

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

USC UNIVERSITY HOSPITAL

and

Cases 21-CA-39656
21-CA-39693
21-CA-39798
21-CA-39799
21-CA-39808
21-CA-39870

NATIONAL UNION OF HEALTHCARE
WORKERS

NUHW'S EXCEPTIONS AND BRIEF IN SUPPORT OF EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE

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I EXCEPTIONS

The National Union of Healthcare Workers (“ Union” or “NUHW”) files exceptions in accordance with Section 102.46 to the Decision of the Administrative Law Judge herein dated April 11, 2012 (“ALJ Decision”) as follows:

1. NUHW files exceptions to the ALJ’s determination that the Respondent USC University Hospital (‘Respondent’ or Employer”) never had an established Policy of allowing employees in the Respiratory, Laboratory and EVS Departments a grace period for arriving at work 7 minutes or less after the start of their shifts. [ALJ Decision at 19].
2. NUHW files exceptions to the ALJ’s determination that Respondent did not engage in a refusal to bargain with the Union when it disciplined Juan Michael Torres (“Torres”), Traci Mills and/or Melissa Lynch for arriving at work 7 minutes or less after the start of their shifts. [ALJ Decision at 19].
3. NUHW files exceptions to the ALJ’s determination that the respondent had good cause to issue two warnings to Torres on March 18, 2011 and to issue a written warning and a 24-work hour suspension to him on April 7, 2011 and was not a pretext to punish Torres for his union and protected concerted activity.[ALJ Decision at 23].

Accordingly, the ALJ made legal errors in dismissing the following paragraphs of the Complaint 15 (a), (b), (c), (d) and its sub paragraphs and 17 and 20. Furthermore, the NUHW requests that the remedy requested by the General Counsel be ordered.

II. BRIEF IN SUPPORT OF EXCEPTIONS

A. STATEMENT OF FACTS

1. THE 7 MINUTE GRACE PERIOD

The record is clear that the “[e]mployees at the Hospital use an individual badge to swipe in and

out recording their arrival time and departure time” through the Kronos record keeping system. [ALJ Decision at 16]. In addition, the Hospital for payment purposes credited employees who swiped in up to 7 minutes late with full pay and after 8 minutes deducted 15 minutes from the employees’ paychecks. [Id.]. The dispute at issue is whether the Employer had a 7 minute grace period under the attendance policy before issuing discipline for tardiness. It is the Union’s and the General Counsel’s position that since 2009, employees in the laboratory, respiratory and EVS were also allowed a 7 minute grace period under the attendance policy before they received discipline for being tardy. [Id.]. It is the Union’s and the General Counsel’s position that managers within these specific departments created an exception to the Hospital’s practice of no grace period. [Id. at 17].

Although evidence submitted by Respondent was that there was only one employee within these departments that was issued discipline from 2009 to 2011 [Tr. 694-696; 697702; 704-705; 711; Jx-1; Rx-25 through 35; Rx-60-62], the ALJ found that these were isolated instances [Id. at 18]. The ALJ erroneously credited the testimony of Human Resources Manager EVA Herberger when the hospital was still owned by Tenet and the employees were represented by SEIU that there was an arbitration over the issue of the existence of the 7-minute grace period in 2006 and that Tenet prevailed on that issue. [Tr. 841-845]. Respondent however failed to produce the arbitrator's decision on this issue. Nonetheless, the ALJ discredited the testimony of Respiratory employee Torres that he remembered the SEIU's pursuit of that particular grievance but stated that the arbitration was never resolved. [Tr. 103]. Respondent, however; failed to produce the arbitrator's decision on this issue. It is unlikely that the HR department would not maintain a copy of an arbitration decision that would have resolved the issue. Instead the ALJ puts the burden on a rank and file member of the bargaining unit, Torres, for failing to remember the outcome. If a grievance was filed in February 2006 by Torres it is highly unlikely that an award would have been rendered in March 2006 and that the former HR representative for Tenet would not have a copy of the decision. Further, the

memo dated March 20, 2006 relied upon by the ALJ does not mention an arbitration decision when it reiterates the alleged policy.

The record demonstrates that NUHW representative Sophia Mendoza first learned that the 7-minute grace period was no longer being honored by Respondent around April and/or May 2011, when she got a text message from Laboratory employee Tracy Mills and a phone call about the issue from EVS employee Melissa Lynch . [Tr. 316-317; GCx-5]. Mendoza filed grievances on behalf of several employees including Lynch, EVS employee David Johnson and Mills and Laboratory employees Cruzberto Sandoval, Edgardo Nured, Akenna Scotland based on the Respondent's failure to abide by the grace period. [Tr. 317].

