

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

KANAWHA HOSPICECARE, INC.

and

Case 9-CA-063109

KEIRA RANSON, AN INDIVIDUAL

MEMORANDUM IN OPPOSITION TO
RESPONDENT'S MOTION TO DISMISS AND
RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

This Memorandum sets forth Counsel for the General Counsel's position in regard to Respondent's Motion to Dismiss, or in the Alternative for a Stay (attached hereto as Exhibit 1); and to Respondent's Motion for Summary Judgment and Motion to Enter Order Finding that the Board's Issuance of the Complaint was not Substantially Justified (attached hereto as Exhibit 2). The General Counsel opposes both Motions and respectfully submits to the Board that such Motions should be denied.

Motion to Dismiss:

In Respondent's Motion to Dismiss, filed on January 30, 2012, Respondent essentially argues that when the Board issued the complaint in this matter on January 27, 2012, the Board was not comprised of a lawfully seated quorum under Section 3(b) of the Act because, Respondent claims, the President's Board Member appointments made on January 4, 2012, were not lawful recess appointments. Respondent relies on the Supreme Court's decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct 2635 (2010). Respondent further requests that if its Motion to Dismiss is denied, the Board should grant a Stay of the hearing set for March 6, 2012, pending the resolution of *National Association of Manufacturers, et al., v. National Labor*

Relations Board et al. Case No. 1:11-CV-01629 United States District Court for the District of Columbia. This request for a stay relies on the same argument made in Respondent's Motion to Dismiss: that the Board was not comprised of a lawfully seated quorum when the complaint was issued.

Respondent's Motion to Dismiss is without merit and should be denied. As an initial matter, the validity of the President's appointments is presumed and the constitutional issues Respondent seeks to raise are not a proper subject of litigation before the Board. See, *Lutheran Home at Moorestown*, 334 NLRB 340, 341 (2001), citing *U.S. v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926).

Furthermore, contrary to Respondent's assumption, the authority of the General Counsel of the National Labor Relations Board to prosecute an unfair labor practice case derives *not* from the Board, but rather directly from the statute. The National Labor Relations Act ("NLRA") "divides responsibility over private-sector labor relations between the National Labor Relations Board and the General Counsel of the Board." *NLRB v. FLRA*, 613 F.3d 275, 278 (D.C. Cir. 2010). "This bifurcated structure reflects the intent of the Congress 'to differentiate between the General Counsel's and the Board's final authority along a prosecutorial versus adjudicative line.'" *Id.* (quoting *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 124 (1987) (*UFCW Local 23*)). As the Supreme Court has explained (*UFCW Local 23, supra*, 484 U.S. at 117-118):

The NLRA, as originally enacted, granted the Board plenary authority over all aspects of unfair labor practice disputes: the Board controlled not only the filing of complaints, but their prosecution and adjudication. The Labor Management Relations Act, 1947 (LMRA), 61 Stat. 136, altered this structure.

One of the major goals of the LMRA was to divide the old Board's prosecutorial and adjudicatory functions between two entities. The Conference Committee did not go so

far as to create a new agency. It did, though, determine that the General Counsel of the Board should be independent of the Board's supervision and review.

To this end, “the General Counsel is appointed by the President, with the advice and consent of the Senate, and is the ‘final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints . . . and in respect of the prosecution of such complaints before the Board.’ 29 U.S.C. § 153(d)” 484 U.S. at 118. Thus, “Congress intended to create an officer independent of the Board to handle prosecutions, not merely the filing of complaints.” *Id.* at 127 Nor does it detract from the General Counsel’s independence that Congress included in Section 3(d) language “on behalf of the Board” to make it clear that the General Counsel acts within the agency. As the Supreme Court found (*UFCW, Local 23*, 484 U.S. at 128-129), the legislative history shows that the acts of the General Counsel were *not* to be considered acts of the Board. ^{1/}

^{1/} The Court there noted the following legislative history. 93 Cong. Rec. 6383 (1947) (remarks of Reps. Owens, Hartley, and MacKinnon) (emphasis added):

“Mr. OWENS. I believe that one of the most important portions of this bill is the division of powers; that is, the division of the functions, the investigation, the prosecution, the complaints, and the judicial end. The gentleman mentioned that the general counsel would be absolutely independent.

In the language [the bill] constantly refers to the Board.

It is my understanding that the conference is saying to the House at this time that those different sections, where they mention the Board, mean that it is the general counsel who shall have the power to proceed with the investigation, with the complaint, and shall have complete power over the attorneys who are prosecuting; that the Board shall not control him or have the right of review in any way. Is that correct?

“Mr. HARTLEY. The gentleman's opinion is absolutely correct. The reference to the Board was necessary *because, in order to have this man independent of the Board, we had to use the term ‘Board.’* Otherwise we would have had to set up a completely independent agency *He acts on behalf of the Board but completely independent of the Board. . . .*”

Not only does the NLRA provide for an independent General Counsel appointed directly by the President but also the NLRA ensures that the agency staff performing investigative and prosecutorial tasks is directly accountable to the General Counsel. Section 3(d) expressly provides that with the exception of administrative law judges and legal assistants to Board members, the General Counsel “shall exercise general supervision over all attorneys employed by the Board” as well as “over the officers and employees in the regional offices.” *NLRB v. FLRA*, 613 F.3d at 278 (the NLRA “specifically mandates a separation of authority over agency employees.”) For this reason, agency staff performing critical prosecutorial functions - such as limiting the issues that may be litigated at trial ^{2/} - are at all times are subject to the Presidentially-appointed General Counsel’s supervision and control.

Finally, there is no merit to Respondent’s argument [paragraph 9] that “judicial economy and fairness dictate that the Board not proceed” when there is a risk that a court could eventually hold that the Board now lacks a valid quorum, and that, as happened following the Supreme Court’s decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2638 (2010), its decision might be vacated and remanded for reconsideration. Respondent’s notion of fairness takes no account of the public interest in having the complaint allegations promptly tested at trial at a time when witnesses are available and memories are fresh. Respondent’s claims about judicial economy also overlook the Board’s actual experience in processing cases during the period covered by the *New Process* decision. Only about 98 of the close to 600 decided cases were challenged in court and ultimately remanded to the Board after *New Process* (and a fair number of those cases were settled after *New Process*). Thus, most of the cases decided by the two-member Board finally resolved labor disputes because the parties either accepted the Board’s

² See, e.g., *Teamsters, Local 282 (E.G. Clemente Contracting Corp.)*, 335 NLRB 1253, 1254 (2001).

decision or settled the dispute. Accordingly, delay in securing remedies for unfair labor practices was significantly reduced because the cases were fully and timely processed before an administrative law judge and the Board.

The complaint in this matter was issued by the Regional Director under authority of the General Counsel. Thus, even assuming arguendo that a quorum of Board members was not seated at the time complaint issued, Respondent's Motion to Dismiss is utterly without merit and should be denied.

Motion for Summary Judgment:

Similarly, Respondent's Motion for Summary Judgment, filed on February 2, 2012, is without merit. Quite simply, the complaint alleges facts that, if proven, would constitute a violation of the Act. Counsel for the General Counsel must be provided the opportunity to present evidence in support of the allegations in the complaint. The proper venue for such evidence is a hearing before an administrative law judge, who is empowered to make resolutions of the credibility of witnesses. All of Respondent's arguments – that Ranson has given certain testimony under oath, that Elsea's conduct was not concerted, that Respondent had a valid reason for the terminations – are factual matters to be litigated before an administrative law judge, not to be decided in a Motion for Summary Judgment. Respondent would have the Board, without a hearing, make factual findings regarding matters that are in genuine dispute. This is contrary to the Board's procedures and to fundamental due process.

