UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIGNITY HEALTH d/b/a ST. ROSE DOMINICAN HOSPITALS

and **Case 28-CA-094717**

MICHAEL S. DELA PAZ, an Individual

GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

Respectfully submitted,

Nathan Higley
Counsel for the General Counsel
National Labor Relations Board, Region 28
600 Las Vegas Boulevard South, Suite 400
Las Vegas, NV 89101-6637
Telephone: (702) 388-6062
Facsimile: (702) 388-6248
Email: nathan.highley@nlrb.gov

I. INTRODUCTION

By its exceptions, Dignity Health d/b/a St. Rose Dominican Hospital (Respondent) urges the Board to ignore the record evidence and well-reasoned ruling of Administrative Law Judge Joel P. Biblowitz (the ALJ). Respondent enacted and maintained an overly-broad and discriminatory rule by prohibiting its employee, Michael Dela Paz (Dela Paz), from seeking to obtain the support of his fellow employees and later discharging him for doing so. Both testimony at trial and documentary evidence wholly establish that Respondent discharged Dela Paz due to his violating the unlawful rule by distributing a petition that sought to draw attention to the behavior of a hospital employee whose performance negatively impacted Dela Paz and his coworkers. The Board should only grant Respondent's exceptions if it accepts a theory of defense that was dismissed as incredible by the ALJ.[1]

II. PROCEDURAL HISTORY

On September 23, 2013, the ALJ issued his decision in this matter, finding that Respondent maintained a "no retaliation rule" that was overly-broad and discriminatory in its application and that Respondent discharged its employee, Dela Paz, for seeking to obtain the support of his fellow employees. The ALJ found that Respondent's rule and Dela Paz' discharge under that rule violated Sections 8(a)(1) of the Act. Respondent's exceptions, and General Counsel's exceptions regarding the failure to find that the discharge was in retaliation for Dela Paz protected concerted and union activities, are before the Board.

III. RESPONDENT'S EXCEPTIONS

A. Dela Paz' Suspension Was Not a Violation

As Respondent states in its exceptions, General Counsel did not allege that Respondent's decision to suspend Dela Paz was a violation. Respondent suspended Dela Paz

[1] ALJ Decision 5:29-31.

based on security reports filed by and on behalf of its employee, Habiba "Mustah" Araru (Araru), and based on Dela Paz' personnel file. (Tr. 25:3-5, GCX 2). Respondent had a copy of the petition created by Dela Paz at the time Respondent suspended him, but, although Respondent first stated that it considered the document retaliatory at the time of Dela Paz' suspension (Tr. 48:18-22), Respondent later stipulated that it did not. (Tr. 52:17-20). Either way, Respondent gave Dela Paz no admonition specific to the petition when it suspended him. (Tr. 48:5-17).

B. Dela Paz' Petition Was Protected Concerted Activity

As more fully outlined in General Counsel's exceptions, contrary to the ALJ's finding, and contrary to Respondent's assertions, General Counsel respectfully submits that Dela Paz' act of forming and circulating his petition is the very kind of activity protected by the Act. Stated briefly here, Dela Paz' circumstances closely resemble those of the charging party in *Hispanics United of Buffalo, Inc.*, 359 NLRB No. 37 (2012). In *Hispanics United,* a single employee used her personal Facebook account to alert her coworkers to their fellow employee's complaint about her and her coworkers and solicited her coworkers' view of this criticism. Likewise, Dela Paz took measures through his petition to defend himself and others against Araru's work habits, which he believed – correctly, as demonstrated by more than two dozen signatures on his petition – had a detrimental effect upon his and others' working conditions. See *Oakes Machine Corp.*, 288 NLRB 456 (1988) (holding that a letter expressing employees' dissatisfaction with a manager constituted protected concerted activity). Although Respondent correctly states that there is no evidence that other employees solicited signatures on Dela Paz' behalf, his coworkers did direct him to other employees interested in signing his petition. (Tr. 78:19-23). In doing so, Respondent's employees made

"common cause" with Dela Paz and took concerted action. *Meyers Industries*, 268 NLRB 493 (1983), remanded sub non. Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985).

