

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13**

ST. BERNARD HOSPITAL AND)
HEALTH CARE CENTER,)
)
)
and)
)
)
EARL LIGGINS, an Individual,)

Case No. 13-CA-074311

**EMPLOYER’S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF
THE ADMINISTRATIVE LAW JUDGE**

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St. Bernard Hospital and Health Care Center (hereinafter referred to as “St. Bernard” or “Employer”), by and through its counsel, submits the following Brief in Support of Its Exceptions to the Decision of the Administrative Law Judge:

INTRODUCTION

In order to navigate these issues, it is important to identify the relevant individuals. St. Bernard is a hospital located in Chicago, Illinois that provides health care services, including, among other things, the services of a radiology department. (TR. at p. 202-203).¹ Lori Chew (“Chew”) is the Director of Radiology at St. Bernard, and has held that position for 10 years. Chew reports to St. Bernard’s Vice President, Mrs. Nohos. (TR at p. 221). Dr. Joseph Carre (“Dr. Carre”) is a Radiologist at St. Bernard. (TR. at p. 202). Dr. Carre has no supervisory authority over Chew, nor is he authorized to discipline Chew. (TR. at p. 203). Debbie Wilson (“Wilson”) is the manager of the Radiology Department, and the direct supervisor of Computed Tomography Technologists (“CT Techs”) (TR. at p. 221). Erika Worthy (“Worthy”) is Clerical Supervisor of the Radiology Department and manages the Department’s clerical staff. (TR. at p. 222). Earl Liggins was a CT Tech at St. Bernanrd. (TR. at p. 19). Monika Hopkins is a CT Tech

¹ Citation to the transcript of the March 4, 2013 hearing are identified as “TR. at p. ____.”

at St. Bernard (TR. at p. 142). Donna Dertz is the Director of Human Resources for St. Bernard, and has held that position for over seven years. (TR. at p. 304).

There are two series of actions by Earl Liggins (“Liggins”) that could arguably serve as the underlying protected activity necessary to support the Administrative Law Judge’s (“ALJ”) Decision that St. Bernard’s decision to terminate Liggins violated § 8(a)(1) of the National Labor Relations Act (“NLRA” or “Act”). The first involved several complaints in July, 2011, regarding the location of a window and a sink in relation to the CT Technician Suite at St. Bernard. The second involved a series of communications Liggins purportedly had with Dr. Carre in September, 2011. It is undisputed that Chew was aware of the July complaints and addressed them to the extent she could at that time. There is no evidence that Chew had knowledge of the second.

The ALJ’s finding to that Chew had knowledge of the second series of events is against the preponderance of the evidence. Further, once that finding is removed, the ALJ’s conclusion that Chew fabricated finding Liggins sleeping is similarly against the preponderance of the evidence, as it rests on the thin support of suspicious timing alone.

UNCONTESTED FACTS

I. The CT Suite at St. Bernard Hospital

1. The CT Suite at St. Bernard consists of two rooms. A larger room where the CT Scanner is located (“Scanner Room”), and a smaller room containing the machinery the CT Techs use to control the Scanner (“Control Room”). (TR. at 80-81).

2. In June 2011, the Radiology Department began utilizing a renovated CT Suite (TR. at p. 23). The Scanner Room had been enlarged to accommodate a larger CT scanner. (TR. at p. 242).

3. As part of the renovation process, it was necessary to remove a wall. As part of that process, a sink that had been in the Scanner Room was removed. (TR. at p. 246-47).

4. Liggins had concerns regarding the fact that no sink was located in the Scanner Room, and he believed that the window between the Scanner Room and the Control Room was too high. (Tr. at p. 41).

5. Liggins raised these issues with Chew in mid-June 2011. (TR. at p. 30-31). Chew did not get angry with Liggins when he raised the issue. Chew did, however, agree to address both issues. (TR. at p. 176).

6. Hopkins also raised concerns regarding the sink with Chew at the same time, and she was never disciplined for doing so. Additionally, Hopkins is not aware of any other CT Tech who was disciplined for raising concerns regarding the location of the sink. (TR. at p. 178).