Finally, Respondent's request that the Board find that its actions were not substantially justified under the Equal Access to Justice Act is obviously premature. Under National Labor Relations Board Rules and Regulations, Sec. 102.143(b), in order to be eligible to apply for an award of fees and other expenses, a respondent must first "*prevail*" in an "*adversary*

adjudication.” It is respectfully submitted that Respondent’s claim that the General Counsel’s litigation posture lacks any reasonable basis must be denied, at least until such time as the litigation has actually occurred. Then, *if* Respondent has prevailed, it may renew its claim.

Conclusion:

For all the reasons stated above, it is respectfully submitted that Respondent’s Motion to Dismiss and Motion for Summary Judgment should be denied.

Dated at Cincinnati, Ohio this 9th day of February 2012.



Kevin P. Luken
Counsel for the General Counsel
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

Attachments

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9**

In the Matter of

KANAWHA HOSPICECARE, INC.

and

Case 9-CA-063109

KEIRA RANSON, AN INDIVIDUAL

MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR A STAY

Kanawha Hospicecare, Inc., (“Hospice”) by counsel, respectfully moves the National Labor Relations Board (“Board”) pursuant to 29 CFR § 102.24 to enter an Order dismissing the Acting General Counsel’s Complaint or, in the alternative, to stay the instant proceedings pending the appointment, via Constitutional and lawful recess appointments or otherwise, of a sufficient number of Board members to establish a quorum.¹ In support of this Motion, Hospice states as follows:

1. On January 27, 2012, the Board issued a Complaint in this matter alleging that Hospice violated Section 8(a)(1) of the National Labor Relations Act (the “Act”) and noticed the matter for hearing beginning on March 6, 2012; the Complaint is utterly without so much as a scintilla of merit, but Hospice will take up that issue when the Board has a quorum and is able to lawfully issue a complaint. Hospice received a copy of the Complaint on January 30, 2012.

2. At the time the Board issued the Complaint, it was not comprised of enough lawfully appointed members to constitute a quorum as required by 29 U.S.C. § 153(b).

¹ The procedural awkwardness of requesting a Board who, by virtue of lacking a quorum of duly appointed members, is Constitutionally unable to act, to pass on a motion, is not lost on Hospice. However, for all intents and purposes, Hospice is simply asking the Board to return to *status quo* and dismiss a complaint that the Board was not able to issue in the first place.

3. The United States Supreme Court has held that the Board lacks authority to conduct business in the absence of a quorum of at least three members. *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010).

4. There currently are only two validly serving members of the Board, Chairman Pearce and Member Hayes.

5. While the President purported to appoint three new members to the Board (purported Members Block, Griffin, and Flynn) on January 4, 2012, such appointments were null and void as they were made without the advice or consent of the Senate as required by Article II, Section 2, Clause 2 of the United States Constitution.

6. The President improperly styled these three individuals as “recess appointments,” even though the Senate was not in recess at the time.²

7. Because the “recess appointments” were not made lawfully, the Board presently lacks the requisite quorum to conduct business under *New Process Steel* and, as such, the issuing of the Complaint in the instant action is an *ultra vires* action by the Board and it must be dismissed.

8. In the event the Board does not grant Hospice’s Motion to Dismiss, it should nonetheless stay the instant action (including all proceedings and the March 6, 2012 hearing) pending resolution of the matter styled *National Association of Manufacturers, et al., v. National Labor Relations Board, et al.*, Case No. 1:11-cv-01629-ABJ (Judge Amy Berman Jackson)

² While the President may contend that the Senate was “effectively in recess,” such contention is without merit. See *Evans v. Stephens*, 387 F.3d 1220, 1224 (11th Cir. 1994) (requiring a “legitimate Senate recess” to exist in order to uphold a recess appointment). See also *Wright v. United States*, 302 U.S. 583 (1938); and *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974) (finding that intra-session adjournments do not qualify as recesses of the Senate sufficient to deny the President the authority to veto bills, provided that arrangements are made to receive presidential messages). Moreover, by unanimous consent, the Senate voted to remain in session for the period of December 20, 2011 through January 23, 2012. Sen Ron Wyden, “Orders for Tuesday, December 20, 2011 through Monday, January 23, 2012,” remarks in the Senate, Congressional Record, vol. 157, part 195 (Dec. 17, 2011, pp. S8783-S8784).

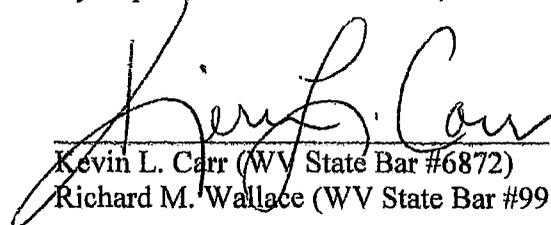
pending before the United States District Court for the District of Columbia. On January 13, 2012, Plaintiffs in that civil action requested that the Court deem the recess [sic] appointments null and void. Such a stay would be consistent with the Board's actions taken in connection with its proposed Notification of Employee Rights under the National Labor Relations Act rule.³ The case at bar, if not dismissed, should be stayed pending resolution of the case before the US District Court for the District of Columbia.

9. Finally, judicial economy and fairness dictate that the Board not proceed in light of the very real possibility that this case, if prosecuted, could later resemble one of the 600 post-*New Process Steel* cases in which unlawful decisions were invalidated. Hospice, a non-profit organization dedicated to providing end-of-life care to terminally ill patients, should not be forced to litigate, then re-litigate the unfounded allegations in the unlawfully issued Complaint. Instead, the Board should stay all further proceedings in this matter until the issue of the Board's failure to establish a quorum and the President's unconstitutional recess appointments is decided in the DC District Court action.

Respectfully submitted,

KANAWHA HOSPICECARE, INC.

By: Spilman Thomas & Battle, PLLC



Kevin L. Carr (WV State Bar #6872)
Richard M. Wallace (WV State Bar #9980)

³ Specifically, the Board postponed the rules January 31, 2012 implementation date barely more than a week after Judge Jackson suggested that it do so.

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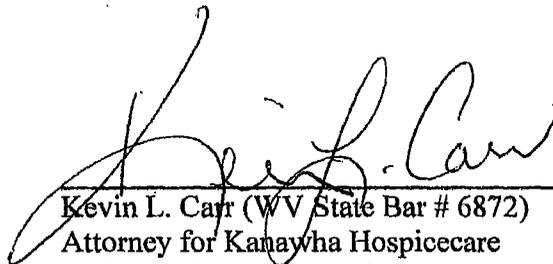
KEIRA RANSON, AN INDIVIDUAL

CERTIFICATE OF SERVICE

I, Kevin L. Carr, being duly sworn, do hereby certify that I have served a true and exact copy of the "Motion to Dismiss or, in the Alternative, for a Stay" by regular United States Mail this 30th day of January, 2012, addressed as follows:

Ms. Keira D. Ranson
2510 Lincoln Ave
St. Albans, WV 25177-3244

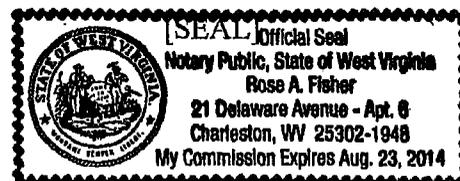
Service was made upon Counsel for the Acting General Counsel via e-mail at Kevin.luken@nlrb.gov.



