

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

**BANNER HEALTH SYSTEM d/b/a
BANNER ESTRELLA MEDICAL CENTER**

and

Case 28-CA-023438

JAMES NAVARRO, an Individual

**ACTING GENERAL COUNSEL'S REPLY BRIEF AND MOTION TO STRIKE
RESPONDENT'S ANSWERING BRIEF AND REPLY BRIEF**

Counsel for the Acting General Counsel (General Counsel) submits the following Motion to Strike the Answering Brief and Reply Brief filed by the Respondent Banner Health System, d/b/a Banner Estrella Medical Center; in the event the Board denies the General Counsel's Motion, the General Counsel files the below Reply to Respondent's Answering Brief.¹

MOTION TO STRIKE RESPONDENT'S ANSWERING AND REPLY BRIEF

Neither Respondent's Answering Brief nor Reply Brief were properly served on the General Counsel. More specifically, neither brief was electronically served to the General Counsel, as required by the Board's rules. The Board's rules, in pertinent part, provide:

Sec. 102.114 *Service of papers by parties; form of papers; proof of service; filing and serving documents and papers by facsimile transmission* (a) Service of documents by a party on other parties may be made personally, or by registered mail, certified mail, regular mail, electronic mail (if the document was filed electronically) or private delivery service. Service of documents by a party on other parties by any other means, including facsimile transmission, is permitted only with the consent of the party being served. Unless otherwise specified elsewhere in these rules, service on all parties shall be made in the same manner as that utilized in filing the document with the Board, or in a more expeditious manner; however, when filing with the Board is done by hand, the other parties shall be promptly notified of such action by telephone, followed by service of a

¹ All dates herein are 2011, unless otherwise noted. References to the official transcript will be designated as (Tr.) with appropriate page citations. References to the General Counsel's and Respondent's Exhibits will be referred to as (GCX), and (RX), respectively, with the appropriate exhibit number.

copy in a manner designed to insure receipt by them by the close of the next business day.

(i) The Agency's Web site (<http://www.nlr.gov>) contains certain forms that parties or other persons are permitted to file with the Agency electronically. Parties or other persons choosing to utilize those forms to file documents electronically are permitted to do so by following the instructions described on the Web site, notwithstanding any contrary provisions elsewhere in these rules. In the event the document being filed electronically is required to be served on another party to a proceeding, the other party shall be served by electronic mail (e-mail), if possible. If the other party does not have the ability to receive electronic service, the other party shall be notified by telephone of the substance of the transmitted document and a copy of the document shall be served by personal service no later than the next day, by overnight delivery service, or, with the permission of the party receiving the document, by facsimile transmission.

As evidenced by the service sheet, Respondent has failed to abide by the Board's rules as neither its Answering nor Reply were sent to the General Counsel or the Charging Party by electronic mail. Instead, Respondent mailed both briefs to the General Counsel, while filing the briefs electronically. With respect to the Answering Brief, the General Counsel was particularly prejudiced, because it was filed electronically by Respondent on December 21, but sent to the General Counsel by mail. Because of the intervening Christmas holiday, the undersigned did not receive notice of the mailed brief until December 27, six days after it was filed electronically with the Board. Accordingly, General Counsel moves to strike both of Respondent's briefs. Although prejudiced by Respondent's improperly served Answering Brief, General Counsel submits the following Reply Brief.

GENERAL COUNSEL'S REPLY BRIEF

The matters asserted by Respondent in its Answering Brief are without merit, and the record as a whole supports a finding that the ALJ erred by failing to find that Respondent: (a) unlawfully issued James A. Navarro (Navarro) a coaching discipline; (b) unlawfully issued Navarro an unfavorable performance evaluation and a revised performance evaluation; and (c)

promulgated an overly-broad and discriminatory rule prohibiting employees from discussing their concerted activities with others. The General Counsel's Cross-Exceptions Brief previously addressed the ALJ's failure to: (a) admit General Counsel's Exhibit 11 into evidence; and (b) order a notice posting at Respondent's other facilities wherever Respondent uses the confidentiality agreement. In all other respects the ALJ's findings are appropriate, proper, and fully supported by the credible record evidence. Accordingly, the Board should grant the General Counsel's Cross-Exceptions.

