

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, DC**

ENCINO HOSPITAL MEDICAL CENTER,

Respondent,

and

Case: 31-CA-066945

SEIU UNITED HEALTHCARE WORKERS – WEST,

Charging Party.

**COUNSEL FOR THE ACTING GENERAL COUNSEL’S REPLY BRIEF TO
THE EMPLOYER’S ANSWERING BRIEF IN OPPOSITION TO
COUNSEL FOR THE GENERAL COUNSEL’S EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Submitted by:
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I. INTRODUCTION

On September 6, 2012, Encino Hospital Medical Center (“Respondent”) filed its Answering Brief in Opposition to Counsel for the Acting General Counsel’s Exceptions to the Decision of the Administrative Law Judge. Pursuant to Section 102.46(h) of the Board’s Rules and Regulations, Counsel for the Acting General Counsel respectfully submits this reply brief in response to Respondent’s Answering Brief.

Respondent’s Answering Brief failed to cure the fundamental flaw in the Administrative Law Judge’s decision in this case: the ALJ summarily dismissed the complaint without providing any substantive analysis and without considering crucial facts in the record. While Respondent attempted to rebut evidence in the record that clearly showed Respondent’s unlawful motivation in terminating discriminatee Patricia Aguirre in violation of Section 8(a)(3) and (1), Respondent failed to show where in the decision the ALJ addressed any of the evidence. Respondent also omitted a critical fact: the ALJ’s credibility determinations do not foreclose a finding of Respondent’s unlawful motivation; such a finding is based on Respondent’s admissions as well as unrebutted documentary and testimonial evidence showing Respondent’s expressed hostility against the Union, its perfunctory investigation of Aguirre’s alleged misconduct, Respondent’s shifting defenses and departures from its past practices, the suspicious timing of Aguirre’s termination, and pretext. The record evidence also showed that Aguirre was a Union leader who spoke out against Respondent and its parent company, and that Respondent was well aware of Aguirre’s various Union activities, including her testimony at the public hearing regarding the sale of Victor Valley Hospital. (GC EB 18-22.)¹ Accordingly, Counsel for the General Counsel maintains that the ALJ erred in dismissing the complaint.

¹ Citations to the ALJ’s decision are as follows: (ALJD page:line). Citations to the record are as follows: Transcript (Tr. page:line); General Counsel Exhibits (GC Ex. #:page); Respondent Exhibits (R Ex. #:page). Citations to

II. ARGUMENT

A. A finding of Respondent's unlawful motivation in terminating Patricia Aguirre relies not on credibility resolutions but Respondent's admissions as well as unrebutted documentary and testimonial evidence.

Contrary to Respondent's assertion, the ALJ's credibility determinations do not foreclose a finding of Respondent's unlawful motivation. It is important to note that the ALJ only discredited Aguirre and Union Chief Negotiator Richard Ruppert's testimony to the extent that their testimony differed from that of Human Resources Manager Back. (ALJD 6, fn. 6.) The ALJ did not discredit Aguirre and Ruppert's other testimony, and the ALJ did not discredit the testimony of Organizer Representative Magdalena Macias and employee Kenton Smartt.

Respondent's discriminatory motive is established through Respondent's own admissions along with unrebutted documentary and testimonial evidence.

1. Perfunctory Investigation

With respect to Respondent's perfunctory investigation, HR Manager Back herself testified that Respondent made its decision to terminate Aguirre long before giving her the opportunity to respond to her alleged misconduct. Back also admitted that she did not follow her normal process of deciding to terminate an employee when she decided to terminate Aguirre, i.e., interviewing all relevant witnesses before making the decision.

JUDGE WACKNOV: So that's okay, that's a good question. So when was the decision made?

WITNESS: The decision was made --

JUDGE WACKNOV: ... Okay. So it was when?

WITNESS: The decision was made prior to Pat coming in.

Q The decision was made prior to Pat coming into the meeting on October 11th, 2011. Is that correct?

A Yes....

Q You decided prior to October 4th that you would terminate [Aguirre]. Is that correct?

General Counsel's Brief in Support of Exceptions are as follows: (GC EB page). Citations to Respondent's Answering Brief are as follows: (R AB page).

- A Based on the events that happened in that final meeting, yes.
- Q You said earlier that you generally like to interview all the witnesses before you make a decision as to whether or not to terminate an individual. Is that correct?
- A Yes.
- Q You didn't even talk to Ms. Aguirre about the incident until October 11th, 2011. Isn't that correct?
- A That's correct....

(Tr. 440:24-441:8, 448:23-449:5, 449:9-11.)