Kevin L. Carr (WV State Bar # 6872)
Attorney for Kanawha Hospicecare
Spilman Thomas & Battle, PLLC
300 Kanawha Boulevard, East (Zip 25301)
P.O. Box 273
Charleston, West Virginia 25321-0273
Telephone: (304) 340-3800
Fax: (304) 340-3801

Subscribed and sworn to before me this 30th day of January 2012.

Rose A. Fisher



UNITED STATES OF AMERICA
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REGION 9

In the Matter of

KANAWHA HOSPICECARE, INC.

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KEIRA RANSON, AN INDIVIDUAL

**NOTICE OF SPECIAL APPEARANCE, MOTION FOR SUMMARY JUDGMENT AND
MOTION TO ENTER ORDER FINDING THAT THE BOARD'S ISSUANCE OF THE
COMPLAINT WAS NOT SUBSTANTIALLY JUSTIFIED**

Special Appearance

Kanawha Hospicecare, Inc., ("Hospice") by counsel, hereby makes a special appearance for the purposes of filing a Motion for Summary Judgment with respect to all claims (each of them unfounded) asserted against it in the Complaint served upon it on January 30, 2012.

Hospice appears specially and out of an abundance of caution and does not waive its argument -- more fully set forth in its Motion to Dismiss or, in the Alternative, for a Stay filed on January 30, 2012 -- that the National Labor Relations Board ("Board") did not have the authority to issue the Complaint because it did not field a quorum of members as of January 27, 2012, the day it issued the Complaint. Hospice hereby incorporates by reference, the entire Motion to Dismiss or, in the Alternative, for a Stay filed on January 30, 2012 in this matter.

While 29 CFR § 102.24 authorizes Hospice to file a Motion for Summary Judgment, the Board's rules are silent as to whether, like the Federal Rules of Civil Procedure, a Motion to Dismiss serves to postpone a respondent's duty to file a Motion for Summary Judgment. Because of this ambiguity, Hospice is quite frankly unable to determine if it is required to file a Motion for Summary Judgment at this time and, to avoid any possible prejudice, files the instant

Motion out of an abundance of caution. But by filing this Motion for Summary Judgment, Hospice does not submit to the jurisdiction of the Board and does not waive – and specifically reserves – its position that the Board acted in an *ultra vires* manner when it issued the Complaint.

Motion for Summary Judgment

I. Introduction

Kanawha HospiceCare, Inc. (“Hospice”) discharged Keira Ranson (“Ranson”) and a co-worker, Penny Elsea (“Elsea”) (collectively “the Charging Parties”) after (and because) each made non-protected, public statements on their Facebook pages which were so antithetical to the mission of Hospice that Hospice could not continue to employ them. It is undisputed that the Facebook postings in question were made on July 29, 2011 by Ranson and provided: “*Some people are just a fucking disease.*” See Screen capture of Facebook postings (attached hereto as Exhibit A). Elsea responded to Ranson’s post with the following “Hope it’s not muah [sic]! I think I know to whom Madame is referring and all I can say is a *wretched, smelly disease and I think it could be finessed to be terminal.* Truth and united front = obliteration to the disease. *It’s a cunning disease however.*” Exhibit A (emphasis added). Ranson has testified, under oath, that her (*people are just a fucking disease*) statements were not in any way related to her work; as such her statements were not protected by Section 7 of the National Labor Relations Act (“the Act”) because they bore no relation, whatsoever, to any term or condition of employment. It necessarily and dispositively follows that even if Elsea’s Facebook posting in response about a “*wretched, smelly disease*” that “*could be finessed to be terminal*” were somehow protected (and they are not even close to meriting such protection), her actions were absolutely not concerted because Ranson – whom the Acting General Counsel cites as Elsea’s mutual aid counterpart – has testified that her abhorrent comments were unrelated to her employment.

There is not a solitary fact that is in dispute and each and every one of the facts in this case fully support an award of judgment as a matter of law in favor of Hospice.

II. Undisputed Facts

A. Hospice's Mission and the Charging Parties' Employment

Hospice is a non-profit healthcare organization that provides palliative care and support services (such as social services and grief and loss counseling) to patients with terminal illnesses and their friends and families. Above all else, Hospice strives to allow terminal patients to face end-of-life with dignity, calmness, and compassion.

Indeed, Hospice's stated mission is "to affirm life through an organization committed to enhancing the lives of the dying and their families by recognizing the dignity and uniqueness of individuals and by responding to the changing needs of our communities." See "HospiceCare Personnel Handbook" (attached hereto as Exhibit B) at p. I-1. In short, Hospice seeks to celebrate life by allowing terminal patients to die well. To accomplish this mission, Hospice employs a dedicated staff of healthcare providers who offer palliative care services (medical treatment aimed at providing dying patients with comfort and pain relief, rather than treatment of the underlying disease) in both in-patient settings and in the patients' homes. The staff knows the mission. Indeed, Ranson testified, under oath, as follows during her unemployment compensation proceeding before an Administrative Law Judge:

Q – You knew that you'd be charged with caring for terminal patients on a daily basis; right?

A – Yes, sir.

Q – And it's the mission of Hospice to, in all respects, treat those patients with dignity as they're facing the end of their life?

A – Absolutely, sir.

Q – And you would agree that it’s contrary to the very fundamental tenants of Hospice to do anything that would result in those – in patients with terminal illness not being treated with dignity at the end of their life?

A – Yes, I agree with that.

See Transcript of Sworn Testimony, attached hereto as Exhibit C, p.41

Toward the end of fulfilling its mission, Hospice operates two in-patient palliative care facilities in Charleston, WV. The Hubbard Hospice House (“Hubbard House”) and the Hubbard Hospice House – West (“Hubbard House West”) are fully-accredited facilities where terminal patients requiring constant care may spend their last days and receive palliative care to make the end-of-life transition as peaceful and pain-free as possible. See Complaint, attached hereto as Exhibit D, ¶ 2.

The Hubbard Houses are staffed by a number of healthcare workers (from physicians to nursing aides), whose raison d’être is to carry out Hospice’s mission by providing compassionate medical care which allows patients to die with dignity. This mission certainly extended to the work of Elsea and Ranson who are both Registered Nurses. Elsea was hired by Hospice on November 13, 2001, and was assigned to the Hubbard House. Ranson was hired by Hospice on June 20, 2011 for its newly opened Hubbard House West. Prior to beginning work at the Hubbard House West, however, Ranson was required to undergo a training period at the Hubbard House. Elsea was assigned to be Ranson’s preceptor (trainer) during this training period. At all times, the Charging Parties were expected to further Hospice’s mission of providing dignity during death. See Exhibit C, p. 41.

B. The Inappropriate and Completely Unprotected Facebook Postings

Co-workers of Elsea and Ranson brought a posting made by Ranson on the Facebook social media site to the attention of the Hubbard House administrator because the co-worker thought the posting was inappropriate. Specifically, the co-worker was upset by the posting because she believed it referred to the CNA with whom Ranson and Elsea had a personal dispute that was resulting in an unpleasant working environment at the Hubbard House.

The Facebook posting in question was made on July 29, 2011 by Ranson and it stated: **“Some people are just a fucking disease.”** See Exhibit A. Elsea responded to Ranson’s post with the following “Hope it’s not muah [sic]! I think I know to whom Madame is referring and all I can say is a *wretched, smelly disease and I think it could be finessed to be terminal*. Truth and united front = obliteration to the disease. It’s a cunning disease however.” Exhibit B (emphasis added). See Exhibit A.