On April 20, 2011, Mendoza sent a letter to Herberger setting forth the unilateral changes that had been implemented at the hospital including the enforcement of the 7-minute grace period. NUHW demanded that Respondent cease and desist from implementing these changes and return to the status quo until the parties negotiated over the issues. [Tr. 383-385; GCx-52]. Between May and June 2011, there was correspondence between Mendoza, Herberger and Human Resources Generalist Sue Whitfield regarding the 7-minute grace period. [GCx-43; GCx-44; GCx-45; GCx-46; GCx-47]. In this correspondence, the Respondent made it clear that they were not willing to meet with the Union regarding the 7-minute grace period and discipline issued in connection with the grace period. Their reasons for this position was that they believed that the Union could not simultaneously pursue unfair labor practice charges and grievances over the same issue. [GCx-45 and GCx-47]. The Respondent at no time claimed that there was an arbitration with its predecessor SEIU that was part of the past practice at the time of the certification of NUHW.

2. THE DISCIPLINE OF JUAN MICHAEL TORRES

In addition, to the Union's and the General Counsel's position that Torres along with the other

disciplined employees under the established policy allowing a 7 minute grace period in the Respiratory, Laboratory and EVS departments, the Complaint alleged that Torres was unlawfully disciplined for his union activity including being a shop steward and on the bargaining committee.¹ [ALJ decision at 19] and further alleges disparate treatment. Specifically, the General Counsel alleged that Torres was unlawfully disciplined by Respondent on March 18, 2011 by issuing him a written warning and on April 7, 2011, by issuing him a written warning and 24-hour suspension for tardiness.

Here, the Union contends that the ALJ was erroneous in his conclusion that in Torres' Respiratory department since 2009 there was a policy to discipline employees under the attendance policy for being tardy less than 7 minutes. Moreover, the records submitted clearly show disparate treatment. Finally, the alleged leniency found by the ALJ was in fact the policy in the department, not to discipline if an employee's tardiness fell within the 7 minute grace period.

The Director of Respiratory Sarkissian and Manager of Respiratory O'Connel assumed their positions in approximately September 2010. [Tr. 57; 498-499; 52]. After they began working in the Respiratory Department, Sarkissian and O'Connel held a staff meeting for the department. During this meeting, one of the day shift respiratory therapist raised the issue of the 7-minute grace period and asked whether employees would still be afforded a grace period for clocking in. Sarkissian said yes, and that he would not write anyone up within the 7-minute grace period. [Tr.62-64; 136; 145-148].

Moreover, the record demonstrates that when O'Connel assumed the position of manager in the Respiratory department she began disciplining Torres in violation of the attendance policy even though she was present at the staff meeting. Torres was written up for tardies of 7 minutes or less on

¹ The ALJ is factually wrong that Torres remained a shop steward under SEIU. Torres was removed by SEIU as shop steward for his activities on behalf of the former leadership of SEIU now the NUHW leadership.

February 10, 2006. [Rx-2] Respondent failed to produce any evidence that Torres received additional write ups for tardies of 7 minutes or less until April 16, 2010 [Rx-4]; despite the fact that Torres was tardy numerous times between 2009 and 2010 [GCx-12]. O'Connel provided Torres with a list of times that he had been tardy. [Tr. 66; GCx-5 pp. 0616-0617]. In response, Torres informed O'Connel that his understanding from the staff meeting with Sarkissian that the tardies of 7 minutes or less should not be counted against him. O'Connel stated that the Hospital did have a grace period although it is considered late, and that he would not lose pay for the occurrences [Tr. 67-68].

On February 4, 2011, O'Connel met with Torres again.. O'Connel issued Tones a Step 1 Verbal Notification. [Tr. 68; GCx-5]. O'Connel clarified her position to Torres with respect to the 7-minute grace period. O'Connel told Torres that even though the Hospital policy didn't allow for a grace period, that within the Respiratory Department, would continue to honor the grace period and that tardies of 7 minutes or less wouldn't count towards discipline. [Tr. 69].

The Respondent produced documents that support the position of the Union and the General Counsel that the Respiratory department would continue to abide by the 7 minute grace period.[pp. 0616-0617]. The Respondent's documents show a total of 35 incidents in which Torres was tardy between June 25, 2010 through January 6, 2011. [Page 0615 of GCx-5], however; only lists a total of 19 tardies, and completely eliminates those occasions in which Torres was tardy 7 minutes or less. The bottom of this page reads: "These were tardies in excess of 7 minutes. The total tardies per hospital policy during this time=35." Thus Torres was disciplined on February 4, 2011, only for tardies in excess of 7 minutes and not for any tardies falling within the 7-minute grace period. Again this discipline reaffirms the 7 minute grace period.