The evidence belies Respondent's argument that its investigation of Aguirre's alleged misconduct was not perfunctory. Aguirre's termination meeting lasted only 10 to 15 minutes and, even according to Back's own testimony, at no time during the meeting did Back ask Aguirre about what happened on the day of the alleged misconduct or if Aguirre had any witnesses or additional information to present. Critically, Respondent and the ALJ omitted the fact that the notes by Laboratory Director Erlinda Roxas, an admitted supervisor/agent of Respondent who was present during the meeting, corroborate General Counsel's witnesses' testimony. Specifically, before ever asking Aguirre about her alleged misconduct, Back told Aguirre that Aguirre "violated a hospital policy regarding employee conduct," "that [Aguirre] was dishonest because she used Barbara's and [CEO] Bob [Bills]' names to obtain information from HR assistants, Carmen [Soto] and Christina [Armenian]," and "that a final decision had been made and that [Aguirre's] employment with [Respondent] was being terminated on that day." (GC Ex. 25.) Clearly, Respondent had already made "a final decision" to terminate Aguirre prior to meeting with her, thus Respondent did not conduct a meaningful investigation of Aguirre's alleged misconduct. *Lancer Corp.*, 271 NLRB 1426, 1427-28 (1984) (employer's failure to conduct a meaningful investigation of an employee's alleged misconduct indicated a discriminatory motivation).

Respondent's failure to provide Aguirre with the opportunity to provide a statement also evidences its perfunctory investigation and unlawful motivation. Back interviewed HR Assistants Soto and Armenian about Aguirre's alleged misconduct, and subsequently, Back requested statements from both Soto and Armenian. (ALJD 4:37-38, 4:44-45; Tr. 443:14-24.) Back also reviewed those statements. (Tr. 407:11-17.) However, Back did not request a similar statement from Aguirre. Instead, Back terminated Aguirre the same day that Aguirre was interviewed. This disparate treatment with respect Respondent's investigation also evidences Respondent's unlawful motivation in terminating Aguirre. *Camelot Terrace, Inc.*, 354 NLRB No. 24, slip op. at 7 (2009) (perfunctory investigation where respondent gave witness supporting respondent an opportunity to prepare and sign statement and did not give witnesses supporting discriminatee same opportunity).

2. Expressed Hostility

With respect to Respondent's expressed hostility against the Union, Respondent presented no evidence disputing the fact that Respondent's CEO Bob Bills made a number of hostile statements toward the Union at the September 22, 2011 bargaining session and that, the same day, Respondent distributed throughout the hospital a flyer with the headline, "The SEIU is DESTROYING Your Jobs."² On that day, Bills was angry, upset, and red in the face when he said that it was the Union's fault that Respondent's parent company lost the sale of Victory Valley Community Hospital; that the Union distributed a number of flyers with inaccurate information; that Respondent was going to distribute its own flyer; and that Respondent would hold meetings with all employees to tell them that the Union was trying to destroy employees' jobs and close the hospital. (Tr. 89:3-6, 89:10-14, 189:18-23, 190:1-3, 248:2-4, 248:25-249:2,

² Respondent's argument that the General Counsel and the Union "base almost their entire case of anti-union animus on the alleged conduct of Prime Healthcare and Prime Foundation," is clearly untrue. (R AB 39.)

249:4-7, 249:11-13, 249:17-18, 251:2-4, 301:5-8, 301:18-20, 302:2.) Bills even looked directly at Aguirre when he said that the Union was spreading inaccurate information. (Tr. 301:18-20.) While Respondent attempted to argue that HR Manager Back was essentially the only individual who made the decision to terminate Aguirre, Back's testimony made clear that she was *never* the only person who made the decision to terminate an employee, and in this case, multiple individuals were consulted regarding the decision to terminate Aguirre.

Q In this case, you consulted -- you weren't the only person who made the decision to terminate Pat Aguirre. Is that correct?

A I never am, yes.

Q Okay, so Bob Bills was consulted with respect to making the decision to terminate Ms. Aguirre?

A Yes.

Q Someone named Tari Williams was also consulted.

A Yes.

Q BY MS. PANG: Was Mary Schottmiller consulted regarding Ms. Aguirre's termination?

JUDGE WACKNOV: Wait a minute, I agree. Okay, overruled. Was Ms. Schottmiller the lawyer that you sent this memo to?

WITNESS: Yes, she was the lawyer of consult.

