UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 34

In the Matter of:	)	
	)	**Case No.: 34-CA-013008**
Gaylord Hospital,	)	**34-CA-013079**
	)	
	)	
and	)	
	)	
Jeanine Connelly, An Individual,	)	
	)	
	)	**February 6, 2012**

RESPONDENT'S REPLY BRIEF IN FURTHER SUPPORT OF CROSS-EXCEPTIONS TO THE DECISION OF ADMINISTRATIVE LAW JUDGE

Respectfully submitted,

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Pursuant to Section 102.46(h) of the National Labor Relations Board (the "Board") Rules and Regulations, Gaylord Hospital (the "Respondent") files the following Reply Brief in Further Support of Cross-Exceptions to the Decision of the Administrative Law Judge.[1]

In its Answering Brief, Counsel for the Acting General Counsel ("opposing counsel") asserts that Respondent simply "rehashes" its arguments. (GCAB 3). Opposing counsel, however, fails to squarely address those arguments, choosing instead to cherry pick Board precedent to support its position that the Atlantic Steel factors are appropriate in this case. In addition, opposing counsel does not dispute that Jeanine Connelly engaged in workplace misconduct leading to her written warning.[2] Instead, opposing counsel attempts to minimize the seriousness of Connelly's misconduct by misrepresenting[3] or glossing over evidence in the record, stripping out the context, and treating the multiple circumstances surrounding the misconduct in isolation from one another. When viewed properly, however, it is clear that Connelly's abusive behavior exceeded the permissible boundaries of the National Labor Relations Act (the "Act"). Accordingly, as set forth below and as explained more fully in Respondent's Brief in

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[1] For the Board's convenience, Respondent adopts Counsel for the Acting General Counsel's shorthand references to the record and briefs in this case set forth in footnote 1 of the Answering Brief. Respondent shall designate the Answering Brief as GCAB (followed by page number).

[2] By continuing to champion the applicability of the Atlantic Steel factors to this case, opposing counsel expressly admits as much.

[3] For example, opposing counsel attempts to present Connelly as "the voice of her cowokers," and the employee who "threatened . . . Respondent's standing with the Connecticut Department of Public Health." (GCAB 3). No exhibits were identified and no testimony was provided establishing that Connelly was the "voice of her coworkers." To the contrary, the record evidence shows that virtually every Respiratory Therapist ('RT") raised concerns at one point with management, and Connelly was not the most vocal. Importantly, no RT has ever been disciplined for raising issues with management. Additionally, there is no evidence establishing that Connelly's "voice" somehow threatened Respondent's standing with the Connecticut Department of Public Health. There is, however, evidence of Connelly's refusal to follow (or inability to comprehend) Respondent's simple requirement to fill out medication occurrence reports and her verbal assault of her supervisor.

Support of its Cross-Exceptions to the Decision, the Board should reverse the judge's findings that Respondent violated the Act when it issued Connelly's written warning.

It cannot be overstated that Respondent is not any employer. It operates a hospital where the maintenance of civility and mutual respect in the workplace is necessary for the health and wellbeing of its patients. In addition, it cannot be overstated that Connelly's abusive behavior occurred during work time, in an area where patients are treated, where the physicians in the office adjacent to her supervisor, Michael Burke, had to close the office door, and where other employees overheard her outburst. Most importantly, it cannot be overstated that Respondent merely issued Connelly a written warning, which is a measured response that carries with it no economic penalty at all.

In light of the foregoing, Respondent urges the Board to analyze this case under its totality-of-the-circumstances approach rather than the rigid Atlantic Steel factors. Opposing counsel, however, claims that the Board has consistently applied the Atlantic Steel factors to cases such as this one, and only applies its totality-of-the-circumstances approach to cases involving outbursts directed at other employees (as opposed to a supervisor). (GCAB 7 and 9). Opposing counsel, however, provides unconvincing support for its position.

Opposing counsel only cites one case, Beverly Health & Rehabilitation Services, 346 NLRB 1319 (2006), in which the Board has applied the Atlantic Steel factors in a hospital setting. Aside from it involving a hospital, that case bears absolutely no resemblance to the case at hand. There, the employee was given a three-day suspension for her spontaneous reaction to a comment about a pending grievance. Importantly, the

outburst was not directed at a supervisor, did not occur during work time, and took place in a break room away from any patient care area. Opposing counsel has not identified a single case involving facts similar to this case where the employee retained the protection of the Act. Opposing counsel simply canvasses Board case law to find any case that may involve one or two analogous facts and then blindly relies on those cases to support each Atlantic Steel factor separately. This is precisely why the totality-of-the-circumstances approach should be utilized. Each situation must be reviewed in light of its specific facts, the circumstances in which it occurred, as well as the nature of the employer's response.

Further, opposing counsel completely fails to address Respondent's argument that when management employs a gentler reminder that an employee is out of line, especially one like the written warning at issue in this case, reversal of the disciplinary decision should involve a closer analysis, and require opposing counsel to carry a much heavier burden of proof than in a discharge or suspension case. Moreover, like the judge, opposing counsel fails to acknowledge that even when the Board recognized "some leeway for impulsive behavior" by an employee, the Board said that leeway was to be balanced against "an employer's right to maintain order and respect." Piper Realty Co., 313 N.L.R.B. 1289, 1290 (1994). That balance is particularly important in a hospital setting where even fundamental differences must be addressed and resolved through civil discourse. The failure to consider that balance warrants reversal of the judge's findings with regard to the written warning.