On March 18, 2011, O'Connel issued Torres a Step 2 Written Warning. On this occasion, O'Connel asked Torres to come and meet with her in her office. The warning issued

included a date on which Torres was 7 minutes late to work. Torres reiterated that if the department had a grace period policy, he shouldn't be counted as late. O'Connel responded that it was still considered late and that was why she was including it in his discipline. [Tr. 70-72; GCx-6].

B. ARGUMENT

1. RESPONDENT VIOLATED SECTION 8(A)(1) AND (5) OF THE ACT BY UNILATERALLY ELIMINATING THE 7-MINUTE GRACE PERIOD AND BY DISCIPLINING EMPLOYEES FOR BEING TARDY 7 MINUTES OR LESS.

It violates Section 8 (a) (5) of the Act for an employer to refuse to bargain collectively with the representative of its employees over unilateral changes to terms and conditions of employment. *NLRB v. Katz*, 369 U.S. 736 (1962). It is well-settled law that work rules that can be grounds for discipline are mandatory subjects of bargaining, and an employer may not change them without notifying the union and giving it an opportunity to bargain. *King Scoopers, Inc.*, supra at 628. If the change affects employee terms and conditions of employment, it is a legitimate concern to the union as collective-bargaining representative. *Bridgestone Firestone, Inc.*, 337 NLRB 133, 134 (2001).

Here, the ALJ relies on the Respondent 's assertion that there was an arbitration decision from 2006 that upheld its right to discipline for tardiness within the grace period. Here, the record demonstrates and the ALJ ignored the fact that Respondent failed to produce the arbitration decision or any documents proving that employees had been consistently disciplined for tardies under the 7 minute or less timeframe. Of the hundreds of employees who could have been subject to discipline, only 14 documents showing that employees had been disciplined for tardies of 7 minutes or less. Moreover of those 14 documents, only one of those documents was derived from one of the departments at issue in the complaint, the Respiratory Department. The remaining disciplinary documents submitted by respondent are for employees not included in the complaint.

Moreover, Respondent may have at times, enforced its alleged policy of disciplining employees for being tardy 7 minutes or less, the record evidence shows that employees in the EVS, Respiratory and Laboratory Departments a few years without being disciplined when they arrived to work within the 7 minute grace period. . For instance, within the EVS Department, EVS employee Lynch was disciplined in 2008 for being tardy 7 minutes or less but didn't receive another disciplinary notice for being late 7 minutes or less until April 2011, despite the fact that she was tardy 7 minutes or less on multiple occasions between 2008 and 2011. In the Laboratory Department, Laboratory employee Mills didn't receive any discipline for tardiness of 7 minutes or less from the date of her employ in 2007, until receiving her disciplinary notice in April of 2011, even though she was tardy 7 minutes or less several times between 2007 and 2011.

In the Respiratory Department, respiratory therapist Aguirre received 2 disciplinary notices for being tardy 7 minutes or less in 2006 and then received no additional disciplinary notices for tardies of 7 minutes or less until April 2010, despite the fact that she had been tardy 7 minutes or less on various occasions between 2006 and 2010. Also since April 2010, Aguirre has received no additional disciplinary notices for being tardy 7 minutes or less despite the fact that she was tardy 7 minutes or less on multiple occasions after April 2010.

Respiratory therapist Torres also received a write up for tardiness of 7 minutes or less in 2006 but then received no additional disciplinary notices for tardies of 7 minutes or less until April 2010, although he had been 7 minutes or less late to work between 2006 and 2010. After Sarkissian and O'Connel began working in the Respiratory Department in September 2010, O'Connel further confirmed Respondent's enforcement of not disciplining employees for tardies of 7 minutes or less when she issued a disciplinary notice to Torres for tardiness in February 2011, but did not include in that

disciplinary notice, occasions in which Tones had been tardy 7 minutes or less. Following that February meeting, Torres was issued discipline which included tardies of 7 minutes or less in March 2011. The evidence fails to establish that Respondent had a policy or practice of disciplining employees who were tardy 7 minutes or less.

Here, the evidence clearly demonstrates that the past practice in the Laboratory, EVS and Respiratory Departments was not to discipline employees for violating the rule. The credible evidence establishes that the past practice in these three departments conformed to the pay policy of not deducting the pay of employees unless they were late more than 7 minutes. It was objectionable for the ALJ to rely on an arbitration award that no employee has seen and was not widely disseminated to reach his conclusion that no such policy exists.

