

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

JEWISH HOSPITAL & ST. MARY'S HEALTHCARE, INC.
d/b/a OUR LADY OF PEACE

and

Case 9-CA-066542

AFSCME COUNCIL 62, AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES

Eric J. Gill, Esq., for the General Counsel.

Mark D. Nelson and Stephanie Dodge Gournis, Esqs.,

(Drinker, Biddle & Reath, LLP, Chicago, Illinois) for the Respondent.

Irwin H. Cutler, Jr., and Cori L. Metcalf, Esqs., Louisville, Kentucky, for the Charging Party

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Louisville, Kentucky on January 17-18, 2012. AFSCME Council 62, the Charging Party, filed the charge initiating this matter on October 12, 2011 and the General Counsel issued the complaint on December 6, 2011. The General Counsel alleges that Respondent violated Section 8(a)(3) and (1) of the Act by placing Amanda "Amy" Doyle on Investigative Time Off (ITO) on September 22, 2011 and then terminating her employment on September 28, 2011.

The General Counsel also alleges that Respondent violated Section 8(a)(1) of the Act by telling Amy Doyle that she was being disciplined and then terminated for distributing union material and encouraging other employees to support the Union. At the instant hearing, the General Counsel moved to amend the complaint to allege that Respondent violated Section 8(a)(1) in several respects on September 23, 2011 when it interviewed five employees while investigating the conduct for which it terminated Amy Doyle. The General Counsel alleges that these interviews were conducted with the illegal objective of discovering Doyle's protected union activities and the interviews constituted illegal surveillance and interrogations of employees' union activities. I grant the motion to amend. The allegations are closely related to the allegations in the charge and the original complaint, *Payless Drug Stores*, 313 NLRB 1220, 1221 (1994). Moreover, the legality of the interviews was fully litigated and briefed, See, e.g., Respondent's brief at pages 13-15.

On the entire record¹, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent and the Charging Party, I make the following

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FINDINGS OF FACT

I. JURISDICTION

Respondent, a not for profit corporation, operates hospitals in Louisville, Kentucky, where it annually derives gross revenues in excess of \$250,000 and purchases and receives goods valued in excess of \$5,000 from outside the State of Kentucky. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, AFSCME Council 62, is a labor organization within the meaning of Section 2(5) of the Act.

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II. ALLEGED UNFAIR LABOR PRACTICES

Respondent hired Amy Doyle in February 2003. At the time of her discharge she was working as a mental health associate (MHA) at Respondent's Psychiatric Residential Treatment Facility (PRTF), 3 days a week from 10:00 a.m. until 10:00 p.m. The PRTF consists of two residential half-way houses for mentally handicapped patients between the ages of 12-18. These are patients who no longer need acute inpatient care at Respondent's Our Lady of Peace Psychiatric Hospital. Prior to 2010 Doyle had been employed at the inpatient hospital. Doyle was at least a satisfactory employee. She had received discipline for a no call/no show attendance violation for the day after Thanksgiving 2010. Doyle also received one other discipline which was rescinded and for which she was apparently exonerated. Jennifer Nolan, Our Lady of Peace's CEO, described Doyle as "very competent" and stated that she thought highly of Doyle.

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There are generally three mental health associates on duty at each of the two PRTF houses. Each is generally responsible for three patients. The MHA's job is primarily to watch the patients during the day and check on them every 15 minutes after they go to bed at 8:00 p.m. The patients attend school at the PRTF in a classroom taught by a Jefferson County school teacher. During class, the MHAs simply sit in the classroom and keep an eye on the students. The same is true when the patients are playing on the PRFT playground or go to the gymnasium at the Our Lady of Peace Hospital.

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Doyle became actively involved in activities in support of the Charging Party Union's organizing drive in the fall of 2010. She encouraged fellow employees to support and join the Union at work, when she was both on and off the clock and distributed union literature and authorization cards. On at least one occasion she distributed union material to other employees while either she or the other employee was on the clock at Respondent's facility.

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Respondent's management strongly opposed the organizing drive. On or about September 9, 2011, Respondent distributed an anti-union letter to all its employees at the Lady of

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¹ Tr. 288, line 6: "long" should be "wrong."

Peace Hospital and the PRTF from CEO Jennifer Nolan and its Chief Nursing Officer, Brad Lincks. Respondent required its supervisors to distribute and read this letter to each employee. In some cases the employee was called away from his or her work assignment to hear this letter read. The letter stated in pertinent part that it was unfortunate that union organizing activity was continuing and that unions are inappropriate for healthcare facilities.