7. Following complaints regarding the height of the window between the CT Scanner Room and the CT Control Room, Chew provided the CT Techs with a new chair that could be adjusted up or down as needed by the CT Tech. (TR. a p. 105-106).

8. Although Hopkins could adequately see patients prior to receiving the new chair while standing, which she did not mind, she can see the patient clearly when using the adjustable chair that Chew provided. (TR. at p. 175-176).

9. Chew raised the issue of the sink with Nohos, who responded that she was aware of the issue, but that there was no requirement that a sink be in the Scanner Room. (TR. at p. 246-247).

10. Chew explained this position to Wilson. (TR. at p. 247).

11. It was Nohos' decision to remove the sink as part of the renovation process, and Chew had no authority to install a sink in the Scanner Room. (TR. at p. 263).

12. While there is no sink in the Scanner Room, there are three glove dispensing stations, a hand sanitizer dispenser, gowns designed to protect against bio-hazards, and masks. Additionally, there is a bathroom with hot and cold water less than 10 feet from the Scanner Room. (TR. at p. 107, 110-111, 115-116, 118). There is also a telephone in the Scanner Room that a CT Tech can use to call for assistance. (TR. at p. 124).

13. There is no evidence that Liggins raised the issue of the sink or the window with Chew after early July, 2011. Hopkins never spoke with Liggins regarding the issue after July, 2011. (TR. at p. 181). There is no evidence that Liggins spoke with any other CT Tech regarding those issues after July, 2011.

II. Liggins' Discharge

14. Chew testified that on September 13, 2011, she entered the Control Room and found Liggins with his head on the control consol with a pillow case and a sheet over his head. (TR. at p. 222-223).

15. Liggins testified that Chew walked into the control room while he was sitting upright and awake, asked Liggins why he had a sheet on his head and if he was asleep, informed

him that sleeping is grounds for automatic dismissal and left the control room. (TR. at 43-44, 93).

16. After Chew left the Control Room, she went to Worthy's office and informed Worthy that she had found Liggins sleeping in the CT room (TR. at p. 235, 296). Chew informed Worthy that when she walked into the Control Room, Liggins had his head down, had a pillow case over his head and was wrapped in a sheet, and that as Liggins sat up, he was attempting to pull the pillow case off his head. (TR. at p. 298, 300)

17. Chew then called Nohos and informed her of what Chew had seen. Nohos instructed Chew to contact Dertz and recommended that Chew suspend Liggins pending further investigation. (TR. at p. 236).

18. Chew then met with Liggins and his union representative, Faye Terry, and provided him with written notice that he was suspended for sleeping while on duty. (TR. at p. 76-77). At that time, Liggins was provided with an opportunity to provide a written response, which he did. (TR. at p. 77, ER Ex. 4)².

19. Liggins did not indicate in his contemporaneous written response that Chew's allegation against him was false, nor did he explain as much to his union representative Terry, who was present at the time. (TR. at p. 78). Liggins also did not raise the issue of his communications with Dr. Carre at that time, nor did he seek out Dr. Carre to support his position. (TR. at p. 80).

20. Liggins testified that after the meeting on September 14, 2011, Dertz informed him that he was being terminated because Dertz believed Chew's version of events. (TR. at p. 60).

21. Liggins' packet of information was not addressed during the meeting on September 14, 2011, and Dertz did not review the materials at that time. (TR. at p. 52).

III. Lack of Connection Between Liggins' Alleged Protected Activity and Chew

22. Liggins' first alleged communication with Dr. Carre regarding his complaints occurred in mid-to-late-June, 2011, and consisted of Liggins merely mentioning the issue while dropping something off at Dr. Carre's office. Dr. Carre made no verbal response. (TR. at p. 35-37, 65).

23. Liggins' does not claim to have spoken to Dr. Carre again regarding the issue until the beginning of September. (TR. at p. 37). Liggins described that communication as "just a passing conversation." (TR. at 65).

24. Liggins claims that he spoke with Dr. Carre again on September 12, 2011, and again that Dr. Carre made no verbal response to Liggins. (TR. at p. 66).

² Citation to Employer's exhibits are identified as "ER Ex. ___."

25. Liggins never spoke with Chew about his assertion that he and the other CT Techs were “banding together.” (TR. at p. 69-70).

