UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ST. FRANCIS REGIONAL MEDICAL CENTER,

Respondent,

and

SEIU HEALTHCARE MINNESOTA,

Charging Party.

Cases 18-CA-092542
18-CA-094066

RESPONDENT ST. FRANCIS REGIONAL MEDICAL CENTER'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS

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I. RESPONDENT DID NOT VIOLATE SECTIONS 8(A)(1) OR (A)(3).[1,2]

A. VIOLATING PATIENT PRIVACY IS NOT PROTECTED BY THE ACT.

The law is clear: violating patient privacy is not protected by the National Labor Relations Act ("NLRA" or the "Act") even if it takes place when the employee was engaged in otherwise protected activity at the time of the breach. Altoona Hosp., 270 NLRB 1179 (1984); Beckley Appalachian Hosp., 318 NLRB 907 (1995). Counsel for the Acting General Counsel (hereafter "General Counsel") appears to agree, conceding that Respondent has a "legitimate interest in maintaining the confidentiality of [its] patients' private health information." (GC Br. 3.) Yet, remarkably, the General Counsel claims that Respondent's privacy policy – namely, its Confidentiality of Patient Information Policy ("Confidentiality Policy") – does not "implicate ***legitimate*** confidentiality concerns" and therefore "should be treated no differently than any other rule." (Id. at 3, 10.) This is not the law.

As an initial matter, the General Counsel's appeal to "legitimate confidentiality concerns" confirms that the General Counsel agrees that this case is governed by the Board's decisions in Altoona and Beckley, and not the factors set forth in Atlantic Steel. See Altoona, 270 NLRB at 1180 ("It is undisputed that employers have a ***legitimate interest*** in keeping certain information confidential . . . ."); Beckley, 318 NLRB at 909 (noting that the Act does not "denigrat[e] [an employer's] ***legitimate confidentiality concerns***."). Of course, rather than admit this, the General Counsel attempts to jettison any reliance on Atlantic Steel by asserting that Wolf and

[1] Citations in this Brief will follow the citations set forth in Respondent's Brief in Support of Exceptions. Additionally, "R. Br. __" indicates pages from Respondent's Brief in Support of Exceptions and "GC Br. __" indicates pages from the General Counsel's Answering Brief.

[2] Although the Board now has quorum, it should vacate the ALJ's Decision given the absence of power in the Acting General Counsel and ALJ to proceed as they did. (R. Br. 5-7.) In fact, since Respondent's previous filing, at least one additional court has held that the Acting General Counsel is without authority to bring complaints because his appointment is invalid. Hooks ex rel. NLRB v. Kitsap Tenant Support Servs., 2013 U.S. Dist. LEXIS 114320 (W.D. Wash. Aug. 13, 2013).

Theis "did not commit any workplace misconduct." (GC Br. 9 n.3.) This contention confuses the proper legal standard and assumes factual predicates that are not in the record. As to the legal standard, the Atlantic Steel analysis does not apply because this is not an "outburst"-type case and because the Board does not apply this analysis in cases where the employer alleges that the employee breached patient privacy. (See R.'s Br. 19-22.) Factually speaking, the General Counsel's claim that Wolf and Theis did not violate Respondent's Confidentiality Policy is not credible and belied by facts in the record.

With the precision of a sledgehammer, the General Counsel reviews the Confidentiality Policy and concludes that its "legitimate business reason" standard is "ambiguous" and therefore Wolf and Theis cannot be said to have violated the policy. (GC Br. 6.) This is absurd. First, the Confidentiality Policy describes that the definition of "legitimate business reason" includes reasons related to payment and treatment. (See R. Ex. 25 ("A provider has a legitimate need to know a patient's medical information during the course of treatment. . . . For someone in the billing office, the legitimate business need to know is in the context of obtaining payment for a bill. . . .") As demonstrated by their testimony, both Theis and Wolf had no reason – let alone a "legitimate business reason" – for accessing (Wolf only), using, and disclosing the patient records at issue in this case. (Tr. 134-37, 253-55.)

Next, the General Counsel asserts that Wolf and Theis were engaged in "processing a grievance," which it declares to be a "legitimate business reason" under Respondent's Confidentiality Policy. (GC Br. 6.) There are two problems with this line of reasoning. First, it ignores Wolf's and Theis' undisputed testimony that they had no reason for sharing anything other than the transcriptionist's initials who was alleged to be doing bargaining unit work. Second, "processing a grievance" may be a legitimate interest of the Union, but it is not a

"legitimate business reason" under the Policy because it is not in furtherance of Respondent's business interests.[3] For the same reason that the Confidentiality Policy prohibits Wolf and Theis from pilfering medical records and giving them to a vendor to show compliance (or non-compliance) with a particular contract or order, Wolf and Theis were without a "legitimate business reason" when they collected and disclosed confidential medical records to the Union.