I. ANALYSIS AND DISCUSSION

The starting point for any examination of the allegations in this case is the fact that Navarro was engaged in protected concerted activity when he questioned and discussed his concerns with several of his coworkers about Respondent's unexpected and unprecedented instructions for cleaning and sterilizing surgical instruments, that were not Respondent's established protocol or procedure. The ALJ described Navarro's actions as "concerted activity." (ALJD at 5: 36) The credible record evidence supports the ALJ's finding, and demonstrates that Navarro's discussions concerned issues that fall squarely within the ambit of Section 7 activity, including the lack of documentation or established protocol in using the methods directed by Respondent, and the potential liability or loss of employment faced by employees using these methods that were not established protocol.

A. The ALJ Erred by Not Finding that Respondent unlawfully issued Navarro a coaching discipline, an unfavorable evaluation, and a revised unfavorable evaluation.

The ALJ failed to evaluate Navarro's coaching discipline, unfavorable evaluation and revised unfavorable evaluation under *Wright Line*² or *Burnup & Sims*³. The

² 251 NLRB 1083 (1980), *enfd.* 662 F. 2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

ALJ further failed in not finding that Respondent had violated Section 8(a)(1) by engaging in this conduct.

1. The General Counsel Established a Prima Facie Case.

To establish that an employer has retaliated against an employee for exercising his right to engage in concerted activity, the following four elements must be established: (1) the employee engaged in protected, concerted activity; (2) the employer knew of the concerted nature of the activity; and (3) the employer bore animus towards the employee's protected activity. *Praxair Distribution, Inc.*, 357 NLRB No. 91 n. 1 (2011); *Meyers Industries*, 268 NLRB 493, 497 (1984). Each of those elements is amply demonstrated by the record evidence.⁴ *Wright Line, supra*.

The record evidence establishes that Navarro was in engaged in protected, concerted activity. *Triangle Electric Co.*, 335 NLRB 1037, 1038 (2001) (an employee is engaged in concerted activity if the activity was “engaged in with or on the authority of other employees and not solely on [the employee’s] own behalf); *Meyers Industries, supra*. More specifically, Navarro, employees Ruth Hernandez, and Muriel Kremb testified that they discussed and shared concerns about the lack of established protocol for the cleaning and sterilization methods used, the fact that the procedures had never been used before, the potential liability if a patient would become ill due to instruments being cleaned and sterilized in the methods proposed by Respondent, and how employees would perform their work duties. (Tr. 124,

³ 379 U.S. 21 (1964).

⁴ The Board has held that after the initial elements of a violation are established, the examination turns to the employer's actual motive behind the decision. *Schaeff Incorporated*, 321 NLRB 202, 210 (1996). If the employer can show that the same action would have been taken against an employee in the absence of his or her protected activity, the employer rebuts the General Counsel's prima facie case. However, the Board has held that a finding of pretext or false reasons, “necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel.” *International Carolina Glass*, 319 NLRB 171 (1995); Also: *Limestone Apparel Corporation*, 225 NLRB 722, 736 (1981) *enfd.* 704 F.2d 799 (6th Cir. 1982).

130) Navarro further testified that he also discussed these issues with employees Wilks and Hedges. Navarro's discussions with his fellow employees are classic protected, concerted activity. *Shippers Dispatch, Inc.*, 223 NLRB 439, 445 (1976) (employees complaining about work assignments engaged in concerted activity); *Bell of Sioux City, LP.*, 333 NLRB 98, 105 (2001) (employee's complaints to coworkers that she had been treated unfairly was concerted activity, as it involved a speaker and listeners, and some other employees agreed her treatment was unfair).