26. Liggins has no knowledge that Dr. Carre ever spoke with Chew about Liggins’ alleged communications with Dr. Carre. (TR. at 70).

27. Dr. Carre believed that some CT Techs mentioned that it would be nice to have a sink in the scanner room; however, Dr. Carre did not associate that issue with Chew’s job responsibilities and never raised the issue with Chew. (TR. at p. 207).

28. Dr. Carre does not believe that he ever told any employees, including Liggins, to “band together,” and he certainly never discussed that issue with Chew. (TR. at p. 203-204, 219). Dr. Carre provided an affidavit to the NLRB that is consistent with his testimony. (GC Ex. 6).

29. Chew testified that Dr. Carre never came to her regarding any complaints Liggins may have had regarding the work space in the Radiology Department. (TR. at p. 241).

30. St. Bernard is accredited by The Joint Commission, and independent accrediting body that independently certifies health care organization and programs in the United States. The Joint Commission’s accreditation extends to the physical space at St. Bernard. (TR. at p. 248).

31. The Joint Commission has inspected the CT facilities at St. Bernard and raised no concerns regarding the location of a sink in the Scanner Room, and the absence of a sink had no impact on St. Bernard’s accreditation with The Joint Commission. (TR. at p. 249-250).

32. During a meeting preceding Liggins’ termination involving Liggins, Faye Terry, Chew, Worthy and Dertz, Liggins never raised his communications with Dr. Carre. (TR. at p. 322-23).

33. Employee’s who have concerns regarding the workplace can raise those concerns at a Labor-Management Meeting. (TR. at p. 330). Neither the sink nor the window was raised at a Labor-Management Meeting. (TR. at p. 331).

IV. Other Complaints in Liggins’ Packet of Materials

34. Liggins did not raise the issue addressed in the document titled “Balancing Act” with Chew or anyone else until after he had been suspended for sleeping while on duty. (TR. at p. 68).

35. Liggins did not raise the issue regarding the television with Chew or anyone else until after he had been suspended for sleeping while on duty. (TR. at p. 69).

36. Liggins’ document titled “Prioritization v. Harassment v. Patient Safety” regards an incident in relation to which Liggins received no formal discipline and which he acknowledges stemmed from the responsibility of Chew and Wilson to direct the manner in which the radiology department operated. (TR. at p. 126-127).

STANDARD

In reviewing exceptions to an administrative law judge's decision, the National Labor Relations Board ("Board") is to evaluate whether findings of fact are contrary to the preponderance of the evidence. 29 C.F.R. §102.48(c). In performing this review, the Act "commits the Board itself, not to the Board's Trial Examiners, the power and responsibility of determining the facts, as revealed by the preponderance of the evidence." *Standard Dry Wall Products, Inc.*, 91 NLRB 544, 544-545 (1950). As a result, in all case that come before the Board, it must base its findings regarding the facts upon a *de novo* review of the entire record, and must not deem itself bound by the administrative law judge's findings. *Id.* at 545.

ARGUMENT

To find a that Liggins' termination constituted a violation of §8(a)(1) of the Act, the ALJ must conclude that the General counsel established through a preponderance of the evidence that (1) Liggins engaged in protected activity; (2) that Chew had knowledge of that activity; (3) and that Liggins' termination was motivated by animus against Liggins' because he engaged in protected activity. *Wright Line*, 251 NLRB 1083 (1980). Where a finding rests on circumstantial evidence, such evidence must be substantial and create more than a mere suspicion that union activity motivated the termination. *Ronin Shipbuilding, Inc.*, 330 NLRB 464 (2000).

Here, the errors identified in St. Bernard's exceptions demonstrate that the ALJ's finding with respect to Chew's knowledge of the September letters is based on pure conjecture, and therefore against the preponderance of the evidence. Once that conclusion is stripped away, the ALJ's conclusion rests solely events that had occurred and been resolved well before the decision to discharge Liggins was made. As a result, the ALJ's finding that Liggins' discharge was motivated by anti-union animus is against the preponderance of the evidence.