The Hubbard House administrator reviewed this posting and also independently reviewed the Facebook pages of both Ranson and Elsea. When those pages were reviewed, it was learned that *both employees publicly identified themselves as employees of Hospice*. See p.1 of Exhibit A, top of page. This caused significant concern to Hospice because its employees were making inappropriate public statements utilizing terms such as “fucking disease” and “terminal” while directly associating themselves with the Hospice organization. Because Hospice’s primary mission (which Elsea and Ranson were charged with carrying out) is to alleviate the suffering of patients with terminal diseases and to provide them with dignity at the end of their lives, the Charging Parties’ statements on Facebook which used such sacred issues as a verbal sword were determined to be reckless, disloyal, and wholly antithetical to the fundamental tenants of Hospice.

Ultimately, Hospice determined that the inappropriate public statements (which were potentially available to co-workers, Hospice patients and families, and the public at-large) undermined Hospice's efforts to provide dignity to the dying and rendered the Charging Parties unfit for employment with Hospice. As a result, they were discharged from employment on August 11, 2011.

Following her discharge, Ranson sought unemployment compensation benefits and, during that process, provided sworn testimony about the Facebook postings and her discharge.¹ During a hearing before an Administrative Law Judge, Ranson testified that her Facebook postings were not in any way related to her coworkers or her employment (i.e., that they were not protected under the Act). Specifically, Ranson testified:

Q – Now you mentioned that – you mentioned that you weren't necessarily complaining about a coworker?

A – Correct.

Q – And in fact, you told – you told Ms. Robinson [Hospice's Administrator] that you weren't complaining about a coworker during the meeting [during which the Facebook postings were investigated]; correct?

A – That's correct.

Q – And is that a true statement that the statement was not about a work related issue?

A – That's correct. It was a generalized statement that was on the argument that I had with my stepmother on the way home from work.

Q – And so you were talking about your stepmother?

A – No. Talking about my ex-husband's wife.

Q – Okay. So you weren't – you weren't discussing a term or condition of your employment?

¹ Ranson was found to have been discharged for an act of misconduct.

A – No, I wasn't.

See Exhibit C, pp. 42-42 (emphasis added).

III. Analysis

A. The Charge should be dismissed because Elsea and Ranson were not engaged in activity that was protected by the Act.

Section 7 of the Act provides that “[e]mployees shall have the right. . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” It is undisputed in this case that Elsea and Ranson were not engaged in efforts to form or join a union or to engage in collective bargaining. Rather, this case turns on whether the Charging Parties acted in concert for their “mutual aid or protection.”

On that front, it is well-settled that the “mutual aid and protection” clause in Section 7 refers to “employees’ efforts to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship.” Eastex, Inc. v. NLRB, 437 U.S. 556, 565 (1978); see also Tradesmen International, Inc. v. NLRB, 275 F.3d 1137, 1141 (D.C. Cir 2002). Moreover, it is axiomatic that “an employee’s activity will fall outside section 7’s protective reach if it fails in some manner to relate to legitimate employee concerns *about employment related matters.*” Kysor/Cadillac, 309 NLRB 237, 237 n. 3 (1992) (emphasis added); Tradesmen Int’l, 275 F.3d at 1141; Eastex, 437 U.S. at 567-58. Thus, “*an essential element* before Section 7’s protections attach is a nexus between one’s allegedly protected activity and employees’ interests as employees.” Id.

Simply put, in order for Elsea's and Ranson's Facebook postings (for which they were discharged) to be afforded protection under Section 7 of the Act, they must be related in some way to the Charging Parties' terms and conditions of employment or an effort to change those terms and conditions of employment. Kysor/Cadillac, 309 NLRB at 237.

Let us first easily dispose of Ranson's outrageous Facebook postings: they were not related in any way to the terms and conditions and, accordingly, were not protected under the Act, period. In response to several unambiguous questions regarding whether or not her statements concerned her work or any term and condition thereof, Ranson unequivocally testified, "no." See Exhibit C, pp. 42-43. Kysor/Cadillac is dispositive of the Acting General Counsel's claims in Paragraph 4 of the Complaint that by making the Facebook posts at issue, "Ranson and Penny Elsea engaged in concerted activities with each other for the purposes of mutual aid and protection by posting on Facebook their complaints about a coworker's adverse impact on their terms and conditions of employment." See Exhibit D, ¶ 4.

While it might be morbidly interesting to go to trial and see how in the world counsel for the Acting General Counsel might effectively impeach his own witness, it is not an exercise in which Hospice should be forced to engage. Ranson's Facebook postings, by her own sworn admissions, were wholly unrelated to the terms and conditions of her employment with Hospice and enjoy no protection under Section 7 of the Act. Kysor/Cadillac, 309 NLRB at 237.

Elsea's Facebook postings are equally undeserving of Section 7 protection. Giving the Acting General Counsel every conceivable benefit of every conceivable doubt and assuming that the "wretched, smelly disease" to be "finessed to terminal" postings were somehow related to "legitimate employee concerns" (and they were not), they nonetheless were unprotected because they were not concerted. Ranson unequivocally testified that her Facebook postings had nothing

to do with work. Of course, the Acting General Counsel will cite to Meyers and claim that somehow Elsea's lone wolf gripes were nonetheless concerted. Such a claim would be of no moment.

As the Board has explained, an activity is concerted when an employee acts "with or on the authority of other employees and not solely by and on behalf of the employee himself." Meyers Industries (Meyers I), 268 NLRB 493, 497 (1984), revd. sub nom. Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand Meyers Industries, 281 NLRB 882 (1986), affd. sub nom. Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Here Elsea was lashing out on her own. Obviously, she could not have possibly been acting "with or on the authority of" Ranson because Ranson testified that her venomous postings were completely unrelated to work.

The Complaint sets forth the following (and only the following) as the protected concerted activity:

"Ranson and Penny Elsea engaged in concerted activities with each other for the purposes of mutual aid and protection by posting on Facebook their complaints about a coworker's adverse impact on their terms and conditions of employment."

See Exhibit D, ¶ 4 (emphasis added). The Acting General Counsel is flat out wrong because **one of the only two people involved** in the activity he claims to be concerted for the purposes of mutual aid and protection **has admitted, after taking an oath, that her Facebook posting was NOT a complaint about work and had absolutely nothing to do with any term or condition of employment.** See Exhibit C. Accordingly, there is no "mutual aid," no "concerted activity" and no Section 7 protection.

- B. The statements made the Charging Parties were so disloyal or reckless that they lost any protection afforded by Section 7 of the Act.**

Even assuming, *arguendo*, that the Facebook postings may have related to Elsea's and Ranson's terms and conditions of employment and assuming further that such postings were concerted, such that they would be protected by the Act (and they clearly are not), they nonetheless would lose any such protection because such statements were indisputably reckless and disloyal.

It is well-settled that "even an employee who is engaged in concerted protected activity can, by opprobrious conduct, lose the protection of the Act." Atlantic Steel Co., 245 NLRB 814, 816 (1979). Indeed, "misconduct that is flagrant or renders the employee unfit for employment is unprotected" by the Act. Carleton College v. NLRB, 230 F.3d 1075, 1081 (8th Cir. 2000). When determining whether misconduct removes activity from the protections of the Act, the Board must "take into account the nature of the misconduct, the nature of the workplace, and the effect of the misconduct on an employer's authority in the workplace." Id.