Additionally, contrary to the General Counsel's contention, federal labor policy does not dictate that "processing a grievance" must read into Respondent's Confidentiality Policy. Indeed, this line of reasons was expressly rejected in Beckley. Specifically, in its analysis of "whether the employee's interests in disclosing the information outweigh the employer's legitimate interests in confidentiality," the Board noted that the employee's interest in disclosure was minimized by the availability of "other channels to obtain the necessary information," such as the union making an information request. Id. at 909. Likewise, in this case, there is no need to shoehorn "processing a grievance" into Respondent's Confidentiality Policy because, as Wolf and Theis readily admitted, they could have obtained the necessary information regarding the transcriptionist work through an information request.

The General Counsel's attempt to distinguish Altoona and Beckley is also unavailing. As to Beckley, the General Counsel claims that the case is inapplicable because Respondent treats patient information as only "regularly" confidential and not "absolutely confidential." (GC Br. 11-12.) However, as a legal matter, no such dichotomy exists.[4] But, even if "absolute" confidentiality is required, Respondent has demonstrated that it is committed to absolute

[3] The General Counsel does not explain why the term "business" should be construed to include any business beyond that of Respondent.

[4] It is absurd to think that the legitimacy of an employer's patient privacy policy turns on the placement of an adjective. Notwithstanding the General Counsel's apparent affinity for adjectives and superlatives, (see generally GC Br.), Respondent submits that no such "magic words" are necessary.

confidentiality through its zealous enforcement of its privacy policies. (R. Ex. 46; Tr. 707-08.)

Also, in Beckley, the nurse's violation of the employer's confidentiality rule was not as "indisputable" as the General Counsel claims. The policy provided that disclosure of patient records was prohibited "to persons outside or inside the hospital except in meeting the needs of the patients." Id. at 908. Arguably, "meeting the needs of patients" could (at least under the General Counsel's expansive reading) encompass a situation where a patient record is needed to show that other employees are utilizing a similar treatment protocol – which was the exact situation in Beckley. Id. at 911. Yet, the Board did not so broadly construe the employer's policy. Instead, it emphasized that it is the employer's prerogative to decide what materials are confidential: "***Management has the authority to determine which of its officials can see and use the information*** . . . [I]t was not up to [the employee] to unilaterally make this delicate decision." Id. at 909 (emphasis added). Here, too, Respondent has the authority to limit the access, use, and disclosure of its medical records, and Wolf and Theis cannot claim the protection of the Act when they unilaterally divulge such information in contravention of Respondent's policy. If confidential patient records are necessary to process a grievance, employees must go through the process of requesting them. Otherwise, the confidentiality policy is rendered meaningless.

In Altoona, like Beckley, the Board made no mention that the employer's patient privacy policy was (or needed to be) "absolute." Instead, the Board noted that an arbitrator had found that the employee violated "the cardinal rule of confidentiality of hospital information" when he engaged in "self-help" by taking patient information and giving it to a private investigator instead of going to the Union which could have filed an information requested on his behalf. Like the employee in Altoona, Wolf and Theis could have requested the necessary information

from Respondent through an information request. Instead, Wolf and Theis similarly engaged in unprotected "self-help" by surreptitiously accessing, using, and disclosing confidential medical information in violation of Respondent's Confidentiality Policy.

B. RESPONDENT'S RELIANCE ON HIPAA IS NOT NEW AND CANNOT CONSTITUTE A "SHIFTING DEFENSE."

The General Counsel's claim that Respondent's HIPAA and/or state privacy law arguments are somehow "makeshift" or "newly-found" is not credible. As an initial matter, Respondent's patient privacy policies are not separate from HIPAA. Instead, Respondent's patient privacy policies, including the Confidentiality Policy, are ***synonymous*** with HIPAA and related state laws. (See Tr. 777.) That is, Respondent's privacy policies represent Respondent's codification of its privacy obligations. This is because, when Congress passed HIPAA, it did not publish a model confidentiality policy that covered entities were to implement. Instead, Congress commanded that these entities, including Respondent, create, implement, and enforce policies and procedures for the protection of PHI. See 45 C.F.R. §§ 164.306(a)(1), (3), (4) and (c)-(d), 164.308, 164.316, 164.514(d), 164.530(c) and (i). In fact, Respondent's privacy policies, including the Confidentiality Policy, expressly reference and incorporate Respondent's obligations – as well as its employees' obligations – under HIPAA. (See, e.g., R. Ex. 25, 45.)