1. There is Insufficient Evidence to Conclude that Chew Knew of Liggins' Alleged Communications with Dr. Carre.

It is not asserted that Liggins directly informed Chew that he and other CT Technicians were “banding together” in September, 2011. Rather, Liggins asserted that he raised this issue solely with Dr. Carre. (TR. at p. 69-70). While Dr. Carre denied that Liggins raised that issue with him, unrebutted evidence was submitted that Dr. Carre and Chew never discussed that issue. (TR. at p. 70, 241). This fact is critical, since knowledge of protected activity is an essential element to establishing a §8(a)(1) violation. *Wright Line*, 251 NLRB 1083 (1980). The ALJ's opinion does not directly address this evidentiary gap.

As an initial matter, in support of her conclusion, the ALJ relied heavily on the erroneous assertion that Liggins' testimony regarding Chew's alleged comment that she heard Liggins was trying to get her fired was unrebutted. (See Employer's Exceptions 1, 15). Liggins testified that Chew came to speak with him twice on the day in question, and asserted that it was during the first visit that Chew allegedly stated that she had heard Liggins was trying to get her fired. (TR. at p. 41-43). Chew expressly denied that more than one meeting even took place, let alone that she said anything to Liggins during such a meeting. (TR. at p. 230). Moreover, Chew testified that “the only thing” she said to Liggins after she found him sleeping was “sleeping on the job is ground[s] for termination.” (TR. at p. 223:8-10). To assert that Chew's testimony does not rebut Liggins' testimony on this point is to ignore Chew's testimony entirely.

Similarly, the ALJ unjustifiably ignored additional evidence supporting Chew's testimony on this point. For example, the ALJ wholly discounted Worthy's testimony that immediately after finding Liggins sleeping, Chew came to Worthy's office and reported that she had seen Liggins sleeping with a sheet and pillow case on his head. (TR. at 300:7-18). The ALJ

gives no weight to this corroborating testimony simply because Worthy used the modifiers “I believe,” “I guess,” and “basically.” (See Employer’s Exception 9).

Additionally, while the ALJ attacked Chew’s credibility by asserting that her story changed, the ALJ ignored the fact that Liggins testified during the hearing that Chew asked him why he was “wearing a sheet,” which is entirely consistent with Chew’s testimony. (TR. at 43-44, 93). Additionally, it was improper for the ALJ to rely on Chew’s affidavit for this point, as the affidavit was never admitted into evidence. *Sam’s Club, a Div. of Wal-Mart Stores, Inc. v. N.L.R.B.*, 173 F.3d 233, 241-242 (4th Cir. 1999).

Further, the ALJ’s conclusion that Chew’s testimony was inconsistent with her affidavit overstates the discrepancy at issue. In her affidavit, Chew stated that Liggins had two pillow cases over his head (p. 3, ln. 19-20), and at trial she testified that he had a pillow case and a sheet over his head. Chew testified that the sheet was folded up, and draped around Liggins’s head and shoulders. This is precisely what Chew described to Worthy on the day Chew found Liggins sleeping, and her description of how Liggins was using the sheet is not materially inconsistent with the assertion that Liggins’ head was covered by two pillow cases. The critical point is that Chew has consistently asserted that Liggins had two linens over his head when she found him, and her affidavit and her trial testimony are consistent in all other material details. Moreover, Chew’s testimony is corroborated by Worthy’s testimony on that point. It was further corroborated by Liggins’ himself, who testified that when Chew came upon Liggins in the Control Room, she asked him why he had a *sheet* on his head. (TR. at p. 93). This admission is particularly compelling, as it was made before any testimony was solicited regarding Liggins’ use of a sheet.

Additionally, while the ALJ recognized that uncontroverted testimony should not be easily disregarded or dismissed (ALJD 16:n.24), the ALJ provided no justification for ignoring the unrefuted testimony by Dr. Carre and Chew that the two never discussed the issue of CT Technicians “banding together” against Chew. (TR. at 70, 203-204, 219, 241). Frankly, it would be very strange for Dr. Carre to advise CT technicians to “band together” against Chew and to then turn around and tell Chew that the CT Technicians were banding against her.