Respondent's letter closed by stating that, "if a union gets into Peace, many of us face decisions of whether we want to work in such an environment. We are hopeful it never gets to this point and we need your support to assure that it does not." The letter then suggested that employees who had signed union authorization cards tear off the bottom of the letter and send it to the Union and the NLRB to rescind the authorization of the Union to represent them.

Doyle's union activities for which she was terminated

On September 22, 2011, Janet Ostbloom, a human resources consultant, called Doyle to her office and informed Doyle that she was being placed on investigative time off (ITO) for discussing non-work related matters with fellow employees that rose to the level of harassment while on working time. On September 23, Ostbloom interviewed five of Doyle's fellow employees.

Respondent terminated Doyle on September 28, 2011. It gave Doyle a Corrective Counseling Record (termination notice) which stated that Doyle was being fired for "multiple violations of distributing non-work related materials and discussing non-work related topics related to supporting an organization during working time. This was determined to be at a level of being disruptive to team members and to the level of harassment," G.C. Exh. 6.

In support of its decision to terminate Doyle, Respondent relies on its Solicitation and Distribution Policy, G.C. Exh. 7 and its Non-Harassment Policy, C.P. Exh. 2. The Solicitation and Distribution Policy provides in pertinent part:

JHSMH team members may not solicit, by any method for any purpose during working time or in immediate patient care areas. Team members may not distribute by any method, literature or information of any type or for any purpose during working time, in working areas, or in patient care areas.

Solicitation and distribution is prohibited if either the soliciting or distributing team member, or the team member being approached, is on working time. Examples: solicitation or distribution of Girl Scout cookies, or flyers on behalf of outside organizations including charitable organizations may not occur during working time or immediate patient care areas.

JHSMH-sponsored support of established annual charity drives and hospital-sponsored organizations, services, and functions are limited exceptions to this policy. Team members are not under any obligation to contribute to such causes.

"Solicitation" is defined as "approaching one or more individuals within any JHSMH facility, with offers, requests, communications, either physically or electronically."

Respondent's Non-Harassment Policy defines "harassment" as "any action, which singles out a team member, to the team's detriment, because of race, sex, religion, national origin, age, sexual orientation, gender identity, veteran status, or disability."

Respondent concluded that Doyle was in violation of these policies based on the interviews Janet Ostbloom had with five employees on September 23, and reports she received from supervisors concerning Doyle's conversations with employees encouraging them to support the Union.

Respondent also contends that it applied its Progressive Discipline Policy, C.P. Exh. 3. Under this policy, Respondent determined that Doyle had accumulated 9 disciplinary points within a one year period. 6 disciplinary points is grounds for termination. Respondent assessed 3 points against Doyle for her no call/show attendance violation in November 2010. It assessed 2 points for violation of Doyle's violation of its solicitation and distribution policy, which would not have been sufficient grounds for termination, Tr. 451. Respondent assessed a total of six points for Doyle's union activities in August and September 2011 because employees complained that she had harassed them. In fact only one or possibly two employees had complained to Respondent that Doyle harassed them, Tr. 442, G.C. Exhs. 12 and 13; R. Exhs 2, 3 and 5.

Interaction with fellow employees for which Respondent terminated Doyle

Conversations with Allen "Cody" Ryan

One evening in approximately late August or early September 2011, Doyle attended an evening training session at the Our Lady of Peace inpatient hospital. At the end of the training she went to unit 3 East to get some cups to take back to the PRFT the next day. On 3 East she encountered Cody Ryan, a mental health associate and spoke to him for a few minutes about the Union. Doyle gave him an authorization card and some union literature. On another occasion, Ryan was working at the PRFT, which was not his usual assignment. Doyle, Ryan and other PRFT employees took patients to the main hospital to use the gymnasium. While they were there, Doyle again encouraged Ryan to support the Union while they were watching the patients play in the gym. On a third occasion, Doyle visited Ryan's home on behalf of the Union when Ryan was not home.

Ryan reported this interaction to his supervisor Stacy Gibson. On or about September 23, 2011, Gibson took Ryan to the Respondent's Human Resources Department.² Janet Ostbloom, a Human Resources Consultant interviewed Ryan in the presence of Gibson and Petie Anderson, another human resources consultant. Anderson took notes of this interview which were shown to Ryan, G.C. Exh. 12. He did not sign the notes, however.