(Tr. 427:18-428:1, 434:17-18, 435:10-13.) An adverse inference should be drawn based on Respondent's failure to call Bills since he, along with Williams and Schottmiller, participated in making the decision to terminate Aguirre. *PCC Structural, Inc.*, 330 NLRB 868, 895 (8(a)(3) violation where individual who made termination decision and was present at pertinent meetings was not called as a witness by the employer).

3. Shifting Defenses

With respect to Respondent's shifting defenses, Respondent failed to provide any evidence that, prior to the hearing in this proceeding, Respondent stated that past discipline played a role in or was a reason for Aguirre's termination. Respondent argued that Standards of

Conduct #400.407 “has a lengthy list of conduct which supports discipline and or termination that includes conduct Aguirre had been previously cited for.” (R. AB 28.) Yet, Respondent failed to cite any such conduct. Respondent further argued that “Aguirre’s prior disciplinary warnings also demonstrate that each disciplinary action contemplated the prior warnings.” (R. AB 28.) But the prior warnings are immaterial in that they do not demonstrate when or how Respondent, prior to the hearing, raised the defense that Aguirre’s termination was based on these warnings.

Poly-America, Inc., 328 NLRB 667 (1999), which Respondent cited in its Answering Brief, contradicts Respondent’s position. In that case, the Board found that the discriminatee’s discharge was unlawful based on the respondent’s shifting explanation of its reason for the discharge. *Id.* at 668. In support of that finding, the Board noted that the respondent failed to rebut the discriminatee’s testimony that none of the pretextual reasons for discharge were communicated to the discriminatee at the time of his discharge. *Id.* Similarly here, Respondent presented no evidence that it informed Aguirre, at the time of her discharge, that she was being discharged because of her prior discipline. As in *Poly-America, Inc.*, Respondent’s reasons are pretextual and advanced in an attempt to hide its unlawful motivation for Aguirre’s discharge.

4. Suspicious Timing

With respect to the suspicious timing of Aguirre’s discharge, Respondent’s repeated argument that Aguirre had a history of discipline predating her Victor Valley testimony is inapposite. (R. AB 32.) At issue is not the timing of Aguirre’s prior discipline, but Respondent’s decision to terminate Aguirre. The uncontroverted evidence shows that: (1) Aguirre testified at a public hearing, at length, against both Respondent and its parent company³ regarding employees’ low pay, insufficient patient care, etc. (ALJD 3:5-7; Tr. 72:21-76:1, 186:5-13.); (2) only one

³ Respondent’s argument that Respondent was not part of the sale of Victor Valley Hospital is inaccurate because Respondent’s parent company was involved, but more importantly, it is immaterial because the evidence shows that Aguirre attacked both Respondent and its parent company at the public hearing.

other employee, Smartt, was present at the hearing, and he did not testify (Tr. 70:1-11, 187:12-16, 441:20-442:1; GC Ex. 6.); (3) Aguirre's name and image were featured prominently on flyers opposing Respondent and its parent company, which were distributed throughout the hospital (GC Ex. 6 & 7; Tr. 86:3-14, 238:19-239:22, 241:21-25); (4) on September 20, 2011, the Attorney General issued its decision against Respondent's parent company (ALJD 3:13); (5) on September 22, 2011, Respondent's CEO Bills made a number of hostile statements toward the Union specifically referencing the Attorney General's decision (*supra*, II.A.2. Expressed Hostility); (6) on September 22, 2011, Respondent posted throughout the hospital flyers echoing Bills' anti-union statements (ALJD 3:26-27; Tr. 250:6-11, 252:4-6, 252:17-19, 264:3-5; GC Ex. 12); and (7) less than two weeks later, some time prior to October 4, 2011, Respondent decided to terminate Aguirre before it ever provided her an opportunity to explain her alleged misconduct (*supra*, II.A.1. Perfunctory Investigation). The close proximity of Respondent's expressed hostility against the Union and Aguirre's termination is the suspicious timing that strongly suggests that Respondent terminated Aguirre, the only employee who testified against Respondent and a long-recognized leader of the Union, to send a message to Union supporters and discourage similar Union activity.

5. Departures from Past Practices

With respect to Respondent's departures from its past practices, Respondent's arguments do not overcome the ALJ's failure to analyze the un rebutted documentary and testimonial evidence showing such departures.⁴ The ALJ failed to consider evidence showing that: (1) Back testified that there was no evidence that, prior to terminating Aguirre for lying, Respondent had ever terminated or even disciplined a single one of its approximately 400 employees for lying

⁴ The ALJ similarly failed to analyze General Counsel's alternate theory of a violation, that Respondent violated the Act because it discharged Aguirre for conduct that was part of the *res gestae* of activities protected under the Act.