In addition, the record is clear that the Union was aware that Wolf and Theis were terminated for HIPAA violations. On the same day that Wolf and Theis were terminated, the Union made information requests that included the following: "Any and all ***disciplines issued for HIPAA, Level 3 Violations*** in the past 5 years." (R. Exs. 33a, 33b.) Likewise, the General Counsel cannot legitimately claim that it did not view this as a "HIPPA case." In its subpoena to Respondent, the General Counsel's requests included requests for "policies ***concerning HIPAA*** and/or patient confidentiality," training completed by Wolf and Theis regarding the same, and

disciplines and terminations "involving ***violations of HIPAA,*** patient confidentiality and privacy concerns." (GC Ex. 1.) From the beginning, all parties (including the General Counsel) understood that Wolf and Theis were terminated for violating patient privacy.

C. THERE IS NO DIRECT OR INDIRECT EVIDENCE OF UNION ANIMUS.

There is no direct evidence of animus. Like the ALJ, the General Counsel claims that Respondent's questioning of Wolf during its privacy investigation is somehow direct evidence of union animus. (GC Br. 19.) This is not the law. The Board has made clear that an employer is privileged to inquire into the "unprotected aspects" of an employee's (mis)conduct. (R. Br. 42.) The General Counsel's attempt to distinguish these cases as not "directly involv[ing] protected discussions" is unavailing. (GC Br. 20 n.10.) First, the Board has made no such distinction in any of its cases.[5] (See id.) Second, in Altoona and Beckley, management officials asked nearly identical questions with respect to the employees' breach of patient privacy, but there were no allegations in either case that the employers engaged in unlawful interrogation. See Altoona, at 1183 ("[The administrative director] asked [the employee] how she obtained [the patient's mother]'s name and who gave it to the private investigator."); Beckley, at 912 ("[The personnel manager] stopped the meeting and asked [the employee] how many copies she had, how many patients she had records [for], . . . [and] how did she get that information.").

The General Counsel also points to an email from Brian Erickson as direct evidence of union animus.[6] (GC Br. 20.) That document is a June 2011 email in which HIM Director Erickson mentioned "losing his patience" with Wolf. (GC Ex. 33.) Notably, the email was ***more***

[5] Indeed, the General Counsel cites no case to support its claim, and it is curious how (or why) the Board would distinguish between cases only "involving" protected discussions from those that "***directly*** involve" such discussions.

[6] Notably, the ALJ did not rely on Erickson's 2011 statement, and the General Counsel did not file any exceptions to her findings.

than one year prior to Wolf's termination and, more importantly, Selvig calmly ignored Erickson's comment and moved forward with her task of gathering the requested information. (Id.) Moreover, Erickson had almost no involvement in the investigation or the decision to terminate Wolf (or Theis). (Tr. 492-93, 501.) In these circumstances, one stray remark – which is remote in time and uttered by a single manager with almost no involvement in the decision to terminate Wolf – cannot constitute evidence of animus or pretext.

There also is no indirect evidence of animus or pretext. Again, like the ALJ, the General Counsel points to several examples where it claims that arguably more serious breaches resulted in something less than a termination. This argument ignores the undisputed fact that, in 2011 and 2012, Respondent terminated over 100 employees for breaching patient privacy. (R. Ex. 46.) Respondent has demonstrated a consistent pattern of terminating employees who violate its Confidentiality Policy – Wolf and Theis were treated no differently. It would be contrary to Board law to imply an evil motive or intent under these circumstances. (See R. Br. 73-75.)

D. HIPAA DOES NOT PERMIT EMPLOYEES TO SHARE PHI WITH THE UNION WITHOUT AUTHORIZATION.

Contrary to the General Counsel's claim, there is no exception specified in HIPAA that allows a union member or a union steward to access, use, or disclose patient records to investigate grievances without the requisite authorization. The exceptions apply only to disclosures by the ***covered entity*** – not to disclosures by an ***employee***. See 45 C.F.R. §§ 164.500(a), 164.502(a). In fact, the comments cited by the General Counsel were in response to questions about whether "***covered entities***" (not employees) could "disclose [PHI] to collective bargaining representatives under the [NLRA]." 65 Fed. Reg. 82485, 82598 (December 28, 2000). In addition, comments do not ***require*** the covered entity to permit disclosure of the PHI; rather, they specify that the covered entity "may" or "is permitted" to make the disclosures without an

authorization. Id. Thus, while Respondent could have authorized Wolf's and Theis' conduct without violating HIPAA, the record is clear that Wolf and Theis had no such authorization, and the absence of this authorization means that disclosure by Wolf and Theis violated HIPAA.

Nothing in the regulations provide employees with *carte blanche* to surreptitiously collect PHI in the hopes that it could be useful in a potential grievance or contract violation. Instead, HIPAA and the Act require the Union to request this information from the covered entity – through an information request – and the union would be entitled to only the amount of PHI that is minimally necessary to accomplish the limited purpose (i.e., if portions of the medical chart were not relevant to the grievance, they would not be included). 45 C.F.R. § 164.502(b). No such request was made in this case. Moreover, Wolf and Theis both admitted that the patient records were not needed in the investigation of the potential contract violation.