As an initial matter, the ALJ’s finding that Dr. Carre’s testimony conflicted with his affidavit is not supported by the evidence. (See Employer’s Exemption 11). In fact, Dr. Carre’s testimony was entirely consistent with the affidavit that he provided to the General Counsel as part of its investigation into Liggins’ Charge. (GC Ex. 6)³. Dr. Carre testified that he and Liggins never discussed the issue of employees banding together against Chew. (TR. at p. 209). The ALJ found that Dr. Carre was not credible simply because in his affidavit he stated that he did not “think” he ever told employees to band together. (ALJD 15:33-35). That is distinction without a difference.

The ALJ also found that it was “difficult to believe” that Dr. Carre would not relay “complaints made by all of the CT technicians” to Chew. (ALJD 15:19-21). This conclusion is not supported by the evidence. Critically, if it is assumed that Liggins spoke with Dr. Carre in September, 2011, there is no evidence that complaints were coming from “all” of the technicians. While Dr. Carre acknowledged that some of the CT Techs came to him with concerns regarding the location of the sink, that occurred in June or July 2011, and not at the time of Liggins’ discharge. (TR. at p. 210). Moreover, Liggins acknowledged that each of his comments to Dr. Carre in September, 2011, were passing comments to Dr. Carre to which Dr. Carre made no

³ Citation to the General Counsel’s exhibits are identified as “GC Ex ____.”

response. (TR. at p. 35-37, 65-66). If Dr. Carre, by Liggins' own admission, did not respond to him, why is it "difficult to believe" that he would not take the issue to Chew?

Additionally, the ALJ ignored significant evidence establishing that the CT Technicians were not, in fact, "banding together." Liggins testified that he spoke with Dr. Carre about the CT Technicians "banding together" on September 6 or 7, 2011, and that he started writing his letters that day. (TR. at 37:10-23; 38:5-8, 23-25). Liggins further testified that he told Dr. Carre on September 13, 2011, that "we the techs have banded together." (TR. at 41:7-8). Assuming that comment was made, it would have been false. The last time Liggins discussed these issues with Hopkins was late June or early July, 2011, and there is no evidence that Liggins discussed the issue with any other Technician since July, 2011. (TR. at p. 181).

Additionally, Liggins' own statements establish that he was being untruthful on this critical point. Liggins asserted in his packet of materials that he had been working on these letters "for months." (ER Ex. 6, p. 3). However, Liggins testified at trial that he began working on these letters on September 6 and 7, 2011, only a few days before his discharge. (TR. at p. 38). While acknowledging this inconsistency, the ALJ found it "minor." (ALJD 16:n.24). A fabrication on this issue cannot be considered "minor," because whether Liggins ever had these exchanges with Dr. Carre is critical to the resolution of this matter, and demonstrates that Liggins was willing to make false statements in an attempt to save his position. Such a conclusion is further supported by the overwhelming majority of the documents in Liggins' packet of information were undisputedly created after his discharge and addressed petty complaints that had not been previously raised.

2. Without Knowledge by Chew, There is No Evidence of Animus

Dr. Carre's unrefuted testimony that he never raised this issue with Chew negates any link between the asserted September protected activity and knowledge of that activity by the

decision-maker. (TR. at p. 219). It is impossible for Chew to have retaliated against Liggins about the letters if she did not know about the letters. *See Sears, Roebuck & Co. v. N.L.R.B.*, 349 F.3d 493, 513 (7th Cir. 2003) (“a decisionmaker cannot be motivated by what he has yet to learn.”). The ALJ’s opinion ignores the fact that there is no evidence that Chew had any knowledge of Liggins’ September actions.

Additionally, the ALJ’s opinion ignores a significant logical hole in Liggins’ position. It would be nonsensical for Dr. Carre to encourage Liggins to incite the CT Technicians to “band together to get [Chew] out” and then to go to Chew and inform her that he had done so. (TR. at 37:21-23). It cannot be believed that Dr. Carre would approach Chew and inform her that he had incited an uprising against her. Additionally, there is no evidence to suggested that Dr. Carre had any ill will towards Liggins. Consequently, it would be equally nonsensical for him to incite the uprising against Chew, and then go to Chew and push off the blame onto Liggins. As a result, the ALJ’s crediting Liggins on this point is not supported by the evidence.

