

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

**WOODCREST HEALTH CARE CENTER**

**and**

**Case 22-CA-083628**

**1199 SEIU, UNITED HEALTHCARE  
WORKERS EAST**

**BRIEF IN SUPPORT OF GENERAL COUNSEL'S CROSS EXCEPTIONS**  
**TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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## STATEMENT OF THE CASE

A Complaint and Notice of Hearing issued on November 30, 2012 upon an unfair labor practice charge filed on June 18, 2012 and amended on July 24, August 30, and November 20, 2012 by 1199 SEIU, United Healthcare Workers East, herein called the Union against Woodcrest Health Care Center, herein called the Respondent. The Complaint, as amended at the hearing, alleged that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a) (1) and (3) of the Act, by interrogating employees, by soliciting grievances, by creating the impression of surveillance, and by discriminatorily withholding a reduction in health insurance premiums from unit employees granted to employees who had not petitioned for union representation. General Counsel's Exhibit 1(k) and (n); Transcript p. 16.<sup>1</sup>

The Board conducted a hearing on the alleged unfair labor practices before Administrative Law Judge of the Board William N. Cates on February 5, 2013. The Administrative Law Judge denied Respondent's motion to dismiss the allegations based upon the Board's lack of authority to act in the absent of a quorum. Tr. 27.

The Administrative Law Judge issued his Decision on April 2, 2013, finding the that Respondent had interrogated employees and announced, then implemented a reduction in health insurance premiums withheld from employees eligible to vote in a representation election in violation of Section 8(a)1) and (3) of the Act.<sup>2</sup> Respondent filed Exceptions to that Decision on May 22, 2013. Counsel for General Counsel filed an Answering Brief on June 10, 2010.

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<sup>1</sup> Hereinafter, General Counsel's exhibits will be referred to as GCX, the Charging Party's exhibits as CPX, Respondent's exhibits as RX, and transcript references as Tr. followed by the page or exhibit number as appropriate.

<sup>2</sup> Hereinafter, the Decision will be referred to as JD followed by the page and line numbers as appropriate.

## STATEMENT OF FACTS

Woodcrest Health Care Center is an employer engaged in the operation of a rehabilitation and nursing facility in New Milford New Jersey. GCX 1 (k) and (m). On January 23, 2012, the Union filed a petition in Case 22-RC-07308 for an election for a unit of approximately 200 employees. JX 1, para. 1. Following an election on March 9, 2012, and a hearing on objections, the Board certified the Union as collective bargaining representative of Respondent's non-professional employees. Woodcrest Health Care, 359 NLRB NO. 58 (January 9, 2013).

The Administrative Law Judge found that Nursing Assistant Jeffrey Jimenez was a visible and vocal union supporter. JD 10:28. The Union had continued its organizing efforts while the objections case was pending before the Board, conducting rallies and passing out t-shirts and flyers across the street from the Employer's facility. Tr. 44. Jimenez had participated in the rallies and had passed out tee shirts. Tr. 45, 50, 57. JD 8:42-46.

Jimenez testified to two conversations with Assistant Director of Recreation Vladamir Guerrero on the subject of the union in August 2012. Tr. 38, 48. The first conversation with Guerrero occurred in the first week of August. Tr. 49. Jimenez and Guerrero were talking about the union in the hallway. The Judge found that when Jimenez told Guerrero that if the company had listened to employee, the mess would never have happened, Guerrero responded that Jimenez's name was popping up a lot. JD 10:42-43. Jimenez testified:

I just brought up that, you know, there was a lot being planned in August with passing out tee shirts and losing the, I mean winning the election. And then he just said, oh, I heard your name popping out a lot.

Tr. 50. See also tr. 49. (“[W]e were actually talking in the hallway. And then he just mentions that, oh, I heard your name, your name has been popping out a lot. And then I'm like I told him I know”). JD 9:5-14.

On August 24, The New Jersey Record published a report of SEIU's activities against the Respondent quoting including an interview with Jeffrey Jimenez as seeking better wages, benefits and a lighter caseload. Tr. 45. GCX 3The newspaper is delivered daily and kept at the lobby desk for distribution by the activities staff. Tr. 162; JD 8:38.

Jimenez's second conversation about the union with Guerrero occurred at the end of August in the recreation department when Jimenez had dropped by to deliver lunch to his sister. Tr. 52. Guerrero walked in and commented, "Oh, it's the famous boy." Tr. 52. JD 9:18 and 10:45. Guerrero continued walking and Jimenez followed him into Guerrero's office. Tr. 52. "[H]e told me that management saw the newspaper and then that they're pretty pissed about it." Tr. 52. Jimenez testified that Guerrero then told him that the Director of Nursing had grabbed the newspaper from the front lobby and taken it to her office and sent out a memo reporting Jimenez's comment in the newspaper. Tr. 52, 65. Guerrero went on to say that Jimenez's name had been mentioned a couple of times in the meeting, and urged Jimenez to watch his back, be careful and to do his job. Tr. 52-3, 65. JD 9:15-26; JD10:44-10 and 11:1-3.