Despite this past practice however, between March and April 2011, Respondent began issuing discipline to employees for tardies of 7 minutes or less. Respondent provided no notice to the Union or an opportunity to bargain over the rule change. Respondent did not deny that it never gave the Union notice prior to disciplining employees for tardies of 7 minutes or less. Moreover, the Union made its objection clearly known to Respondent by both sending Respondent a cease and desist letter and filing grievances over the disciplines issued to employees. Finally, the Respondent never informed NUHW that an arbitrator had upheld the practice under the SEIU in 2006.

Here, the Respondent violated Section 8(a)(1) and (5) by unilaterally implementing a new rule in which employees could be disciplined for tardies of 7 minutes or less and by disciplining employees Lynch, Mills and Torres under this policy. Therefore, the ALJ's decision to the contrary should be reversed.

2. RESPONDENT VIOLATED SECTION 8(A)(1) AND (3) OF THE ACT BY DISCIPLINING JUAN MICHAEL TORRES

To establish an §8(a)(3) violation, the General Counsel must show: (1) the existence of protected

activity; (2) the employer's knowledge that the employee engaged in such activity; (3) the alleged discriminatee suffered an adverse employment action; (4) and a motivational link, or nexus, between the employee's protected activity and the adverse employment action. *American Gardens Management Co.*, 338 NLRB 644, 645 (2002).

Here, contrary to the ALJ's decision, the General Counsel established that Torres' protected activity was indeed the motivating factor for the adverse employment action taken against him. Once it was shown that the Respondent's opposition to union activity is a motivating factor in its decision to take adverse action against an employee, the employer will be found to have violated the act unless it is able to demonstrate that the adverse action would have taken place even in the absence of protected concerted or Union activity. *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert denied*, 455 U.S. 989 (1982). With regard to the employer's burden, it is not enough for an employer to show that it had a legitimate reason for taking the action—it must demonstrate that it would have, not just *could* have, taken the same action even absent the employee's union activity. *Hicks Oil & Hicksgas, Inc.*, 293 NLRB 84, 85 (1989). In this case, the ALJ turned the *Wright Line* decision on its head by his finding that the General Counsel failed to make a *prima facie* case.

The first prong of the four-pronged test articulated under *Wright line* as set forth in *American Gardens Management Co.*, *supra* is clearly met. Torres is a well-known Union supporter and is extremely involved in the Union. He is currently one of the interim vice presidents of the Union, an elected shop steward and one of the elected contract bargaining team members at the Hospital. He has attended the majority of the negotiation sessions between Respondent and the Union. In his roles on behalf of the Union, Torres acted as a liaison between management and employees on contract interpretation, disciplinary and other matters. Finally, Torres has testified at other NLRB proceedings against the

Employer and has engaged in a strike of the Employer.

The second prong of this test was also met. Torres' activities on behalf of the Union are open and well known to Respondent as he participates in bargaining sessions and otherwise represents employees as a shop steward. Moreover during Torres' first meeting with O'Connel, he was careful to inform her of his role with the Union. The third prong of the test is met as well as Torres suffered adverse employment actions when he was disciplined twice on March 18, 2011 for unexcused absences and for tardiness and received an unpaid 24-work hour suspension for tardiness on April 7, 2011.

The fourth prong of the test was established by the fact that Tones was treated disparately by Respondent, and that his discipline occurred close in time to O'Connel's employment in the Respiratory Department began. The Board considers the timing of the adverse action in relation to the employee's protected concerted activity or Board activity to be critical in identifying employer motivation. Indeed, "timing alone may suggest anti-union animus as a motivating factor." *Masland Industries*, 311 NLRB 184, 197 (1993). quoting from *NLRB v. Rain-Ware, Inc.*, 732 F. 2d 1349, 1354 (7thCir. 1984); *World Fashion, Inc.*, 320 NLRB 922 (1996). When adverse action is taken against employees on the heels of their union or other protected concerted activity, the Board finds that the General Counsel has made out a prima facie case of unlawful motivation. *Limpert Brothers*, 276 NLRB 364 (1985). Here, once again the decision of the ALJ is clearly erroneous. The evidence at the hearing supports a prima facie case.

The first time that Torres met with O'Connel he made known to her his role in the Union and immediately challenged her, based on both contractual and past practice arguments, on the incidents of tardiness and absences. O'Connel became increasingly frustrated with Torres and his write ups continued to accelerate Torres' discipline through September 2011. O'Connel embarked upon an anti-Torres campaign as soon as she took over the department in September 2010. O'Connel immediately began meeting with Torres, to critique his behavior and/or discipline him, soon after she began

working in the Respiratory Departments.