When the factors of the Carleton College test are evaluated in this case, it is clear that the misconduct of Elsea and Ranson would lose the protections of Section 7 of the Act even if it were otherwise protected (which, as discussed above, it clearly is not). Indeed, the nature of the misconduct at issue are public statements by Hospice employees which make light of disease and even go so far as to express a desire by these two nurses that the object of their rant be subjected to "a terminal disease." In other words, Elsea and Ranson were very publicly stating a desire to inflict someone (in Ranson's case, someone unaffiliated with Hospice) with a terminal illness. Such comments are beyond the pale when one considers the nature of the Hospice workplace. The fundamental goal of Hospice is to provide dignity and comfort to patients afflicted with terminal illnesses as they face the end of their lives. Again, Ranson testified that she understood this. See Exhibit C. Elsea and Ranson were literally on the front lines of Hospice's efforts in

that respect. Nonetheless, they made reckless, thoughtless and hurtful comments in a very public forum (available to the very terminal patients and families that Hospice serves), which flippantly utilized terms that are inescapable parts of the daily lives of the dying patients which Elsea and Ranson were required to care for. Clearly, their actions were opprobrious in the extreme when one considers the nature of the Hospice mission and its daily delivery of services.

Moreover, Elsea's and Ranson's conduct would severely undermine Hospice's authority in the workplace if left unchecked. Indeed, Hospice would lose all moral authority to carry out its mission (and regulate the actions of its other employees) if it were to allow its own employees to make light of the plight of terminal patients. In short, Elsea and Ranson engaged in opprobrious misconduct which removes any protections that the Act might have otherwise afforded them. The Complaint must be dismissed.

C. The Board's Actions Were Not "Substantially Justified" as that Concept is Defined Under the Equal Access to Justice Act, as Amended²

The Equal Access to Justice Act, 28 U.S.C. § 2412 and 5 U.S.C. § 504, et seq., as amended ("EAJA"), allows small businesses to recover attorney's fees from the government – here, the Board – in civil actions and administrative adjudication where the Board was not "substantially justified" in its position. 28 U.S.C. § 2412(d)(1)(A). The United States Supreme Court has held that "substantial justification" requires that the government's position, in both its underlying conduct and its litigation posture, have a "reasonable basis both in law and fact." Pierce v. Underwood, 487 U.S. 552 (1988).

² As more fully set forth in Hospice's Motion to Dismiss, because the Board unlawfully issued the Complaint at a time when it was not comprised of a quorum of members, Hospice requests that the Administrative Law Judge enter an Order finding that the Board's issuance of the Complaint was not "substantially justified" as that term is defined under the Equal Access to Justice Act, 28 USC § 2412, et seq. However, there are additional reasons, discussed *infra*, why the Board's underlying conduct and litigation posture lack a reasonable basis both in law and fact.

In the case at hand, Hospice is a non-profit, 501(c)(3) entity that meets the definition of “eligible party” (for fee shifting under EAJA) as defined in 28 U.S.C. § 2412(d)(2)(B) & 5 U.S.C. § 504(b)(1)(B). The Board’s position, in both its underlying conduct and its litigation posture, lack a reasonable basis in law and fact. With respect to its underlying conduct, prior to issuing the Complaint, Hospice informed the Board that Ranson testified that her Facebook postings were not in any way related to the terms and conditions of her employment. Hospice offered to provide the Board with this evidence. The Board declined Hospice’s offer. Had the Board conducted an investigation that included examining prior sworn statements from one of its two primary witnesses, it would have learned that Ranson’s Facebook postings were not protected and, accordingly, that Hospice’s decision to discharge her was lawful. Perhaps the Board did not want to know this fact? Perhaps Hospice fits neatly into a Board edict that social media PCA cases would be aggressively prosecuted? Regardless of the reason, the Board did not want the information regarding Ranson’s damning sworn testimony and, as such, the Board’s underlying conduct lacked a reasonable basis in fact. This is all that Hospice needs to prove.

But Hospice believes that it can also prove that the Board’s litigation posture has no basis in fact. Again, in Paragraph 4 of the Complaint, the Acting General Counsel alleges that Ranson and Elsea engaged in concerted activities “**with each other**” for the purposes of “**mutual aid and protection**” by “**posting on Facebook their complaints about a coworker’s adverse impact on their terms and conditions of employment.**” See Exhibit D, ¶ 4. Had the Board investigated the information Hospice provided it regarding Ranson’s sworn testimony, it would have had absolutely no factual basis to make this very serious (and very untrue) allegation in the Complaint.

What did the Board know? Because it is the practice of the Board to obtain affidavits from Charging parties, Hospice has a reasonable and good faith belief that the Board obtained an affidavit from Ranson. If Ms. Ranson testified in that Affidavit consistent with her testimony before the Unemployment Compensation ALJ (i.e., that her Facebook postings were not job related), then the Board must be held accountable for alleging that Elsea engaged in concerted activities “with Ranson” for “mutual aid and protection” by posting on Facebook “their complaints about a coworker’s adverse impact on their terms and conditions of employment” in Paragraph 4 of the Complaint.

To put it simply, the Board’s litigation posture (i.e., the allegations it made in the Complaint) also lacked any basis in law or fact. Specifically, if the Board obtained an Affidavit from Ranson and if, in that Affidavit, she admitted that her complaint was not about a coworker and did not involve the terms and conditions of her employment, then the Board’s allegation in Paragraph 4 of the Complaint was, at best, disingenuous or, at worst, an intentional and prejudicial misstatement of material fact akin to an abuse of judicial process. The Board’s position lacked substantial justification.

IV. Request for In Camera Review of Ranson Affidavit

Hospice respectfully requests that the Administrative Law Judge determine if the Acting General Counsel obtained an Affidavit from Ranson. If such an Affidavit was obtained, Hospice requests that the Administrative Law Judge examine the Affidavit, in camera, and determine if Ranson provided additional sworn testimony that further erodes the basis for the Acting General Counsel’s allegations in Paragraph 4 of the Complaint. If so, then Hospice moves the Administrative Law Judge to make a finding that the Board’s actions were not substantially justified as defined under the Equal Access to Justice Act.

V. Conclusion

None of the issues complained about by the Acting General Counsel violate Section 8(a)(1) of the Act because such actions were not related to Elsea's and Ranson's terms and conditions of employment. Moreover, Ranson has admitted, under oath, that her Facebook statements were not in any way related to her job or the terms and conditions thereof. As such, Ranson's statements were not protected and Elsea's actions were not concerted. None of either of these two nurse's conduct was protected by Section 7 of the Act. Furthermore, the opprobrious nature of the Charging Parties' misconduct would remove the protections of the Act even if the conduct was protected (and it is not). Finally, the Board either knew or should have known that the allegations contained in Paragraph 4 of the Complaint – allegations that are the gravamen of the Acting General Counsel's case – were untrue. Simply put, there is no basis for the Acting General Counsel's claims in the facts or in the law. This Complaint must be dismissed.

WHEREFORE, for the reasons set forth in Hospice's Motion to Dismiss filed on January 30, 2011, the reasons set forth above and for such other and further reasons as may be apparent to the Administrative Law Judge, the Complaint should be dismissed in its entirety.

Moreover, given that the Board unlawfully issued the Complaint at a time when it was not comprised of a quorum of members, Hospice requests that the Administrative Law Judge enter an Order finding that the Board's issuance of the Complaint was not "substantially justified" as that term is defined under the Equal Access to Justice Act, 28 USC § 2412, et seq.

Both the Board's underlying conduct and litigation posture lack any reasonable basis in law and fact. This Administrative Law Judge should conduct an in camera review of any

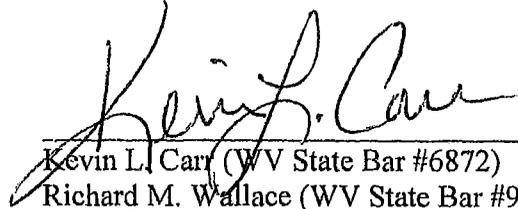
Affidavit(s) executed by Ranson and determine if there are further reasons to make the finding that the Board lacked substantial justification.

Finally, Hospice requests that the Administrative Law Judge award Hospice such other and further relief as is fair and just.