Guerrero recalls hearing Jimenez talking about the union in the hallways and admitted that he had two conversations with Jimenez on the subject of the union. Tr. 156, 161. He described one as taking place outside the facility when Jimenez asked if Guerrero thought he should join the union representatives were distributing t-shirts across the street. Tr. 156. He denied informing Jimenez as to the views of managers' impressions of him. Tr. 155-6. JD 10:1-9. He did not specifically deny Jimenez's account of an exchange in the hallway or telling Jimenez that his name keeps popping up.

Guerrero confirmed a second conversation occurred after Jimenez had been quoted in the newspaper article. Tr. 153. According to Guerrero, Jimenez initiated the conversation, coming

into Guerrero's office and asking his thoughts on the union. Tr. 154. Guerrero testified that he simply advised Jimenez, "friend to friend, rather than manager to employee" to avoid getting "as much attention as he is getting." Tr. 154. Guerrero explained his personal view that:

having these opinions and working in a workplace where you share with other people, I felt like it is not his best approach to get extra attention and put his beliefs on everyone else. So I just was - - I would hope that maybe for him that he would just keep it under wraps, not just from a manager's point of view, but there's other staff that might not want or share the same opinions he has. And it just wouldn't - - it's just not the place for it. So for me, I just felt as though maybe he could tone it down a little bit.

Tr. 155. Guerrero testified his response was prompted by his observation of Jimenez's union activities: the newspaper and Jeffrey's conversations about the union in the hallways was "enough for me to make that statement to him." Tr. 161-2.

Guerrero stated he was aware that the Employer did not want the union to come to Woodcrest but only generally denied that he said anything to Jimenez about any other manager's views of his activity. Tr. 155-6, 163-4. He did not deny calling out "Oh, it's the Famous Boy" as a greeting to Jimenez or that Jimenez's name came up at management meetings, that management had circulated a memo about him, or had collected extra copies of the newspaper quoting him.

## **ARGUMENT**

**THE ADMINISTRATIVE LAW JUDGE FAILED TO FIND THAT RESPONDENT, BY VLADAMIR GUERRERO, CREATED THE IMPRESSION OF SURVEILLANCE OF EMPLOYEE JEFFREY JIMENEZ IN VIOLATION OF SECTION 8(A)(1) OF THE ACT.**

1. **Guerrero's statements to Jimenez created the impression that Management was taking undue notice of his Union activities.**

The Administrative Law Judge erred by failing to consider Guerrero's statements in the context of his explicit warnings that Jimenez should keep his union activity under wraps and tone

it down a little. The Administrative Law Judge further erred in relying on Jimenez's open and public support for the union in concluding that Guerrero's warnings that management had noticed his union activities were not coercive.

An employer creates an impression of surveillance when an employee would reasonably assume from the employer's statements that his union activities had been placed under surveillance. *Flexsteel Industries*, 311 NLRB 257, 257 (1993). The General Counsel does not argue that Respondent unlawfully surveilled Jimenez's open public activity in front of its facility or in the newspapers. Nor is this a case where the impression of surveillance is created by an employer's failure to identify the source of his knowledge of an employee's union activity. See e.g. *Connecticut Humane Society*, 358 NLRB No. 31, slip op at 33-34 (2012). Rather, the violation is the communication that management moved from passive observation to closely monitoring the degree of an employee's union involvement. While management may be free to observe public union activity, an unusual level of scrutiny may have an inhibitory effect:

If an employer behaves in a manner that is out of the ordinary as it observes union activities, or *by its statements or actions implies that it has done so*, it engages in unlawful surveillance or creates an unlawful impression of surveillance, even if the employees' union activities are conducted openly.

*Wal-Mart Stores, Inc.*, 350 NLRB 879, 887 (2007) (Emphasis added); *Flexsteel Industries*, 311 NLRB at 257 (noting that an employer creates an impression of surveillance by indicating that it is closely monitoring the degree of an employee's union involvement). See also, *Aladdin Gaming, LLC*, 345 NLRB 585, 585-6 (1005) (while a supervisor's routine observation of employees engaged in open Section 7 activity on company property does not constitute unlawful surveillance, an employer violates Section 8(a)(1) when it surveils employees engaged in Section 7 activity by observing them in a way that is out of the ordinary and is thereby coercive).

The Board's test for determining whether an employer has created an unlawful impression of surveillance is whether, under all the relevant circumstances, reasonable employees would assume from the statement or conduct in question that their union or other protected activities have been placed under surveillance. *Metro One Loss Prevention Services*, 356 NLRB No. 20, slip op. at 14 (November 8, 2010). The standard is an objective one, based on the rationale that employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways. *Id.* The Judge properly noted that the basis of the violation is that employees should be free to participate in union campaigns without fear that management is peering over their shoulder. JD 10:17-20.