² I do not credit or discredit Ryan's testimony that he reported his contacts with Doyle to Gibson on his own volition. It is quite apparent that some of the witnesses who testified that they voluntarily reported similar contacts without prodding, were in fact solicited and possibly coerced by managers into reporting on Doyle's union activities.

Ryan told Ostbloom that Doyle kept approaching him about the Union at the gym. He told Ostbloom that he was annoyed that Doyle kept asking him about the Union, “even though he said no.” When testifying at the instant hearing, however, Ryan stated that he never asked Doyle to stop talking to him, Tr. 65. He did testify that she persisted despite the fact that he told her he was not interested in signing an authorization card. Doyle denied that Ryan told her he wasn’t interested in the Union. I do not necessarily credit either.

It is clear from this record that employees who were known to have been approached by Doyle about the Union were under tremendous pressure to demonstrate that they were hostile to the organizing drive, to relate to Respondent that they demonstrated hostility to Doyle when she broached the subject of the Union to them and to provide a version of events that supported Respondent’s position that Doyle harassed them.

Ryan also told Ostbloom that Doyle approached him after the training class and gave him a card. Ryan’s testimony makes it clear that Doyle’s conversations with him did not interfere with the performance of his duties, which at the gym, involved simply watching the patients play.

Conversations with James Stone

In mid-September 2011, James Stone was working in ward 3 East when he was approached by his supervisor, Angie Rodgers. Rodgers gave him anti-union literature and told Stone that there were rumors that somebody was handing out union literature. Stone testified that he replied to Rodgers, “I just said I had talked with somebody about it. And that was all I said at that point,” Tr. 192. On September 23, 2011, Janet Ostbloom summoned Stone to the HR office for a 20 minute interview in the presence of Rodgers and Petie Anderson. Anderson took notes of the interview, G.C. Exh. 13.³

Ostbloom asked Stone about his conversation with Doyle, who Stone had not identified to Rogers or to Ostbloom, Tr. 405. Stone may or may not have told Ostbloom that Doyle had spoken with him about the Union three times. At trial he could only recall one occasion. He testified the conversation lasted about a minute and he and Doyle were watching the patients either in the classroom or on the playground.

Stone may or may not have told Ostbloom that he didn’t like being bothered by Doyle or the Union and that Doyle reacted adversely, like he was not a “team player.” Anderson recorded that Stone said that the first time Doyle approached her “it was like I was “fresh meat.”⁴ Stone, who was also interviewed by Respondent’s counsel in preparation for trial did not recall using the term “fresh meat” when giving an affidavit to the NLRB agent on November 16, 2011. He also did not testify that he was bothered by Doyle’s conversation, leading me to conclude that Respondent’s interview notes may be inaccurate and/or that Ostbloom or Anderson led the interviewees to provide information they believed damaging to Doyle and/or put words in the

³ It is not clear whether these notes were shown to Stone. I find that the notes are substantively inaccurate. As a current employee Stone’s testimony is particularly reliable in that it is adverse to his pecuniary interest, a risk not lightly undertaken, *Gold Standard Enterprises, Inc.*, 234 NLRB 618, 619 (1978); *Flexsteel Industries*, 316 NLRB 745 (1995).

⁴ Respondent hired Stone on June 5, 2011.

interviewee's mouths. At trial, Stone testified that his response to Doyle was that if he was interested in [the Union] he would get back to her, Tr. 194.

Doyle's conversation with Lewis Gilbert

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Lewis Gilbert is a mental health associate at Our Lady of Peace. He worked at the PRTF on only one occasion in about August or September 2011. At about 10:30 a.m. on that occasion, Gilbert and Doyle were watching patients play basketball. Gilbert was shooting baskets with the patients and Doyle was sitting on a bench a few feet away. Doyle started a conversation with Gilbert about the Union, encouraging him to support it. This conversation lasted 5-10 minutes, during which time Gilbert continued to shoot baskets with the patients.