Respectfully submitted,

KANAWHA HOSPICECARE, INC.

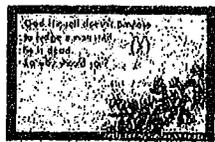
By: Spilman Thomas & Battle, PLLC

A handwritten signature in cursive script, appearing to read "Kevin L. Carr", is written over a horizontal line.

Kevin L. Carr (WV State Bar #6872)
Richard M. Wallace (WV State Bar #9980)
300 Kanawha Boulevard, East (Zip 25301)
P.O. Box 273
Charleston, West Virginia 25321-0273
Telephone: (304) 340-3800
Fax: (304) 340-3801

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RN, CHPN at Hubbard Hospice House [Suzied Certified Hospice and Palliative Care RN at University of KY Southeast Community College](#) [Married to Randy Elsea](#) [From Indianapolis, Indiana](#) [Born on November 5](#)

- Info
- Photos (3)
- Notes
- Friends

Married to Randy Elsea

Friends (119)

- Jamie Trifiro
- Sharon Utsey
- Melissa Doty
- Stephanie Woods
- Betsy McKenna
- Rhonda Barnett
- Angie Hudson Barnes
- Kathy Angustino-Merelish
- Wilsie Herlihy
- Dan Conway

- Family
- Draw Elsea Son
 - Amariah Rebecca-Jayto Elsea Daughter

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Education and Work

Employers

- Hubbard Hospice House**
RN, CHPN · Jun 2001 to present · Charleston, West Virginia
Charge Nurse

College

- University of KY Southeast Community College**
Class of 1989 · Certified Hospice and Palliative Care RN · Registered Nurse

High School

- Warren Central High School**
Class of 1976

Philosophy

Religious Views Liberal Christian

Political Views Democratic Party

Favorite Quotations poop or getoff the pot ... Longene Powell

Arts and Entertainment

Music

- Classical Mozart
- Anything and Everything
- James Taylor
- Carole King
- Nickie Creek

[More](#)

Books

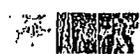
- The Shack
- Gone with the Wind

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- Dances with Wolves
- It's Complicated
- It's a wonderful life

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You and Penny



4 Mutual Friends

The Shack

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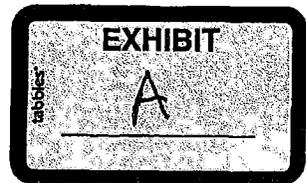


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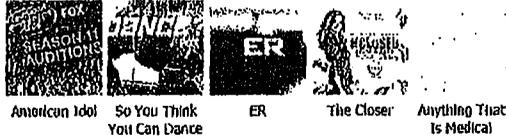


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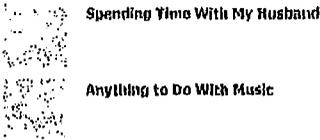
Television



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Activities and Interests

Activities



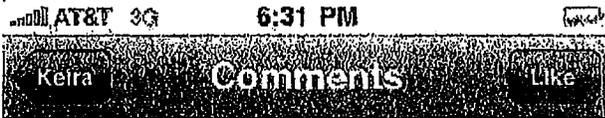
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Show Other Pages

Basic Information

Relationship Status	Married to Randy Elias
Anniversary	March 22, 1986
Sex	Female

Chat (Offline)



Keira

Comments

Like



Keira Ranson Some people are just a fucking disease.

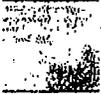
Jun 26 8:53 PM via Presence@t-mobile

Tyler Wayne Grimm and 3 people like this.



Cathy Hilliard well put,

Jun 27 8:58 PM



Penny Elsea Hope it's not muah! I think I know to whom Madame is referring and all I can say is a wretched, smelly disease and I think it could be finessed to be terminal . Truth and united front = obliteration to the disease. It's a cunning disease however.

Jun 27 8:58 PM

AT&T 3G 6:31 PM

Keira Comments Like



Keira Ranson I <3 u
 Penelope...when do we work together
 again? I have a present..... :) for
 being the BEST preceptor EVER...
 Jul 26 9:39 PM



Penny Elsea We will work
 together soon. I will check my phone
 schedule and text u back. I <3 you too.
 The wretched diseases days are
 numbered. Count on it. Gayle can't
 stand her attitude and will not risk
 losing you as you have proven your
 abilities without a hitch or a dip or a
 glitch. Nor will she risk losing me I
 believe. The truth is the truth. I knew
 she would try to strike some of the
 trainees will tuck their tails and run.
 Proud proud proud of you. I told her to
 stay in her lane and that I was training
 you. She was afraid I was writing her

AT&T 3G 6:31 PM

Keira Comments Like

she would try to strike some of the trainees will tuck their tails and run. Proud proud proud of you. I told her to stay in her lane and that I was training you. She was afraid I was writing her up! I think it's time to check the employee handbook and check p+p on insubordination. Wink wink nudge nudge.

8/10/2011 6:31 PM



Keira Ranson love u mama duck!...sincerely, Fern

8/10/2011 6:31 PM



Penny Elisea Ba ha ha ha ha!!

8/10/2011 6:31 PM



Dawn Young I hate it when you beat around the bush and don't say what you really mean :)

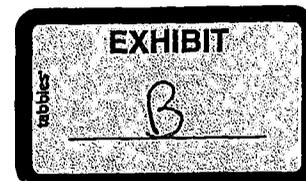
8/10/2011 6:31 PM

Kanawha Hospice Care, Inc.

The mission of Kanawha Hospice Care, Inc. is to affirm life through an organization committed to enhancing the lives of the dying and their families by recognizing the dignity and uniqueness of individuals and by responding to the changing needs of our communities.

Core Principles

- | | |
|--------------------|---|
| Integrity | We are guided by our principles and mission in our decisions and actions. We earn trust through ethical behaviors and uncompromising professionalism. |
| Respect | We treat patients, families, co-workers, business partners, and community with compassion, dignity, and kindness. We respect the values, cultures, beliefs and traditions of others. |
| Excellence | We strive to foster excellence in clinical practice, education, personal learning, administration, and community development. We act upon opportunities for innovation with creativity and knowledge. |
| Stewardship | We hold our resources in trust. We hold ourselves accountable for using and distributing our resources wisely and with utmost consideration. |
| Safety | We are dedicated to providing a safe environment for our patients, staff, volunteers, and all guests who visit our sites. We strive to achieve the highest levels of safe clinical practice. |



IN THE MATTER OF:)
)
 KEIRA D. RANSON) CASE NO. R-11-3961
 2510 LINCOLN AVE) (R-1-E)
 ST. ALBANS, WV 25177)
)
 EMPLOYER:)
)
 KANAWHA HOSPICE CARE,)
 INC., TA)
 1606 KANAWHA BLVD W)
 CHARLESTON, WV 25312)

AT: CHARLESTON, WEST VIRGINIA

DATE: OCTOBER 07, 2011

BEFORE: TRUMAN L. SAYRE, JR., DEPUTY
 CHIEF ADMINISTRATIVE LAW JUDGE
 BOARD OF REVIEW
 WORKFORCE West Virginia

APPEARANCES:
 CLAIMANT APPEARED
 TELEPHONICALLY

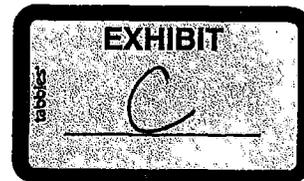
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RANSON

INDEX

EMPLOYER APPEARED BY RICHARD
 WALLACE, ATTORNEY, AND MARY
 KATHREN ROBINSON, ADMINISTRATOR

TRANSCRIBED BY: CHRISTI RAY



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RANSON

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4

The Claimant appealed from the decision of the deputy at Charleston, West Virginia, dated August 30, 2011, which held: "Claimant disqualified beginning August 07, 2011, to September 24, 2011; discharged for an act of simple misconduct. Maximum benefits reduced by six times weekly benefit rate of \$424. Total reduction \$2,544."