E. THE BOARD'S DECISION IN *CHINO VALLEY* IS INAPPOSITE.

The Board's decision in Chino Valley Medical Center, 359 NLRB No. 111 (2013), does nothing to advance the General Counsel's case. The key distinction is that the employee in Chino Valley had been ***given permission by his supervisor*** to access the patient information.[7] Id. at 1, n.3. No such authority was granted to Wolf or Theis in this matter.

In fact, the Board's decision in Chino Valley actually supports Respondent's contention that an employer may lawfully discipline employees who violate patient privacy, even if the employees are engaged in protected activity. Specifically, in affirming the ALJ's decision, the Board noted that the employer had given the employee permission to "view, copy, and use" the medical records for the purpose of prosecuting his grievance, and that there was "no evidence that [the employee] ***exceeded the scope of that authority***." Id. at 1, n.3. This means that even in

[7] As noted *supra*, this grant of authority by the covered entity is not inconsistent with HIPAA. 65 Fed. Reg. at 82598.

a situation where an employee is prosecuting a grievance, the employee ***loses protection of the Act*** if the employee "***exceeds the scope of that authority***" in accessing and using the confidential medical records. Here, unlike Chino Valley, Wolf and Theis exceeded the scope of their authority by accessing (Wolf only), using, and disclosing confidential medical information in violation of Respondent's Confidentiality Policy. Accordingly, Chino Valley does not change the result dictated by Beckley and Altoona.

II. RESPONDENT DID NOT VIOLATE SECTION 8(A)(5) OF THE ACT.

The General Counsel agrees that only an "unreasonable delay" constitutes a violation of Section 8(a)(5). (GC Br. 37.) Yet, rather than assessing the "reasonableness" factors, the General Counsel simply concludes that because the Union "did not receive *any* information that it requested until December 4," Respondent violated the Act. (GC Br. 38.) This is not the law.

First, the parties' bargaining history dictates that a one-month delay in providing requested information is not unreasonable. Indeed, no charge was filed with respect to Respondent's one-month response time to Wolf's September 26th information request. (GC Exs. 7, 27.) Second, there is no evidence in the record that the Union ever requested the information in piecemeal fashion. (GC Ex. 13.) Thus, it was not unreasonable for Respondent to not immediately produce the records that were more readily available. Finally, the General Counsel's claim that the Union was prejudiced by any delay is simply not supported by the record. Indeed, Respondent offered to delay the meeting in order to accommodate any such need, and the unrebutted testimony of Labor Relations Director Tim Kohls demonstrates that there has been no delay in the progress of the grievances. (Tr. 758.) More fundamentally, the Union had requested to forgo the Step 1 meeting, so it cannot now claim that it was prejudiced by not receiving documents in a timely fashion for a meeting it believed to be unnecessary.

III. THIS CASE SHOULD HAVE BEEN DEFERRED TO ARBITRATION.

Rather than addressing the ALJ's erroneous analysis of the Collyer factors, the General Counsel argues that, as a matter of law, this matter cannot be deferred to the parties' grievance-arbitration process because it involves allegations that a steward was disciplined in retaliation for grievance-related activities. (GC Br. 43-48.) This is not the law.

The General Counsel's appeal to Ryerson & Sons, Inc., 199 NLRB 461 (1972) is unavailing because, as the Board held in Postal Service, 271 NLRB 1297, 1298 (1984), the pertinent question is not (as the General Counsel claims) whether the case involves allegations of retaliation against a union steward but rather whether there is "a genuine obstacle to utilization of the parties' contractually agreed-upon method for dispute resolution." Here, no such obstacle exists because the evidence shows that the grievances have progressed as fast (or faster) than any other case in the last seven years. (Tr. 758.) The General Counsel's attempt to distinguish United Beef Co., Inc., 272 NLRB 66 (1984) is similarly misguided. For the purposes of deferral, it makes no difference whether the alleged retaliation is "general allegations of harassment" or termination.[8] As it did in Postal Service, the Board first examined whether utilization of the grievance process would be "futile" and, finding the process not to be futile, the Board proceeded to analyze the Collyer factors. Id. 68. Here, because utilization of the grievance process would not be futile and because all of the Collyer factors support deferral, (R. Br. 7-19.), the Board should order that the case be deferred to arbitration.

Dated: September 13, 2013.

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[8] As a factual matter, the General Counsel is wrong. The shop steward in United Beef was both harassed and terminated. Id. at 66 ("Respondent discharged [shop steward] Rodriguez . . . .").

STATEMENT OF SERVICE

This is to certify that, on September 13, 2013, I caused the **Respondent St. Francis Regional Medical Center's Reply Brief in Support of Exceptions** to be electronically filed with the National Labor Relations Board E-Filing System, and that I electronically mailed the same to the following:

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