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The next day at Our Lady of Peace, his supervisor, Andrea Lewis, approached Gilbert with some anti-union literature and told him that he might be approached by persons favoring the Union. Gilbert testified that he volunteered the fact that he'd been approached. I do not credit Gilbert on this point or any other significant matters. On cross-examination, Gilbert conceded that his supervisor, Angie Lewis, told him that if he was approached by someone about the Union, he should let his supervisor know about it, Tr. 305. Regardless of whether or not this was said before or after Gilbert supposedly volunteered the information about his conversation with Doyle, it is clear that Respondent's supervisors were placing employees' protected activities under surveillance, a clear, albeit unpled violation of the Act.⁵

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On September 23, 2011 Gilbert was summoned to HR and was interviewed by Ostbloom, in the presence of Susan McMahon, who was then his supervisor, and Petie Anderson, who took notes, R. Exh. 2. Gilbert had never been called to HR previously and at this point he had accumulated 5 disciplinary points since his hire in March 2011. An employee with 6 disciplinary points was terminated. Whoever told Gilbert to go to HR did not tell him the reason he was to go to HR. I infer that Gilbert feared that he about to be terminated and that much of what he said at the interview and at trial is the product of this fear and not credible.

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Conversations with Wrae Sanders

Wrae Sanders had two conversations with Doyle about the Union. The first occurred at a picnic table when they were watching the patients play outside. At Tr. 322, Sanders indicated that the conversation as "brief" but testified at Tr. 327 that it lasted 10-15 minutes. Sanders testified that the conversation did not interfere with her duties.

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The Union also visited Sanders at home, which may or may not have upset her. Sanders was also interviewed by HR on September 23. She may have told Ostbloom that she told Doyle she was not interested in the Union, but that Doyle "wouldn't let up.", Exh. R-3. Assuming that Respondent's notes are accurate, I infer Sanders' statements at the interview and at trial are the result of Respondent's coercion.

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⁵ It is far more likely than not that Gilbert's report of the conversation with Doyle followed Lewis' admonition that he should report all contacts about the Union to his supervisor.

Sanders testified that when Doyle was talking to her about the Union, she (Sanders) asked Doyle about what benefits the Union provided, Tr. 340-2. Doyle pulled out her cellphone and showed Sanders an application that pertained to Union benefits. Thus, it is clear that Sanders showed interest in Doyle's conversation and did not continually tell Doyle that she wasn't interested in the Union.

I also infer that Sanders' testimony and interview are the result of Respondent's coercion from the exchange between Sanders and Respondent's counsel at Tr. 329-330. Counsel asked Sanders whether Doyle had given her union literature or an authorization card. Sanders responded, "She didn't, but the lady who came to my house did, but I mean, I threw the thing out..." This is further indication that Sanders did not vigorously resist all union communication since she could have refused to accept the card. Her gratuitous testimony about discarding the card indicates a desire, similar to that of other witnesses, to assure Respondent that they were opposed to unionization. This desire I infer emanates out of fear for their jobs.

Conversation with Stephen Austin Carter

One day in September 2011, Stephen Austin Carter (Austin) was watching patients in the 2 East Unit of Our Lady of Peace with three other employees, one of whom was Lewis Gilbert. According to Carter, the four were discussing the Union when they were approached by Carter's supervisor, Susan McMahan. McMahan came to unit to distribute Jennifer Nolan's September 9 letter opposing the union organizing drive, G.C. Exh. 5. McMahan pulled Carter away from his work duties and talked to him for about 5-10 minutes about the Union.

Carter testified that when McMahan gave him the letter, she asked Carter and the others if they had been approached by the Union, Tr. 491-96. Although, Carter's testimony is not a model of clarity, I infer that McMahan solicited information about his contacts with the Union before he told her about his conversation with Doyle. His conversation with Doyle had occurred days or a week earlier and Carter had not previously mentioned it to management, Tr. 533. Since the General Counsel did not plead a statutory violation with regard to McMahan's inquiry, I do not find a violation. However, She clearly engaged in an illegal interrogation regarding the protected activities of a number of employees.

Carter had two conversations with Doyle about the Union. The first was at the PRTF playground. Carter's testimony regarding his response to Doyle establishes that his statements to Ostbloom when she interviewed him on September 23 and at trial about feeling harassed are not credible and are in fact the result of intimidation by Respondent.

Carter testified that at the playground he responded to Doyle as follows, "I don't, you know, I – I don't know, if we need a union or not," Tr. 498. His response in fact accurately described his feeling about the union organizing drive. As Carter testified:

I wasn't – I mean, to be honest, I wasn't against the Union, but I wasn't for the Union. I honestly didn't care at the time, I mean I'd only been there, you know, since March 3, you know.

Tr. 498.