(Tr. 442:6-15); (2) unlike other employees whom Respondent terminated based on prior discipline, there was no mention of Aguirre's past infractions in her termination documents (GC Ex. 8 (comments section of Aguirre's termination form stated, "violation of Standards of Conduct #400.407"); *cf.* GC Ex. 26:1 (comments section of Layla Nichols' termination form stated, "Progressive Termination"); GC Ex. 28:1 (comments section of Tommy Felshaw's termination form stated, "Termination based on past disciplinary action"); GC Ex. 29:1-3 (attachment to Anthony Haney's termination form described his past infractions)); and (3) the documentary evidence contradicted Back's testimony regarding progressive discipline and supported Rupperts' (GC Ex. 26-29 (employees terminated for repeated, similar misconduct)).

Respondent's argument that Aguirre's termination notice featured a more comprehensive statement of reasons for her termination than other employees is undermined by the notice itself. The comments section of Aguirre's termination notice merely stated, "violation of Standards of Conduct #400.407." (GC Ex. 8.) Policy #400.407 is a three-page document with approximately 30 reasons for which an employee can be terminated, including use of alcohol or drugs, threats of violence, and smoking in unauthorized areas; not a single one of the 30 reasons was specified in Aguirre's termination notice. To date, neither Respondent nor the ALJ has identified which of the 30 reasons was the basis for Aguirre's termination. Respondent's vague reference to its Standards of Conduct further evidences its pretextual reasons for terminating Aguirre.

6. Pretext

With respect to pretext, neither Respondent nor the ALJ addressed the clear evidence of pretext in the record. In addition to what has been discussed above, evidence of pretext included the following: (1) as of October 28, 2011, long after the decision had been made to terminate Aguirre, HR Manager Back was not clear on the reason for Aguirre's termination; (2) assuming

arguendo that Aguirre made the alleged statements and those statements were untrue, the discipline imposed was clearly not commensurate with the nature of the offense; and (3) Aguirre's conduct was not comparable to other terminated employees'. (GC EB 31-33.)

As Respondent acknowledged, pretext may exist where the evidence shows a "flimsy or unsupported explanation" for an employer's challenged conduct or where the explanation is implausible or inconsistent. (R AB 38.) Here, Respondent alleged that Aguirre made the following statements to HR Assistant Soto: "Barbara told me you or Bob would attend [employee Arse's hearing]," and, "Ok, well, then I'll talk to Barbara about it." Based on these statements, Respondent contended that "Aguirre's lies were a dishonest and manipulative attempt to obtain information from less senior Human Resources personnel." (R AB 40.) Respondent cited no evidence to support this contention. To date, Respondent has failed to identify what highly confidential information Aguirre would have obtained from making the alleged statements. Aguirre's "lies" are clearly a flimsy and unsupported basis for her termination. Respondent's exaggerated interpretation of Aguirre's alleged statements only further evidences pretext.

B. The ALJ and Respondent failed to show by a preponderance of the evidence that Respondent would have discharged Patricia Aguirre absent her Union activities.

Since the evidence establishes that the reasons given for Aguirre's discharge were pretextual, Respondent failed by definition to show that it would have taken the same action for those reasons, absent protected conduct, and there is no need to perform the second part of the *Wright Line* analysis. *Road Trucking Company, Inc.*, 342 NLRB 895, 898 (2004). Furthermore, the fact that Respondent failed to produce any evidence that it had ever terminated or even disciplined a single one of its approximately 400 employees for lying precludes a finding that

Respondent would have terminated Aguirre absent her Union activities. This is because under *Wright Line*, an employer cannot carry its burden of persuasion by merely showing that it had a legitimate reason for imposing discipline against an employee, but must show by a preponderance of the evidence that the action would have taken place even without the protected conduct. *Hicks Oils & Hicksgas, Inc.*, 293 NLRB 84, 85 (1989).

III. CONCLUSION

Based on the entire record in this matter and on the foregoing arguments, Counsel for the Acting General Counsel respectfully urges the Board to find that Respondent violated Section 8(a)(3) and (1) as alleged in the complaint and issue a proper remedy.

Dated at Los Angeles, California, this 20th day of September 2012.

Respectfully submitted,



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Re: Encino Hospital Medical Center
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CERTIFICATE OF SERVICE

I hereby certify that I served the attached copy of the COUNSEL FOR THE ACTING GENERAL COUNSEL'S REPLY BRIEF TO THE EMPLOYER'S ANSWERING BRIEF IN OPPOSITION TO COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE on the parties listed below on the 20th day of September, 2012.

VIA E-FILE

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