The Claimant then appealed from the decision of the Administrative Law Judge which held; "The decision of the deputy is affirmed. The Claimant was discharged for an act of simple misconduct. The Claimant is disqualified for the week of discharge and the next six weeks.

"If West Virginia is in an Extended Benefit Period when your regular benefits are exhausted, this decision, if it becomes final, will have an effect of denying

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evidence.)

JUDGE: Employer Exhibit 2 is a two-page job description, Registered Nurse. Do you have a copy of that?

CLAIMANT: I do not have a copy of that.

JUDGE: Do you want me to mail it to you?

CLAIMANT: That would be - that would be fine.

JUDGE: Okay. I'll mail it to the Claimant. She can review it and provide written objections to the Board of Review. Employer Exhibit 2 is admitted and will be given appropriate weight, as will the Claimant's objections.

(WHEREUPON, the document referred to was marked as Employer Exhibit 2 and received as evidence.)

JUDGE: Next is Employer Exhibit 3. It's a one-page

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printout from a - allegedly from the Facebook. Do you have a copy of Employer Exhibit 3, Ms. Ranson?

CLAIMANT: No, sir. No, I didn't -

JUDGE: Would you like - would you like for me to mail it to you so you can review it and provide written objections to the Board of Review?

CLAIMANT: Yes, sir.

JUDGE: Employer Exhibit 3 is admitted and will be given appropriate weight, as will the Claimant's objections.

(WHEREUPON, the document referred to was marked as Employer Exhibit 3 and received as evidence.)

(Witness Sworn)

WHEREUPON,

KEIRA D. RANSON, called as a witness, being first duly sworn to tell the truth, testified as

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follows:

EXAMINATION

BY JUDGE:

Q Ms. Ranson, how many hours a week did you work for the Employer?

A Thirty-two.

Q Is there something else you'd like to add, ma'am? Go ahead.

A The only statement, like I said, I'd like to make is it seems like there's a focus on the word, terminal and malicious and foul relation to diseases. And I made, like I said, the statement, "some people are a fucking disease."

But a lot of the large comments there that was made was made by someone else. I didn't use the adjectives. I didn't elaborate. And I also did not acknowledge or deny frankly, who I was referring to.

I'm not responsible - with Elsea, apparently, spoke with

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Administration and told them who I was talking about. And I'm not responsible for what Ms. Elsea assumed. She assumed incorrectly. And I suppose that's all I have to say.

Q Ms. Ranson, what was your pay rate?

A \$21.40 an hour.

Q Ms. Ranson, is there anything else you'd like to add or present?

A No, sir.

JUDGE: Mr. Wallace, any questions for Ms. Ranson? Go ahead.

MR. WALLACE: A few. Thanks.

CROSS-EXAMINATION

BY MR. WALLACE:

Q Ms. Ranson, you don't dispute the fact that you made the comments on Facebook, "that some people are just a fucking disease"; correct?

A I do not dispute that.

Q Now you were hired as a

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Hospice Nurse and you knew what was expected of you; correct?

A Yes, sir.

Q You knew that you'd be charged with caring for terminal patients on a daily basis; right?

A Yes, sir.

Q And it's the mission of Hospice to, in all respects, treat those patients with dignity as they're facing the end of their life?

A Absolutely, sir.

Q And you would agree that it's contrary to the very fundamental tenants of Hospice to do anything that would result in those - in patients with terminal illness not being treated with dignity at the end of their life?

A Yes, I agree with that.

Q And you would - I would assume you would also agree then that making, using terms like

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disease in a flippant or hurtful manner is also not consistent with the fundamental goals of the Hospice organization?

A At work, yes. At home, no.

Q Now you mentioned that - you mentioned that you weren't necessarily complaining about a coworker?

A Correct.

Q And in fact, you told - you told Ms. Robinson that you weren't complaining about a coworker during the meeting; correct?

A That's correct.

Q And is that a true statement that the statement was not about a work related issue?

A That's correct. It was a generalized statement that was on the argument that I had with my stepmother on the way home from work.

Q And so you were talking about

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your stepmother?

A No. Talking about my ex-husband's wife.

Q Okay. So you weren't - you weren't discussing a term or condition of your employment?

A No, I wasn't.

MR. WALLACE: Those are all the questions I have for Ms. Ranson.

JUDGE: Ms. Ranson, is there anything else you'd like to add, ma'am?

CLAIMANT: No, sir.

JUDGE: Mr. Wallace, is there anything further for the Employer?

MR. WALLACE: Not for the Employer, Your Honor.

JUDGE: Ms. Ranson, is there anything further for the Claimant?

CLAIMANT: No, sir.

JUDGE: This concludes the hearing. There'll be a written

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decision mailed to the parties within three weeks. Thank you all. Have a good weekend.

CLAIMANT: Thank you.

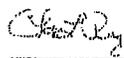
JUDGE: Good-bye, Ms. Ranson.

* * * * *

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, TO-WIT:

I hereby certify that the foregoing testimony was taken from a recorded tape and transcribed into the English language to the best of my skill and ability.

This, the 30th day of October, 2011.


CHRISTI RAY

iMedX, Inc.
800-221-0244

1/27/12

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

KANAWHA HOSPICECARE, INC.

and

Case 9-CA-063109

KEIRA RANSON, AN INDIVIDUAL

COMPLAINT
AND
NOTICE OF HEARING

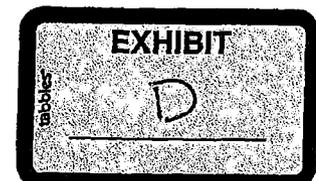
Keira Ranson, an individual, herein called Ranson, has charged that Kanawha Hospice Care, herein described by its correct name, Kanawha HospiceCare, Inc., and herein called Respondent, has been engaging in unfair labor practices as set forth in the National Labor Relations Act, 29 U.S.C. § 151 et seq., herein called the Act. Based thereon the Acting General Counsel, by the undersigned, pursuant to Section 10(b) of the Act and Section 102.15 of the Rules and Regulations of the National Labor Relations Board, herein called the Board, issues this Complaint and Notice of Hearing and alleges as follows:

1. The charge was filed by Ranson on August 18, 2011, and a copy was served by regular mail on Respondent on August 23, 2011.

2. (a) At all material times, Respondent, a corporation, with an office and place of business in Charleston, West Virginia, has been engaged in the operation of a hospice facility providing in-patient hospice care.

(b) During the past 12 months, Respondent, in conducting its business operations described above in paragraph 2(a), derived gross revenues in excess of \$250,000.

(c) During the period of time described above in paragraph 2(b), Respondent, in conducting its business operations described above in paragraph 2(a), purchased and received at



its Charleston, West Virginia facilities goods valued in excess of \$50,000 directly from points outside the State of West Virginia.

(d) At all material times, Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has been a health care institution within the meaning of Section 2(14) of the Act.

3. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Jeff Carrier	- Clinical Service Director
Mary Kathren Robinson	- Administrator
Kendra Prine	- Human Resource Director
Gayle Michaels	- Nursing Supervisor

4. In about late July 2011, Respondent's employees Ranson and Penny Elsea engaged in concerted activities with each other for the purposes of mutual aid and protection by posting on Facebook their complaints about a coworker's adverse impact on their terms and conditions of employment.