Similarly, when Doyle told Carter that she had union literature to give him later, he replied, "Oh, okay," Tr. 507.

5 Later that evening, Carter was at the nurse's station at one of the PRTF houses where he discussed the Union with Doyle. He testified that Doyle volunteered to check on Carter's patients for him to make sure that they were in their beds. He also testified that as a result of his conversation with Doyle rounds were not done on time, laundry did not get done and employees did not take out the trash when they were supposed to do so, Tr. 505. This testimony is not
10 credible. Carter did not tell Ostbloom anything about Doyle interfering with his job duties when Ostbloom interviewed him on September 23, R. Exh. 5, Tr. 515. His trial testimony about such interference is embellishment to curry favor with Respondent.

15 At some point between the time he spoke with Doyle and his September 23 interview with Janet Ostbloom. Susan McMahan brought Carter to HR. Carter brought union literature and authorization cards to HR with him. Carter brought Ostbloom as many as five authorization cards and union brochures, Tr. 422-23. The fact that Carter had received these cards and leaflets establishes that he was not as offended by Doyle's conversations with him as he stated in his
20 September 23 interview with Ostbloom or at trial.⁶

On September 23, Susan McMahan told Carter to go the human resource department. I infer that McMahan did not tell Carter why he needed to go to HR, but it is clear he was afraid he was about to be terminated.⁷ Carter had been assessed 5 disciplinary points previously and he knew that one more would lead to his termination, Tr. 551. He testified that he told McMahan,
25 "that I felt like I was worried about – uh, being in jeopardy as far as getting a write-up or -- uh, me not doing my round rounds on time, and me not doing my job. That's the biggest thing that worried me about the situation," Tr. 517.⁸

30 Carter testified at trial, "And I know, they had video tape and stuff, and none of that stuff was done, and the rounds were late," Tr. 518. While Carter was afraid of being fired on September 23, it is not clear that this was due to his failure to do his job while talking to Doyle. Respondent does not claim that Doyle failed to do her job at any time relevant to this case.

Doyle's conversation with Rebecca Rattray

35 In deciding to terminate Amanda Doyle, Respondent also relied on the account of Nurse Manager Stacy Gibson concerning a conversation Rebecca Rattray had with Doyle. Since Rattray was on vacation on September 23, Respondent did not interview her before firing Doyle.

⁶ This is very strong evidence that Respondent had placed employees' union activities under surveillance before it placed Doyle on investigative time off on September 22.

⁷ There is no evidence that any of those interviewed by Ostbloom were told why they were being summoned to HR until they arrived at the meeting. Indeed, from Lewis Gilbert's testimony at Tr. 316, I find that none of them was told the reasons they were to report to HR. Thus, all were interviewed under very intimidating circumstances.

⁸ Carter testified that he made these statements in his meeting with Ostbloom. If so, Respondent failed to record them, R. Exh. 5.

Ratray is a mental health associate at Our Lady of Peace. She worked at the PRTF on only one occasion. Ratray testified that she was sitting at the nurse's station at the PRTF and had no duties to perform, so she began reading a non work-related book, while on the clock. Doyle approached Ratray while she was reading and began discussing the Union with her.

5 Ratray testified at hearing that she simply ignored Doyle and continued reading her book. At some point she testified that she got up and went into another room and Doyle followed her and continued talking about the Union.

10 Ratray testified that the entire conversation lasted about ten minutes. She also testified that because she felt "very uncomfortable" she went straight to her supervisor, Stacy Gibson, and reported the conversation. Ratray never told Doyle that she was making her uncomfortable, Tr. 355-357. However, Ratray testified that she told Gibson that she "felt harassed," Tr. 360.

15 I find Ratray's testimony regarding the circumstances and the reasons for which she reported her conversation with Doyle to be completely incredible. I infer that Gibson solicited the report and that there may be other reasons not in this record as to why Ratray testified as she did about such an innocuous incident. One such reason might be that she was reading a book during work time.

20 I would note that Janet Ostbloom testified that Gibson told her that Doyle followed Ratray around while she did her rounds. This is obviously incorrect. Ratray was reading a non work-related book. Gibson didn't testify and I find Ostbloom a generally incredible witness. Thus, I decline to credit Ostbloom that this is what Gibson reported to her.