Holling Press, Inc., 343 NLRB 301 (2004), cited by Respondent, is inapposite to the case here. In *Holling Press*, the charging party was discharged for urging a coworker to testify in connection with the charging party's sexual harassment claim with a state agency. The Board stated that the charging party's purpose in filing her charge was not protected concerted activity because it was not for mutual aid or protection but rather "to benefit herself alone." *Id.* at 303. Here, Dela Paz' petition inquired exclusively after the way in which coworkers were affected by Araru's performance. (GCX 3). While true that Dela Paz had recently been disciplined due to an altercation with Araru, the petition made no reference to this fact, and there is no evidence that Dela Paz discussed his discipline or the altercation during his circulation of the petition. The only concrete indication to coworkers that the petition might be personal in nature is the title, which states simply "Signature Campaign in Support of Mhike Sanchez."[2] It is the body of the document, not its title, that best describes its purpose. When considered in connection with the wording of the body of the document, the title is little more than that, a means of identifying the document's purpose and creator.

C. The ALJ Correctly Found that Respondent Enacted and Maintained Overly Broad and Discriminatory Rules

Respondent does not dispute that the June 7, 2012, rule was overly broad but argues that it was limited to the period of Dela Paz' suspension. The ALJ correctly linked this rule to the rule promulgated in Respondent's suspension paperwork (see GX5) forbidding Dela Paz from retaliating against Araru. The June 7 rule forbade Dela Paz from speaking to hospital employees during his suspension. (RX 6). The second rule of June 12, 2012, as enforced and

[2] Dela Paz' full name is Michael Sanchez Dela Paz. Dela Paz is Filipino, and, as is common in the Philippines, Dela Paz has two surnames, both Sanchez and Dela Paz. Also, "Mhike" is a common spelling.

as found by the ALJ, forbade Dela Paz from circulating the petition he formed in connection with his suspension. The second rule, by its application is a continuation of the first rule, prohibiting him from speaking to other employees. Respondent admits that on June 12, in response to receiving the Dela Paz' petition, it advised him that the matter "was closed…there was nothing further that needed to be done and that the expectation was that [Dela Paz] would not retaliate…" (Tr. 31-32:22-2). This was the same day Respondent issued its second rule, the violation of which was Respondent's reason for discharging Dela Paz, and which rule the ALJ determined was an unlawful prohibition from Dela Paz circulating his petition.

D. The ALJ Correctly Ruled that Respondent Discharged Dela Paz over the Petition

The ALJ properly found that the reason Respondent discharged Dela Paz was due to Dela Paz' continued circulation of his petition. The ALJ found no merit in the assertion that Dela Paz was discharged for his approaching Wild, going so far as to qualify his finding that Respondent's witness was "generally credible" except that he "had difficulty admitting that it was the petition, not the fact that Wild was the recipient of it, that was the cause of the termination." (ALJD p. 5, lines 28-31).

1. There Is No Evidence that the Written Statement Was a Factor

The evidence established at trial provides no basis for the assertion that the written statement Dela Paz' delivered to Wild (RX 5) was reason it discharged Dela Paz. Duda did not mention the statement in his initial examination when discussing his reasons for discharging Dela Paz. (Tr. 43:18-24, 47:16-24). It was not until later, when Respondent's counsel presented the statement, that it was discussed:

Q Can you identify this document?
A This is a typed document provided by Mr. Dela Paz regarding the incident.
Q And did he give you this on the meeting on June 12?
A Yes, I believe he did.

(Tr. 93:2-6). The ensuing discussion concerned whether the allegations made in the RX 6 were true; not whether the document was the basis for Duda's decision to discharge Dela Paz. (See Tr. 93). Wild also discussed the document only enough to describe how he received it; no discussion regarding its alleged inflammatory nature took place. (See Tr. 103-104:17-10). General Counsel can find no testimony or documentary evidence supporting the proposition that Respondent discharged Dela Paz due to this document.

2. The Statement is Not Retaliatory

The only support for this theory appears for the first time in the form of argument by Respondent in its post-trial brief. Furthermore, examination of RX 6 reveals that it is not an "acrimonious," "vitriolic," "diatribe" "attacking" and "slamming Araru." General Counsel will not attempt to discuss at length the content of that three-page document, but the foci are Dela Paz' allegation that Araru's work habits make his job more difficult and that the treatment of the matter that led to his discipline was one-sided. He points out that no investigation was done into his own complaints in the matter, an assertion borne out in Respondent's testimony. (Tr. 25:3-5, 26:8-12, 27:13-22, 30-33, 37, 106-107:19-11). Far from a diatribe, the statement is an admirably restrained petition for redress. Dela Paz' comments do reflect frustration, and rightly so. He alleges that Araru's work performance increased the burden on him and that she made derogatory comments based on his race. The bulk of the content in the statement raises matters that should be of concern to any responsible employer.