5. (a) About August 11, 2011, Respondent discharged its employees Ranson and Penny Elsea.

(b) Respondent engaged in the conduct described above in paragraph 5(a) because Ranson and Penny Elsea engaged in the conduct described above in paragraph 4, and to discourage employees from engaging in these or other concerted activities.

6. By the conduct described above in paragraph 5, Respondent has been interfering with, restraining and coercing employees in the exercise of their rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

7. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

WHEREFORE, as part of the remedy for the unfair labor practices alleged above in paragraphs 5 and 6, the Acting General Counsel seeks an Order requiring that Respondent preserve and within 14 days of a request, provide at the office designated by the Board or its agents, a copy of all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order. If requested, the originals of such records shall be provided to the Board or its agents in the same manner.

The Acting General Counsel further seeks as a remedy an Order requiring the reimbursement by Respondent of amounts equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there been no discrimination; and, an Order requiring Respondent to submit the appropriate documentation to the Social Security Administration so that when back pay is paid, it will be allocated to the appropriate periods.

IN ADDITION, as part of the remedy for the unfair labor practices alleged above in paragraphs 5 and 6, the Acting General Counsel seeks an Order requiring that Respondent immediately expunge from its files and records any statement that Keira Ranson and Penny Elsea were terminated for cause, and any reference to the unlawful termination, and notify them, in writing, that this has been done and will not be used against them in any way, and prohibit Respondent from stating to any employer, prospective employer, or responding to any credit, referral, character, or similar inquiry that they were terminated for cause.

Lastly, the Acting General Counsel seeks all other relief as may be appropriate to remedy the unfair labor practices alleged.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be received by this office on or before **February 10, 2012**, or postmarked on or before **February 9, 2012**. Unless filed electronically in a pdf format, Respondent should file an original and four copies of the answer with this office.

An answer may also be filed electronically through the Agency's website. *To file electronically, go to www.nlr.gov, click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.* The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no

answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

Service of the answer on each of the other parties must be accomplished in conformance with the requirements of Section 102.114 of the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed or if an answer is filed untimely, the Board may find, pursuant to Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on **March 6, 2012, 9 a.m. at a place to be hereinafter scheduled in Charleston, West Virginia**, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated at Cincinnati, Ohio this 27th day of January 2012.


Gary W. Muffley, Regional Director
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

Attachments

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
NOTICE

Case 9-CA-063109

The issuance of this notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end. An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing.

However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements will not be granted unless good and sufficient grounds are shown and the following requirements are met:

- (1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).
- (2) Grounds must be set forth in detail;
- (3) Alternative dates for any rescheduled hearing must be given;
- (4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and
- (5) Copies must be simultaneously served on all other parties (*listed below*), and that the fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

<p>MARY KATHREN ROBINSON, ADMINISTRATOR KANAWHA HOSPICE CARE 1001 KANAWHA BLVD W CHARLESTON, WV 25302</p>	<p><u>BY REGULAR MAIL:</u></p> <p>RICHARD M. WALLACE, Esq. KANAWHA HOSPICE CARE 300 KANAWHA BOULEVARD P.O. BOX 273 CHARLESTON, WV 25321-0273</p> <p>MS. KEIRA D. RANSON 2510 LINCOLN AVE SAINT ALBANS, WV 25177-3244 ***** National Labor Relations Board Washington, D.C. 20570</p>
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**SUMMARY OF STANDARD PROCEDURES IN FORMAL HEARINGS HELD
BEFORE THE NATIONAL LABOR RELATIONS BOARD
IN UNFAIR LABOR PRACTICE PROCEEDINGS PURSUANT TO
SECTION 10 OF THE NATIONAL LABOR RELATIONS ACT**

The hearing will be conducted by an administrative law judge of the National Labor Relations Board who will preside at the hearing as an independent, impartial finder of the facts and applicable law whose decision in due time will be served on the parties. The offices of the administrative law judges are located in Washington, DC; San Francisco, California; New York, N.Y.; and Atlanta, Georgia.

At the date, hour, and place for which the hearing is set, the administrative law judge, upon the joint request of the parties, will conduct a "prehearing" conference, prior to or shortly after the opening of the hearing, to ensure that the issues are sharp and clearcut; or the administrative law judge may independently conduct such a conference. The administrative law judge will preside at such conference, but may, if the occasion arises, permit the parties to engage in private discussions. The conference will not necessarily be recorded, but it may well be that the labors of the conference will be evinced in the ultimate record, for example, in the form of statements of position, stipulations, and concessions. Except under unusual circumstances, the administrative law judge conducting the prehearing conference will be the one who will conduct the hearing; and it is expected that the formal hearing will commence or be resumed immediately upon completion of the prehearing conference. No prejudice will result to any party unwilling to participate in or make stipulations or concessions during any prehearing conference.

(This is not to be construed as preventing the parties from meeting earlier for similar purposes. To the contrary, the parties are encouraged to meet prior to the time set for hearing in an effort to narrow the issues.)

Parties may be represented by an attorney or other representative and present evidence relevant to the issues. All parties appearing before this hearing who have or whose witnesses have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603, and who in order to participate in this hearing need appropriate auxiliary aids, as defined in 29 C.F.R. 100.603, should notify the Regional Director as soon as possible and request the necessary assistance.

An official reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the administrative law judge for approval.

All matter that is spoken in the hearing room while the hearing is in session will be recorded by the official reporter unless the administrative law judge specifically directs off-the-record discussion. In the event that any party wishes to make off-the-record statements, a request to go off the record should be directed to the administrative law judge and not to the official reporter.

Statements of reasons in support of motions and objections should be specific and concise. The administrative law judge will allow an automatic exception to all adverse rulings and, upon appropriate order, an objection and exception will be permitted to stand to an entire line of questioning.

All exhibits offered in evidence shall be in duplicate. Copies of exhibits should be supplied to the administrative law judge and other parties at the time the exhibits are offered in evidence. If a copy of any exhibit is not available at the time the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the administrative law judge before the close of hearing. In the event such copy is not submitted, and the filing has not been waived by the administrative law judge, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

Any party shall be entitled, on request, to a reasonable period of time at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. In the absence of a request, the administrative law judge may ask for oral argument if, at the close of the hearing, it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.

(OVER)

BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

KANAWHA HOSPICECARE, INC.

and

Case 9-CA-063109

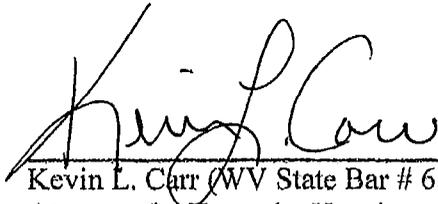
KEIRA RANSON, AN INDIVIDUAL

CERTIFICATE OF SERVICE

I, Kevin L. Carr, being duly sworn, do hereby certify that I have served a true and exact copy of the "Notice of Special Appearance, Motion for Summary Judgment and Motion to Enter Order Finding that the Board's Issuance of the Complaint was not Substantially Justified" by regular United States Mail this 1st day of February, 2012, addressed as follows:

Ms. Keira D. Ranson
2510 Lincoln Ave
St. Albans, WV 25177-3244

Service was made upon Counsel for the Acting General Counsel via e-mail at Kevin.luken@nlrb.gov.



Kevin L. Carr (WV State Bar # 6872)
Attorney for Kanawha Hospicecare
Spilman Thomas & Battle, PLLC
300 Kanawha Boulevard, East (Zip 25301)
P.O. Box 273
Charleston, West Virginia 25321-0273
Telephone: (304) 340-3800
Fax: (304) 340-3801

Subscribed and sworn to before me this 1st day of February, 2012.