25 *Respondent puts Doyle on Investigative Time Off*

30 On September 22, 2011, after receiving reports from supervisors that Doyle had been discussing the Union with other employees, Respondent placed her on investigative time off (ITO). It did this before it interviewed any of the employees Doyle had talked to or talking to Doyle. When Doyle was called in the human resources office and asked if the investigation had anything to do with the Union, Respondent untruthfully told her that it did not.

35 Janet Ostbloom testified that the supervisors of the employees who reported their conversations with Doyle came to her without prodding from HR. I find this incredible. To the contrary, I infer that Respondent's managers had been encouraged to interrogate employees about union activity and to report their findings to HR.

40 Ostbloom testified that each employee interviewed was asked if they were comfortable talking her and also whether it was o.k. for their supervisor to remain in the room. This gives these interviews the appearance of being voluntary, when in fact they were not. No employee summoned to HR for unexplained reasons, particularly one with disciplinary points just short of the number needed for their termination, would refuse to be interviewed under these circumstances or insist that their supervisor leave the room.

45 The intimidating and coercive nature of the interviews is also established by things the interviewees did not mention. For example, Wrae Sanders did not tell Ostbloom that she had asked Doyle questions about the union benefits, Tr. 409.

Respondent terminates Doyle on September 28, 2011

5 On September 28, 2011, Ostbloom called Doyle and told her to come to the HR office because Respondent had completed its investigation. When she arrived her supervisor Kathy Cohen handed Doyle her termination notice in the presence of Ostbloom and Helen Schrock, an HR official to whom Ostbloom reports.

Analysis

Respondent violated Section 8(a)(3) in terminating Amanda Doyle

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20 If an employer discharges an employee for engaging in protected union activity, it violates Section 8(a) (3) and (1). If the employer contends that the employee was engaged in misconduct in the course of his or her protected activity, the employer violates the Act if the employee was not, in fact, guilty of misconduct, *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964); *Marshall Engineered Products Co., LLC*, 351 NLRB 767 (2007). In the instant case, Respondent disputes the notion that Doyle's activities were protected and argues that even if they were protected, she engaged in misconduct justifying her termination. I conclude that with the possible exception of a few instances in which Doyle distributed literature, her activities were protected. Secondly, I conclude that the alleged misconduct for which Respondent terminated her employment either did not occur and/or did not constitute misconduct.

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30 Respondent admits that it would not have terminated Doyle but for that fact that it concluded that Doyle had "harassed" fellow employees. "The Board has long held that legitimate managerial concerns to prevent harassment do not justify policies that discourage the free exercise of Section 7 rights by subjecting employees to investigation and possible discipline on the basis of the subjective reactions of others to their protected activity." *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2000) (footnote collecting cases omitted), *enfd.* 263 F.3d 345 (4th Cir. 2001). There is no credible evidence in this case that Doyle engaged in any conduct that would forfeited the protections of the Act. The "harassment" claims herein are purely the subjective reaction of a fellow employee or employees to protected activity. Moreover, there is a strong suggestion that these claims were either solicited by Respondent and/or are the result of Respondent's coercion of fellow employees.

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40 Moreover, Doyle's conduct does not constitute "harassment" under Respondent's anti-harassment policy, which is limited by definition to offensive conduct regarding particular matters such as race, sexual orientation, national origin, etc. The fact that Respondent relied on its anti-harassment policy to terminate Doyle is evidence that its motive in terminating her was to discourage the Charging Party's organizing drive and that the reasons for her termination are pretextual.⁹

⁹ To the extent Janet Ostbloom testified that Respondent's harassment policy is broader than the definition in its written policy, her testimony is simply a post-hoc rationalization for Doyle's illegal termination. There is no evidence that Respondent ever applied this policy in such a manner to anyone other than Doyle.

Respondent concedes that but for her alleged “harassment,” Doyle would have accumulated only five disciplinary points by September 28, an insufficient number to justify her termination. Despite the fact that Doyle on one or more occasions violated Respondent’s rules on the distribution of literature, Respondent concedes that it assessed two disciplinary points against Doyle solely on the basis of her oral solicitation in favor of the Union. This too is a violation of Section 8(a)(3).

Respondent violated Section 8(a)(3) by imposing discipline on Doyle for talking about the Union and encouraging employees to support the Union on working time.