3. Dela Paz' Approaching Wild Is Not Retaliatory Conduct

The ALJ did not ignore the idea that Dela Paz' approaching Wild was the reason why Dela Paz was fired. Rather, he dismissed the idea as unsupported by the evidence. General Counsel's Exhibit 2, the security report relied on in placing Dela Paz on administrative leave, provides an example of what might constitute employee retaliation: "Habiba did say that the only thing she would be concerned about is if Mr. Delapaz were to cause some sort of damage to her vehicle i.e. slash the tires." There is no allegation that Dela Paz took any such action, but this demonstrates the distinction that Respondent failed to recognize: as an employee, Dela Paz was powerless to take corrective action against Araru whatever his intent might have been. In approaching a manager, Dela Paz placed the volition to take any action with Respondent. In a manner of speaking, Dela Paz' approach and his documents might have been a but-for cause for any hypothetical discipline issued to Araru, but it would not be the proximate cause. In any case where an actor's wishes rely entirely on the volition of a third party, who as a supervisor has no pressure to take action urged by the actor, the actor's action stops at petitioning the third party. The most Respondent can allege is that Dela Paz approached Wild and delivered documents.

i. Respondent's Allegation Is Based on Supposition of Dela Paz' Intent

The allegation that Dela Paz attempted to have Araru disciplined is supposition on the part of the Respondent, and any such accusation regarding what *might* have happened must be preceded by, "If Dela Paz had his way," or "If it were up to Dela Paz," but it was not. General Counsel acknowledges that providing a manager with incriminating allegations about another employee's work performance may lead to discipline for the employee implicated. However, this assertion regarding Dela Paz' intent is an assumption of Respondent not

supported by evidence. (See Tr. 77-78:18-11). None of Dela Paz' documents call for Araru to be disciplined, and there is no evidence that Dela Paz made this request. While it is safe to assume that a responsible company would act on credible information that implicates an employee and take whatever corrective action necessary, Dela Paz not only omitted any request for corrective action, he was powerless to instigate discipline. The fact that Dela Paz put information in the hands of Respondent, the only party with the authority to take corrective action, is evidence that he respected the instruction not to retaliate by having no contact with Araru.

ii. Dela Paz Did Not Retaliate

As far as smearing Araru's reputation, the most reasonable strategy would be to approach his and Araru's own coworkers. Dela Paz approached a single manager, Wild, and asked whether Wild was interested in information about a dispute he had with one of Wild's employees. (Tr. 102:15-23). There is no evidence that Dela Paz distributed the statement to anyone other Duda and Wild. To his coworkers, Dela Paz distributed a mildly-worded petition that gave no details as to his personal conflict and made no assertions regarding his own views. Respondent's argument that it would have terminated Dela Paz even had he not circulated the petition boils down to punishing Dela Paz for what Respondent thought Dela Paz was thinking. This is similar to punishment for a "dirty look."

Furthermore, there is no evidence that Araru received any discipline for the interaction that led to Dela Paz' suspension or as a result of Dela Paz' petition, statement, or his approaching Wild. Assuming, as Respondent has, that this was Dela Paz' intent, Dela Paz was unable and – the facts demonstrate – unsuccessful in achieving corrective action against Araru.

iii. Dela Paz' Actions Were Reasonable

The claim that Dela Paz' approaching Wild was the reason for his discharge is untenable. In fact, Dela Paz' action is understandable. Dela Paz' supervisors were heedless of his petition and the concerns of his coworkers. His discipline stood. Respondent characterized this approach as Dela Paz' attempt to have Araru disciplined. There are other reasons why Dela Paz might have approached Wild including his stated reasons: that he wished to resolve his discipline and tell his side of the story. (Tr. 77-78:18-11). It could be nothing more than a responsible attempt to bring serious problems to the attention of management. Or it could be an attempt to gain some support for his campaign from Wild, Araru's manager and the person in a position most likely to be familiar with Araru problematic behavior. It could also be a plea for outside help from an employee who had been punished wrongfully by his own supervisors. And it could be the next step to taking the petition to hospital administrators or human resources, which, contrary to Respondent's argument, might be the most direct route to getting Araru disciplined. Whatever his reasons, without supporting evidence, any assertion regarding Dela Paz' intent in approaching Wild must remain conjecture. Furthermore, his intent is a small piece of an assertion overshadowed by the ALJ's reasonable conclusion that Respondent truly discharged Dela Paz for distributing his petition.