The Judge properly found that Guerrero informed Jimenez that his name was "popping out a lot," and that management was collecting the newspapers, writing memos and mentioning him at meetings. The statements, coupled with the assertion that management was "pissed," would lead a reasonable employee to conclude that management was monitoring his union activities and would tend to coerce and restrain those activities. See, *McClain & Co.*, 358 NLRB No 118, slip op. at 4 (August 31, 2012) (Comment that everything got back to Virginia, reasonably suggested that management at the highest level was closely monitoring the degree and extent of employees' union activities); *Townsend Culinary, Inc.*, 1998 WL1985307 (ALJD) (Supervisor's warning to open union supporter that "people were checking him out" and that he should be extremely careful, gave impression that employer was closely monitoring, as opposed to generally noting, employee's union activity).

That Guerrero was stating his personal opinion and that his comment may have been intended as a friendly warning, does not mitigate its coercive impact. See, *Pacific Southwest Airlines*, 201 NLRB at 651.

Employees should be free to participate in union activity without fearing that members of management are peering over their shoulders, noting who is involved in union activities and to what extent or how.

*East Buffet and Restaurant, Inc.*, 352 NLRB 975, 994 (2008). Likewise, Jimenez's observations that he knew his rights, and did not feel threatened does not establish the conversation as non-coercive where the Board uses an objective standard rather than subjective response of the employee involved. See, e.g., *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1276 (2005).

Guerrero's statements about management's observations, coupled with his admitted warnings that Jimenez should "tone down" his activities and avoid undue attention, would tend to restrain and coerce employees protected activity.

2. While the Administrative Law Judge did not make specific factual findings or credibility resolutions on these allegations, his finding Jimenez to be generally credible supports a reliance of Jimenez's account of the two conversations.

While not making any specific factual findings as to the content of the conversations or any specific credibility resolution between the accounts proffered by Jimenez and Guerrero, the Administrative Law Judge's observation that "As indicated elsewhere in this decision, I find Jimenez generally to be credible" supports an implicit reliance on the employee's account. JD 10:25-28. This conclusion is supported by the inherent probabilities of Jimenez's testimony, and Guerrero's failure to specifically deny the attributed statements.

Jimenez testified that in the course of a conversation about the union, Guerrero told him that his name "had been popping out a lot." Later in the month, after Jimenez had participated in

distributing union tee shirts across from Respondent's facility and been quoted in the local paper, Guerrero greeted him as "Famous Boy," and informed him that management had noticed the newspaper article, had collected the copies from the lobby, had circulated a memo, was "pissed" about it, and that Jimenez's name had been mentioned at supervisory meetings. Guerrero admitted two conversations, but differed on details.

Jimenez's account is the more plausible and credible given Guerrero's failure to deny that he made the statements alleged, his confirmation of the sequence of events and his admissions that he was urging Jimenez "to tone things down." Respondent offers Guerrero's general denial that he said anything to Jimenez about managers viewpoints of his activity, but failed to deny that he told Jimenez that his name had come up at management meetings, that management had sent out a memo about his activities or had collected newspapers reporting his union activities. Secondly, the undisputed sequence makes Jimenez's account of the second meeting more plausible. Guerrero's suggestion that Jimenez invited the conversation by following Guerrero into the office is overcome by the undenied evidence that it was Guerrero's use of a nickname that prompted the exchange. Guerrero noted that Jimenez was present in his department where his sister was having lunch but did not deny calling out, "Oh it's the famous boy," before Jimenez followed him into his office. Thirdly, Guerrero's admissions that he warned Jimenez to "tone down" his open activity, statements he made "not just from a managers point of view," supports an inference that his remarks may have been accompanied by mentions that supervisors had mentioned his name at meetings, had sent out a memo, and had collected newspapers reporting his activities.

## CONCLUSION

The General Counsel urges the Board to find that Respondent, by Vladimir Guerrero, created the impression of surveillance in violation of Section 8(a)(1) in early and late August 2012 by informing Jeffrey Jimenez that managers had noted his activities, collected newspapers quoting him, and were mentioning his name at management meetings. Such conduct, particularly in the context of Guerrero's warnings that Jimenez "tone down" his union activities, would not have reasonably been perceived as ordinary behavior by management and created a reasonable apprehension that management was paying unusual attention to his activities. See, *Wal-Mart Stores*, 350 NLRB at 887.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "M Greenfield". The signature is written in a cursive style with a small "is" written above the first letter "M".

Marguerite R. Greenfield

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National Labor Relations Board  
Region 22

Dated this 10<sup>th</sup> day of June 2013.

**CERTIFICATION OF SERVICE**

This is to certify that copies of the foregoing General Counsel's Brief in Support of Exceptions to the Decision of the Administrative Law Judge have been served upon the parties as follows:

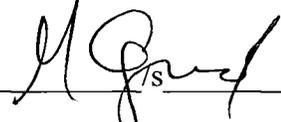
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Dated this 10 th day of June, 2013

  
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