Contrary to the Respondent's assertions, the record clearly demonstrates, by a preponderance of the evidence, that Respondent knew that Navarro was discussing with coworkers concerns about Respondent's instructions on the cleaning and sterilization of surgical instruments, which were important terms and conditions of their employment. See *Triangle Electric*, supra at 1039.

Respondent's Human Resources Consultant Odell admitted that Navarro informed her he had discussed his concerns with other employees, and that she knew these concerns were shared by other employees. In fact, Odell's notes show that Navarro told her that he discussed these issues with Hernandez and Kremb. (GCX 12) Navarro also told Fellenz, before he was issued his coaching discipline, that Navarro had discussed his concerns with coworkers, including Curtis Wilks, Mary Hedges, and Hernandez. (Tr. 131-32) While Kenneth Fellenz denied Navarro informed him that he had discussed these concerns with other employees, he admitted that Navarro raised his concerns with him. Fellenz further admitted that after his conversation with Odell, which occurred after Navarro had met with Odell, Fellenz changed his initial proposed discipline of Navarro to a coaching discipline, based upon Odell's recommendation. Specifically, this was done due to the fact Navarro had

raised concerns with Respondent that had been discussed with other employees. Cecelia Dicob, an admitted supervisor, also testified that Navarro raised concerns that he had discussed with other employees with her.

Contrary to Respondent's claims as to the lack of animus, Respondent was angry at Navarro for raising concerns about the "new" methods for cleaning and sterilizing surgical instruments, and as a result took adverse action against Navarro. Animus can be shown through direct evidence, or it can be imputed from circumstantial evidence, and the record as a whole. *Tubular Corp. of America*, 337 NLRB 99, 99 (2001); *Olathe Health Care Center*, 314 NLRB 54, 54 (1994) (here disciplinary action was taken shortly after an employer became aware of protected activity, timing is particularly strong evidence of illegal discrimination).

Just days after raising issues with his coworkers regarding Respondent's directive that employees clean surgical instruments using hot water from the coffee machine, and sterilize them using the Sterrad, Navarro was issued a coaching discipline, and poor performance appraisal. This is strong evidence of Respondent's illegal motive and its adverse action against Navarro.⁵ *Olathe Health Care Center* supra.; *Daniel Construction Company*, 264 NLRB 569, 578 (1982), enfd. 731 F. 2d 191 (2d Cir. 1984) ("abruptness," along with timing, are often relied upon as indicia of an employer's discriminatory conduct)

B. Respondent violated the Act under *Wright Line* or *Burnup & Sims*

1. Respondent does not have a Wright Line defense.

Respondent, under *Wright Line*, supra, failed to establish that it would have disciplined Navarro absent his protected, concerted activities. Perturbed that Navarro vocally

⁵ Moreover, Respondent's independent rule violation, in regard to its Confidentiality Agreement, is sufficient to find animus. *West Michigan Plumbing & Heating, Inc.*, 333 NLRB 418 n. 2 (2001) (employee handbook provision which independently violated Section 8(a)(1) evidences anti-union animus).

raised issues concerning Respondent's cleaning and sterilization processes, patient care, and employee liability, Respondent opportunistically seized upon Navarro's supposed reluctance to implement Respondent's untested process to discipline Navarro, issue him an unfavorable evaluation, and a revised unfavorable evaluation. The credible record evidence demonstrates that Navarro did not refuse to follow Respondent's instructions.

Respondent's reliance on discipline issued to former employee Lorina Reyes, who it alleges received a discipline for "less egregious" incidents of insubordination, is misplaced. (RX 4) Specifically Reyes, who was subsequently discharged for this reason, was issued a March 30 coaching discipline that was well documented and concerned her yelling and screaming at coworkers. The record evidence further demonstrates that Reyes also continuously failed to perform her assigned work. Respondent, failed to present any evidence showing that Navarro failed to perform any assigned work. In fact, the only documentary evidence, other than those in dispute in this matter, show that Navarro sterilize surgical instruments using the Sterrad, as instructed, on February 20. (GCX 7) Accordingly, the General Counsel met his burden of proof, and has shown that Navarro's protected conduct was a motivating factor in Respondent's decision to issue him a coaching discipline. Conversely, Respondent has failed to show by a preponderance of the evidence that it would disciplined Navarro absent his protected activities.⁶