E. Respondent's Rule that Dela Paz Not Contact Employees While on Suspension Was Overly Broad and Discriminatory

The ALJ correctly found that the rule prohibiting Dela Paz from speaking to employees while on administrative leave was overly broad and discriminatory. The test of whether a statement made by an employer is unlawful is whether the words could reasonably be construed as coercive. *Double D. Construction Group*, 339 NLRB 303, 303-04 (2003).

Respondent's employees include Dela Paz' union vice president. The directive did not make an exception for union members. When an employer gives a directive whose application might be interpreted as prohibiting lawful activity, the employee is not responsible for interpreting the rule as enforceable only to the extent of its legal boundaries. *Boulder City Hospital*, 355 NLRB No. 203, slip op. at 2-3 (2010). The fact that Respondent did not specify that Dela Paz was not to speak to union members does not excuse its unlawful interpretation. Furthermore, the rule served no legitimate business interest. Respondent's concern was that Dela Paz would retaliate against Araru by slashing her tires. GCX 2. Curtailing Dela Paz' speech has no connection to ensuring the integrity of Araru's vehicle. The fact that Dela Paz acted in spite of the rule does not change the rule's unlawful nature or eliminate the possibility that he might have done more in the absence of the rule to prevent his administrative leave from becoming a suspension.

Regarding the claim that the unlawful rule is outside of the time period prescribed by Section 10(b), General Counsel acknowledges that Respondent's statement was made prior to June 12, the day on which Respondent ended Dela Paz' administrative leave and converted it to suspensions. However, the record establishes that the rule was maintained during the entire period. Section 10(b) states that "[n]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge and the service of a copy thereof upon the person against whom such charge is made." The charge was mailed and therefore served on December 12, 2012, exactly six months after the alleged wrongdoing stopped. It was therefore not more than six months.

IV. CONCLUSION

The ALJ correctly found that Dela Paz was discharged pursuant to an overly broad and discriminatory rule that forbade him from communicating with coworkers. His written statement was barely noticed, and his approaching Wild was a reasonable action in light of his circumstances. Respondent discharged Dela Paz for forming and circulating a petition, a protected concerted activity that it made no personal claim, but rather sought to bring to Respondent's attention an arduous working condition brought about by a troublesome coworker.

Dated at Las Vegas, Nevada this 20th day of November, 2013.

Respectfully submitted,

/s/ Nathan A. Higley

Nathan A. Higley
Counsel for the General Counsel
National Labor Relations Board
Region 28 – Las Vegas Resident Office
600 Las Vegas Boulevard South, Suite 400
Las Vegas, NV 89101-6637
Telephone: (702) 388-6062
Facsimile: (702) 388-6248
E-Mail: nathan.highley@nlrb.gov

CERTIFICATE OF SERVICE

I hereby certify that the **GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS** in Case 28-CA-094717 was served via E-Gov, E-Filing, and electronic mail, on this 20th day of November 2013, on the following:

Via E-Gov, E-Filing:
Gary W. Shinners, Executive Secretary
National Labor Relations Board
Office of the Executive Secretary
1099 14th Street NW – Room 11612
Washington, DC 20570

Via Electronic Mail:
Judy S. Coffin, VP & AGC
Dignity Health
185 Berry St Ste 300
San Francisco, CA 94107-1773
E-Mail: judy.coffin@dignityhealth.org

James T. Winkler, Attorney At Law
Littler Mendelson, PC
3960 Howard Hughes Pkwy, Ste 300
Las Vegas, NV 89169-5937
E-Mail: jwinkler@littler.com

Michael S. Dela Paz
9001 Harbor Wind Ave
Las Vegas, NV 89178-6277
E-Mail: mhike070871@yahoo.com

Cheryl Bunch, Director, Healthcare Division
Service Employees International Union, Local 1107
3785 E Sunset Rd
Las Vegas, NV 89120-6259
E-Mail: cbunch@seiunv.org

/s/ Dawn M. Moore

Dawn M. Moore, Election Assistant
National Labor Relations Board
Region 28 - Las Vegas Resident Office
600 Las Vegas Boulevard South, Suite 400
Las Vegas, Nevada 89101-6637
Telephone: (702) 388-6417
Facsimile: (702) 388-6248
E-Mail: dawn.moore@nlrb.gov