Even if Dr. Carre knew of Liggins’ purported protected activity, that knowledge cannot simply be attributed to Chew. *Vulcan Basement Waterproofing of Illinois, Inc. v. N.L.R.B.*, 219 F.3d 677, 685 (2000). As the Seventh Circuit held in *Vulcan*, automatically imputing such knowledge “improperly removes the General Counsel’s burden of proving knowledge.” *Id.* Here, there is no evidence that Dr. Carre played any role in Liggins’ termination. As a result, Liggins’ purported communications with Dr. Carre “sheds no light” on whether Chew acted out of animus, “and therefore does not constitute substantial, or even relevant, evidence” that animus caused the discharge. *Sears, Roebuck & Co.*, 349 F.3d at 508. Consequently, there is no basis from which his knowledge generally can be imputed to Chew. *Vulcan Basement Waterproofing of Illinois, Inc.*, 219 F.3d at 686.

Absent some basis for imputing knowledge of protected activity to an employer, the General Counsel's failure to present substantial evidence to support the conclusion that an employer actually had knowledge of the protected activity at issue ends the analysis and demands a finding in favor of the employer. *Id.* at 687. In *Vulcan*, the court held that there was insufficient evidence to overcome the unrefuted denials that the decision-makers had knowledge. *Id.* at 687. In reaching that conclusion, the court noted that there was no evidence of anti-union animus, and there was no other circumstantial evidence that the employer was aware of the protected activity. Further, the court rejected the General Counsel's heavy reliance on timing. While the employer terminated the employee on the first business day after receiving an NLRB petition, the court recognized that mere coincidence alone is not sufficient evidence of anti-union animus. *Id.* at 688, quoting *Chicago Tribune v. NLRB*, 962 F.2d 712, 717-18 (7th Cir. 1992).

Here, Liggins admits that he never raised the issue with Chew. (TR. at p. 69-70). Further, he admitted that he has no evidence that Dr. Carre spoke to Chew about the issue, and that any conclusion that the two did discuss the issue would be purely speculative. (TR. at p. 70). Dr. Carre testified that he never raised the issue with Chew. (TR. at 207, 219). Finally, Chew testified that Dr. Carre never raised the issue with her. (TR. at p. 241).

An ALJ cannot base a finding purely on speculation or conjecture. "Suspicion, conjecture, and theoretical speculation register no weight on the substantial evidence scale." *N.L.R.B. v. Mini-Togs, Inc.*, 980 F.2d 1027, 1032 (5th Cir. 1993); see also *The Murrary Ohio Mfg. Co.*, 207 NLRB 481, 483 (1973) (suspicions alone did not support conclusion that animus motivated discharge). While an ALJ's credibility determinations are generally entitled to deference, deference is not owed where the determinations are based on an inadequate reason, or no reason at all. *Id.* In *Mini-Togs*, the decision at issue hinged on a conversation on which

conflicting evidence was offered, and the court recognized that it was “questionable whether [the] conversation ever occurred and, if it did, what was actually said.” *Id.* at 1035. Moreover, even if the conversation had occurred, the court held that it was “too tenuous to serve as the basis for the Board’s conclusion” on the issue of knowledge of protected activity. *Id.* As a result, the court refused to uphold the Board’s order. *Id.*

An unfair labor practice finding cannot be sustained where there is no substantive evidence supporting it. *Sam’s Club*, 173 F.3d at 242. In *Sam’s Club*, the issue was whether a threat had been made in violation of § 8(a)(1). The ALJ determined that the witness with knowledge of the issue was not credible. *Id.* That determination did not resolve the issue, however. As the court recognized, the ALJ’s credibility determination created an evidentiary vacuum as to whether the threat had been made, and the Board’s decision could therefore not be enforced.

Dr. Carre and Chew’s testimony on this issue is dispositive. The General Counsel offered no circumstantial evidence to undercut the conclusion demanded by the testimony. As the General Counsel’s opening statement made clear, the ability to establish knowledge on behalf of Chew hinges on the inferential leap that “Dr. Carre must have passed on this damaging information to Ms. Chew.” Ultimately, however, the evidence submitted does not support such an inferential leap, and the claim fails. The ALJ’s credibility determinations regarding Dr. Carre and Chew only create an evidentiary vacuum, they do not fill that void. Without evidence that Chew knew of the “banding together,” that conduct cannot support the § 8(a)(1) violation.