The ALJ ignored the motivational link between Torres' March 18 and April 7, 2011 disciplines and his protected concerted activities also lies in the disparate manner in which Respondent administered these disciplines. Although many other employees in the Respiratory Department were late less than 7 minutes, Torres was singled out for discipline. First with respect to Torres' discipline for tardiness on March 18, 2011, the January 6, 2011, incident includes a tardy in which Tones was late to work 7 minutes or less. Even if the Board finds that there was no 7 minute policy, the Respondent nonetheless, violated Section 8(a)(3) of the Act. The record shows that although Respondent maintains that it enforced the tardiness policy within the 7-minute timeframe, Torres was the only employee within the Respiratory Department that was disciplined for being tardy during the grace period since Sarkissian and O'Connel began working for the Respiratory Department. Thus, Torres was the only employee within this department against whom this policy was enforced. Hence, there was indisputable disparate treatment.²

If the discipline or discharge is inconsistent with an employer's usual procedure, the discipline or discharge is also found to be discriminatory. *Keystone Lamp Manufacturing Corp.*, 284 NLRB 626 (1987); *Pottsville Bleaching and Dyeing Company*, 283 NLRB 359 (1987). Where an employee is treated disparately, and punished more harshly than others who engaged in similar conduct, the discipline violates Section 8(a)(3) of the Act. *Sonoma Mission Inn And Spa*, 322 NLRB 898 (1997). When an employer fails to discipline other employees engaged in comparable conduct, and reserves discipline exclusively for the union adherent, the Board determines that the discipline or discharge is unlawful. *Sonoma Mission Inn*, supra.

² For example, respiratory therapist Aguirre received discipline which included a tardy of 7 minutes or less in April 2010, she didn't receive any additional disciplines including tardies for 7 minutes or less after this date or after Sarkissian and O'Connel took over the department, despite the fact that she had been tardy 7 minutes or less on various occasions after April 2010. Even respiratory therapists Margaret Knight, Alex Correa, Allen Ravago and Richard Rea who received disciplines similar to those received by Torres, did not receive any disciplines including tardies of 7 minutes or less after April 2010. Here the ALJ dismissed the disparate treatment of Torres, as trivial and ignored that Respondent was not fair and even handed in meting out discipline within the department.

Based on the foregoing, Torres should not have received a written warning on March 18, 2011, with only 7 occurrences. Furthermore, Torres should have not received a 24-work-hour suspension on April 7 because the January 6 occurrence was precluded.

Further, Respondent chose to use a separate disciplinary notice for Torres than it did for other employees. With respect to the tardiness disciplines issued to Torres above, Respondent issued him a form which required only 6 incidents of tardiness over a 12 month period as opposed to the standard 8 incidents as required in Respondent's time and attendance policy. (Rx-1). The ALJ ignored the fact that Respondent did not explain on the record why this separate form was used specifically for Torres and not for other employees in the department.

Finally, Respondent issued Torres a written warning for attendance on March 18, 2011, which included an absence on March 16, 2011 for which Torres had submitted a doctor's note. Respondent discriminatorily disregarded this doctor's note and counted the March 16 absence against him. Had this March 16 absence not been counted against him, Torres would not have been eligible to receive a written warning on March 18.

Based on the foregoing, the ALJ determination should be reversed and the Board should find that Respondent's timing of the discipline issued to Torres along with Respondent's disparate treatment violated Section 8(a)(3) of the Act in issuing discipline to him on March 18 and April 7.

III. CONCLUSION

Based on the above, the record evidence and applicable Board law establish that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally eliminating the 7-minute grace period of employees in the respiratory, laboratory and environmental services department and disciplining employees for tardies falling within the 7-minute grace period. Further Respondent violated Section 8(a)(1) and (3) of the Act by

disciplining its employee Juan Michael Torres because of his support for the NUHW. Accordingly, the ALJ made legal errors in dismissing the following paragraphs of the Complaint 15 (a), (b), (c), (d) and its sub paragraphs and 17 and 20 and NUHW requests that these Exceptions be granted.

DATED: May 9, 2012

RESPECTFULLY SUBMITTED

/s/Florice Hoffman, ATTORNEY FOR NUHW

STATEMENT OF SERVICE

I hereby certify that a copy of was submitted for E-filing to the National Labor Relations Board on May 9, 2012

The following parties were served with a copy of said document by electronic mail on May 9, 2012.

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Dated at Orange, California, this 9th day of May under penalty of perjury pursuant to the laws of the Unites States.

/s/Florice Hoffman