It is settled law that an employer may forbid employees from talking about a union during periods when the employees are supposed to be actively working, if that prohibition also extends to other subjects not associated or connected with their work tasks. However, an employer violates the Act when employees are forbidden to discuss unionization, but are free to discuss other subjects unrelated to work as is the case at Respondent’s facilities, *Jensen Enterprises, Inc.*, 339 NLRB 877, 878 (2003); *Sam’s Club*, 349 NLRB 1007, 1009-10 (2007).¹⁰

As Judge William Pannier observed in his decision in *Altorfer Machinery Co.*, 332 NLRB 130, 2133 (2000), which was affirmed by the Board,

After all, if production and workplace discipline are not viewed as impaired by communications among employees concerning nonwork-related subjects generally, then it is difficult for the employer to view them as somehow endangered by communications regarding union, union-related subjects, and employment terms and conditions unless, of course, that employer satisfies its burden of showing “special circumstances.”

In its *Jensen* decision that Board also stated,

“We reject the Respondent’s argument that the rule promulgated by Black prohibited only union solicitation as opposed to mere discussion about union topics, and that therefore it was lawful, in the absence of evidence that the Respondent allowed other similar solicitation during working time. Black told Vasquez and Monzon not to “talk

¹⁰ The Board has not adopted the Seventh Circuit’s view that an employer may discriminate against pro-Union discussion so long as it does not allow communications of similar nature, such as anti-union talk. Respondent would be in violation of the Act even under the Seventh Circuit view in that it eschewed taking disciplinary action against employees who were discussing the union, so long as they were not advocating support for the Union. Thus, when supervisor Susan McMahan learned that Austin Carter, Lewis Gilbert and two other employees were discussing the Union during work time Respondent took no disciplinary action against them, Tr. 49, 533-37. Respondent also knew that James Stone discussed the Union on work time and took no action against him, Tr. 192.

There is no reason to extend the reach of the Board’s decision in *Register Guard*, 351 NLRB 1110 (2007), enf. denied 571 F.3d 53 (D.C. Cir. 2009); decision on remand 357 NLRB No. 27 (2011), to this case. That decision sanctioned the employer’s prohibition of pro-union communications through use of the employer’s email system, while allowing employees to use the email system for other personal messages. The instant matter does not involve the use of the employer’s property to communicate pro-union messages.

about the Union” during working time and the Respondent has presented no evidence that it clarified the ban to make clear that it intended to prohibit only union solicitation.”

5 One could argue that this dictum suggests that an employer may allow non-work related discussion on work time, but may prohibit a pro-union employee from orally advocating support for a union in an organizing campaign, or encouraging other employees to sign authorization cards later, on non-work time in non-work areas (e.g., meet me in the parking lot after work). To so hold would render the long-standing rule that employers may not discriminatorily prohibit discussion of union topics a nullity. If an employer may not discriminatorily prohibit discussion of union topics, it would be absurd to conclude that it may prohibit discussions that advocate support for the Union. Such a conclusion would also be completely inconsistent with purposes of Section 7 of the Act.¹¹

15 *The allegations in complaint paragraph 5*

Complaint paragraph 5 alleges that Respondent violated Section 8(a)(1) on September 22, and 28, 2010, when it informed Doyle of the disciplinary measures taken against her. Although, neither Ostbloom on September 22, or Cohen on September 28, mentioned the Union, it was obvious that discipline was being imposed in part for Doyle’s protected activities in advocating support for the Union. Thus, I find that Respondent violated the Act as alleged.

20 *Respondent violated the Act in interviewing five employees on September 23, 2010*

25 The Board's evaluative criteria regarding Respondent’s September 23, 2010 interviews of employees Ryan, Stone, Gilbert, Sanders and Carter are particularly clear. They derive from its leading case on the topic, *Rossmore House*, 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985), and are summarized as follows:

30 Under Board law, it is [well established] that interrogations of employees are not per se unlawful, but must be evaluated under the standard of “whether under all the circumstances the interrogation reasonably tended to restrain, coerce, or interfere with rights guaranteed by the Act.”

35 In making that determination, the Board considers such factors as the background, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and whether or not the employee being questioned is an open and active union supporter. *Norton Audubon Hospital*, 338 NLRB 320, 320-321 (2002).

40 In addition, it is important to note that the Board has expressed particular concern regarding interrogations that appear designed to obtain “information upon which to take action against individual employees.” *John W. Hancock, Jr., Inc.*, 337 NLRB 1223, 1224 (2002). See also *SALA Motor Freight, Inc.*, 334 NLRB 979, 980 (2001) (interrogations that constitute “a pointed attempt to ascertain the extent of the employees' union activities” are unlawful).