3. The June/July activity does not support the ALJ’s findings

The preponderance of the evidence does not support the conclusion that the June/July complaints motivated Liggins’ discharge. Initially, one of the two June/July complaints, the Control Room window, had been resolved months earlier. During trial, Liggins admitted that an

adjustable chair was provided that allowed the CT Techs to adjust the height of the chair up or down to a level that was comfortable for them. (TR. at p. 106). Hopkins, the only other CT Tech to testify, confirmed that once the new chair was provided, she could adjust the chair to a level that allowed her to see the patient through the window while seated. (TR. at p. 175-176). Dr. Carre and Chew both testified that after the new chair was provided, neither received any further complaints regarding the window. (TR. at p. 208, 246). As a result, contrary to Liggins' assertions, it is clear that any concerns regarding the window had been resolved well prior to his purported communications with Dr. Carre. It is therefore, implausible to conclude that Chew lied in wait for months to terminate Liggins for a complaint that had been easily reconciled.

This fact is all the more significant when juxtaposed against the hyperbole set forth within Liggins' September 14, 2011 letter on the issue. In his letter, Liggins intimates that the window "flaw" could compromise patient care, and ultimately lead to a patient's death. He goes on to assert that a patient "can not [sic] be visualized through the control room window," and that the "window is positioned incredibly high to the point that patients could not be visualized." (ER Ex. 6, p. 6). Even if these assertions were true, the provision of an adjustable chair establishes that Liggins' claims were outright falsehoods at the time his packet of materials was submitted, and would have been at the time he purportedly spoke with Dr. Carre in September, 2011.

Additionally, the evidence established that the June/July complaints did not result in any discipline or retaliation from Chew. Neither Liggins nor any other CT Tech was disciplined for raising their concerns. In fact, just the opposite was true. With respect to the height of the window, Chew secured an adjustable chair that remedied the issue. While Chew did not have the power or authority to unilaterally remedy the CT Tech's concern regarding the location of the

sink, she did raise the issue with St. Bernard's Vice President and relayed the results of that communication to the CT Tech's manager, Wilson.

There is also no evidence that Chew would view Liggins' conduct as something bearing on her employment. The window issue had been resolved, and Chew did not make the decision regarding the sink. That issue fell squarely under the control of Vice President Nohos, who was fully aware of the situation. Frankly, the more probable reaction to learning that Liggins was preparing to raise the issue with Nohos would be one of relief, as it would become one less issue for Chew to direct attention towards. Additionally, St. Bernard's is accredited by The Joint Commission, and the configuration of the Scanner Room, including the absence of a sink, did nothing to impact St. Bernard's accreditation. Consequently, there is no reason to believe that the sink complaint would have raised concern for Chew.

There is no dispute that any employee found sleeping while on duty at St. Bernard would have been terminated. The General Counsel has not provided substantial evidence the Liggins' termination was motivated by any form of animus related to protected activity. As a result, the claim fails.

CONCLUSION

When the issues of the sink and the window were originally raised in late June or early July, Chew responded to them. She provided a chair to remedy the concerns regarding the height of the window, and she brought the Tech's concern regarding the sink to the attention of Vice President Nohos. There is no evidence that Chew became angry with any of the Techs regarding the issue, and none of the Techs were disciplined for raising their concerns. As a result, it is unbelievable that Chew would orchestrate an elaborate plot to have Liggins terminated if the issues arose again months later. More importantly, the General Counsel has failed to establish that Chew had any knowledge that Liggins had engaged in any form of protected activity. As a

result, St. Bernard Hospital and Health Center respectfully requests that the Board reverse the Order of the ALJ and that the Complaint be dismissed.

Respectfully submitted,
St. Bernard Hospital and Health Care Center

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CERTIFICATE OF SERVICE

The undersigned, on behalf of the Employer, St. Bernard Hospital and Health Care Center, hereby certifies that on the 28th day of May 2013, I served Employer's Brief In Support of its Exceptions to the Decision of the ALJ electronically to the NLRB Office of the Executive Secretary and by U.S. Mail to the individuals and entities set forth below:

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