear that genuine issues of fact and conclusions of law exist.

Respondent’s Motion is nothing more than a summary of its arguments and raised defenses in support of its denial of the substantive allegations of the Complaint, decorated with its version of the facts, and further adorned by evidence that lacks proper foundation, has not been properly authenticated, and is inadmissible. Respondent is left with its Answer in which it denied the allegations of paragraphs 5(f), 5(g), 5(h), 7 and 8. In these circumstances, “a simple denial of an 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 at 1331 n.4. Therefore, Respondent’s Motion must be denied.

III. CONCLUSION

The evidence upon which Respondent relies to support its Motion is inadmissible. Further, Respondent's denials of the Complaint allegations are sufficient to preclude summary judgment. To this end, there exist several genuine issues of material fact which are most appropriately resolved in an administrative hearing before an Administrative Law Judge. Based upon the foregoing, it is respectfully submitted that Respondent's Motion should be denied expeditiously to avoid any delay of the litigation of this matter as the hearing date is currently scheduled for June 28, 2011.

Dated at Albuquerque, New Mexico, this 2nd day of June 2011.

Respectfully submitted,

/s/ Liza Walker-McBride
Liza Walker-McBride
Counsel for the Acting General Counsel
National Labor Relations Board, Region 28
Albuquerque Resident Office
421 Gold Avenue, SW, Room 310
P.O. Box 567
Albuquerque, New Mexico 87103
Telephone: 1-505-248-5132
Facsimile: 1-505-248-5134

CERTIFICATE OF SERVICE

I hereby certify that a copy of COUNSEL FOR THE ACTING GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT in EL PASO HEALTHCARE SYSTEM, LTD. d/b/a LAS PALMAS MEDICAL CENTER, Case 28-CA-23368 was served by E-Gov, E-Filing, E-Mail and overnight delivery via United Parcel Service on this 2nd day of June 2011, on the following:

Via E-Gov, E-Filing:

Lester A. Heltzer, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

One Copy on the following:

Paul R. Beshears, Attorney at Law
Ford & Harrison, LLP
271 17th Street NW, Suite 1900
Atlanta, GA 30363
E-Mail: pbshears@fordharrison.com

El Paso Healthcare System, Ltd., d/b/a Las
Palmas Medical Center
1801 North Oregon Street
El Paso, TX 79902

Marcie Ellen Berman, Legal Counsel
National Nurses Organizing Committee
(CNA/NNOC)
2000 Franklin Street
Oakland, CA 94612
E-Mail: mberman@calnurses.org

National Nurses Organizing Committee-
Texas/NNU
316 West 12th Street, Suite 102
Austin, TX 78701

Brendan White, Attorney at Law
NNOC – Texas/NNU
2000 Franklin Street
Oakland, CA 94612
E-Mail: bwhite@calnurses.org

/s/ Katherine Stanley
Katherine Stanley
Secretary to the Regional Attorney
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1800
Phoenix, Arizona 85004
Telephone: (602) 640-2163