¹¹ I neither credit nor discredit the testimony of the General Counsel’s witnesses that the sale of and solicitation for various items was commonplace at Respondent’s facilities. I do not rely on this testimony because none of it comes from witnesses whom I regard as neutral.

All of these factors lead me to conclude that the interrogations of September 23, 2011 violated the Act. Respondent had made its animus towards union activity known to all employees in its September 9, 2011 letter and in one-on-one discussion with its employees. Moreover, the interviews sought information regarding protected conduct and they were conducted in the human resources office by a human resources official for reasons that were not explained to the employees beforehand.¹²

Some of these employees, James Stone, for example, had not given any indication as to whether or not they were favorably or unfavorably disposed to the Union. Indeed, conceivably none of these employees had ever expressed uncoerced opposition to the Union. Some of interviewees, Gilbert and Carter for example, had good reason to believe that the interviews could have resulted in their termination. Finally, these interviews were conducted precisely for the purpose of terminating Amanda Doyle for protected activity.

Conclusions of Law

Respondent violated Section 8(a)(3) and (1) by placing Amanda Doyle on investigative time off on September 22, 2012 and in terminating her employment on September 28, 2011.

Respondent violated Section 8(a)(1) of the Act by telling Doyle that she was being disciplined and then terminated for conduct which Doyle and Respondent's representatives understood to be protected by Section 7 of the Act.

Respondent violated Section 8(a)(1) by coercively interrogating five employees on September 23, 2012 and giving them the impression that employees' union activities were under surveillance by management.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Amanda Doyle, it must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of discharge to the date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest compounded daily, *Kentucky River Medical Center*, 356 NLRB No. 8 (October 22, 2010) enf. denied on other grounds sub nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011), as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Respondent shall reimburse Amanda Doyle in amounts equal to the difference in taxes owed upon receipt of a lump-sum backpay award and taxes that would have been owed had there been no discrimination. Respondent shall also take whatever steps are necessary to insure that

¹² Although Ostbloom's written questions, R. Exh. 4, do not expressly mention the Union, all the interviewees understood what "approaches" and "non-work related issues" she was talking about. Respondent's prior communications to its employees, written and oral, made that perfectly clear.

the Social Security Administration credits Amanda Doyle's backpay to the proper quarters on her Social Security earnings record.

5 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹³

ORDER

10 The Respondent, Jewish Hospital & St. Mary's Healthcare, d/b/a Our Lady of Peace, Louisville, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

15 (a) Discharging or otherwise discriminating against any employee for supporting AFSCME Council 62 or any other union.

(b) Coercively interrogating any employee about the union support or union activities of that employee or any other employee.

20 (c) Giving employees the impression employees' union activities are under surveillance by management.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

25

2. Take the following affirmative action necessary to effectuate the policies of the Act.

30 (a) Within 14 days from the date of the Board's Order, offer Amanda Doyle full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Amanda Doyle whole for any loss of earnings and other benefits suffered as a result of the discrimination against her as specified in the remedy portion of this decision.

35 (c) Within 14 days from the date of the Board's Order, remove from its files any reference to Amanda Doyle's unlawful discharge and discipline and within 3 days thereafter notify her in writing that this has been done and that her discharge and illegal discipline will not be used against her in any way.

40 (d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records

¹³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

5 (e) Within 14 days after service by the Region, post at all its Louisville, Kentucky facilities copies of the attached notice marked “Appendix.”¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 22, 2011. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.

20 (f) Within 14 days after service by the Region, hold a meeting or meetings during working hours, which will be scheduled to ensure the widest possible attendance of employees, at which time the attached notice marked “Appendix” is to be read to its employees by a Board agent in English and any other language spoken by more than three employees in the presence of Respondent’s President/Chief Executive Officer or highest ranking human resources official.

25 (g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., March 5, 2012.

30

Arthur J. Amchan
Administrative Law Judge

¹⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT discharge or otherwise discriminate against any of you for discussing or advocating support for AFSCME Council 62, American Federation of State, County and Municipal Employees, or any other union.

WE WILL NOT coercively question you about your union support or activities or the protected activities of other employees.

WE WILL NOT give the impression that employees' union or other protected activities are under surveillance by management.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Amanda Doyle full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Amanda Doyle whole for any loss of earnings and other benefits resulting from her discharge and other discrimination, less any net interim earnings, plus interest compounded daily.