Regarding the Navarro's performance evaluations, Navarro credibly testified that he had no work performance issues, and that Fellenz never previously advised him of any work

⁶ Respondent, in support of its claim that coaching was not a disciplinary action, cites *Amber Foods, Inc.*, 338 NLRB 712, 713 (2002), where the Board adopted the ALJ's finding that the employer did not violate Section 8(a)(3) by issuing a verbal warning to an employee for not washing her hands, and the verbal warning did not constitute a discipline. However, the instant case is readily distinguishable from *Amber Foods*, supra as there is no evidence that the respondent in *Amber Foods* had the same disciplinary procedure as Respondent; there is no evidence that the coaching discipline in the instant case, can be equated to the verbal warning in *Amber Foods*, and the employee in *Amber Foods* did not dispute the substance of the verbal warning, while Navarro unequivocally denied engaging in insubordination.

performance issues. Although Respondent presented witnesses that allegedly complained to Fellenz regarding Navarro's failure to perform his work properly, it is inherently implausible that Fellenz had received complaints since June 2010, but never issued Navarro any prior discipline, or made any negative notation in Navarro's September 28, 2010 evaluation regarding poor work performance.

Respondent alludes to the unfavorable evaluation that it issued to employee Peter Flores, however, as noted in Flores' evaluation (in the Collaboration section), there are detailed examples of Flores having "a problem with being able to move on from issues that happened before I arrived here at the end of June 2010." (RX 3) Absent from Navarro's evaluation, are any details such as those contained in Flores' evaluation regarding the failure to perform assigned work. The credible record evidence demonstrates that Navarro credibly and continuously denied that he failed to perform his work, or that he ever had a conversation with anyone concerning these alleged complaints. The record shows that the only reason Navarro was issued his unfavorable evaluation and a revised unfavorable evaluation was because of his protected concerted activities.

2. Respondent's conduct was Unlawful under *Burnup & Sims*

Respondent violated the Act under a *Burnup & Sims* analysis.⁷ Despite Respondent's claim that Navarro allegedly committed insubordination and refused to perform his work duties, the record evidence shows that the real reason Respondent disciplined Navarro, and issued him unfavorable evaluations and a revised unfavorable evaluation, is that it wanted to silence him, and by doing so Respondent has violated Section 8(a)(1) of the Act. Even if the

⁷ Under the principles set forth in *NLRB v. Burnup & Sims* when an employer disciplines an employee for misconduct arising out of a protected activity, the employer has the burden of showing that it held an honest belief that the employee engaged in serious misconduct. *Id.* at 23. Once the employer establishes that it had such an honest belief, the burden shifts to the General Counsel to affirmatively show that the misconduct did not in fact occur.

Respondent was not motivated by animus, its discipline and issuance of an unfavorable evaluation, and a revised unfavorable evaluation still violated Section 8(a)(1) of the Act under *Burnup & Sims*, supra.

Respondent failed to show that it had an honest belief that Navarro engaged in any misconduct, as Navarro sterilized the medical instruments using the Sterrad as instructed, and he presented Respondent with documentary evidence of such. Accordingly, even when analyzed under a *Burnup & Sims*, the finding of a violation is still warranted.

II. CONCLUSION

The record demonstrates that Respondent was intent on trampling the Section 7 rights of its employees. The record evidence further supports a finding based upon the foregoing and the entire record in this matter, it is respectfully submitted that the Board should grant General Counsel's Cross Exceptions and find the additional violations urged by the General Counsel.

Dated at Phoenix, Arizona, this 4th day of January 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S REPLY BRIEF AND MOTION TO STRIKE RESPONDENT ANSWERING AND REPLY BRIEF in Case 28-CA-023438, was served by E-Gov, E-Filing, and E-Mail, on this 4th day of January 2012, on the following:

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