That the Board has applied the totality-of-the-circumstances approach to certain cases does not preclude it from applying it in other cases. It most certainly does not make the application of the Atlantic Steel factors always appropriate. As recently recognized by the Second Circuit Court of Appeals, the focus of the Atlantic Steel factors was on workplace outbursts that may undermine an employer's authority, not outbursts in public spaces. NLRB v. Starbucks Corp., 679 F.3d 70 (2012) (finding the Atlantic Steel factors inapplicable to the facts of that case). "Thus, it is clear that 'place,' the first of the four factors, serves to distinguish outbursts in the presence of other employees from those away from other employees or in the course of grievance proceedings or contract negotiations. It has nothing to do with public venues where customers are present. In that context the *Atlantic Steel* test is inapplicable." Id. at 79. Similarly, the Atlantic Steel factors are inapplicable in this case. Although Connelly verbally assaulted her supervisor in front of coworkers, thus undermining his authority, she also verbally assaulted him in a patient care area, where physicians in a nearby office had to close the door. The location is more akin to the public spaces involved in Starbucks than the closed door grievance proceeding or contract negotiation contemplated by the Board when it created the Atlantic Steel factors, and thus the Board should apply its totality-of-the-circumstances approach to this case.

Even if the Board determines that the Atlantic Steel factors are appropriate, Connelly's abusive behavior cost her the protection of the Act regardless of whatever spin opposing counsel attempts to place on it. Opposing counsel does not dispute that the area where Connelly engaged in her abusive behavior includes an office for physicians and an office of a speech therapist. More importantly, opposing counsel does not dispute that

the speech therapist sees patients in that area. In addition, opposing counsel does not dispute that other employees were present when Connelly verbally assaulted her supervisor. Opposing counsel, however, attempts to marginalize these facts by employing flawed logic and by ignoring well settled Board principles.

According to opposing counsel, "while Respondent argues that a physician had to close the office door . . . there is no testimony as to why the physician actually closed his door and no complaint from a physician, an employee of Respondent, or patient . . ." (GCAB 11). Opposing counsel further argues that there is no evidence that a patient was actually present in the area, and there is no evidence that Burke's authority was undermined. (GCAB 11, 15 and 16). Based on these arguments, opposing counsel asserts that the judge was warranted in finding that the location of Connelly's abusive behavior weighed in favor of protection. (GCAB 11).

Whether a complaint was made by the physicians who shut their office door is irrelevant. What is relevant is that the physicians in the office overheard Connelly's verbal assault, which was not confined to Burke's office or any break room.[4] Despite opposing counsel's attempts to cast doubt over the presence of a physician, the record evidence establishes that the Director of the Respiratory Therapy Department, Paul Trigilia, spoke to the physicians who were in the office next to Burke's and they confirmed that "the incident was what it was."[5] (Tr. 1141). Further, Connelly could not unequivocally deny that the physicians were in the office at that time, and stated that "[i]t is a possibility" that the physicians shut their door. (Tr. 664). Under opposing counsel's logic, any

[4] Perhaps opposing counsel's position would be relevant if there was any question that Connelly engaged in misconduct. That, however, is not the case here.
[5] What the incident was is clearly set forth in Burke's March 31, 2011 e-mail. (GCX 29).

employee who engages in workplace misconduct is immune from corrective action when every witness fails to make a complaint. That logic is simply absurd.

Given opposing counsel's acknowledgment that patients are treated in the area where Connelly verbally assaulted Burke, it is puzzling that opposing counsel would take the position that Connelly's actions remained protected because there was no evidence that a patient overheard her outburst. According to Board precedent, immediate patient care areas include "patients' rooms, operating rooms, and treatment rooms." See NLRB v. Baptist Hospital, 442 U.S. 773, 780 (1979) (quoting St. John's Hospital, 222 NLRB 1150 (1976)).[6] Whether a patient was in the area or not at the time does not make the area any less of patient care area. In fact, the Board has expressly rejected the proposition that patient care areas are those areas where patients happen to be. See e.g. St. John's Hospital, supra. If a hospital can restrict solicitation in patient care areas (id.), it may certainly issue a written warning to an employee who verbally assaults her supervisor in such an area.

With respect to the fact that other employees overheard Connelly's outburst, "the Board has regularly observed a distinction between outbursts under circumstances where there was little if any risk that other employees heard the obscenities and those where that risk was high." Starbucks, supra, 679 F.3d at 79 and cases cited therein. When the latter is involved, the Board has frequently found that the employee lost the protection of the Act. Although opposing counsel asserts that there was no evidence that Burke's authority was undermined, the question is only whether the employee's conduct would reasonably tend to affect workplace discipline. DiamlerChrysler Corp., 344 NLRB

[6] Treatment rooms include areas where patients receive therapy. St. John's Hospital, 22 NLRB at 1150.

1324, 1329 (2005). That test necessarily presumes that evidence of such an effect might not be readily available.

Relying almost exclusively on Connelly's self-serving testimony, opposing counsel refers to Connelly's verbal assault of Burke as a "conversation" and asserts that "Respondent must live in Pleasantville to find Connelly's behavior to amount to assault or abuse." (GCAB 12). To emphasize its point, opposing counsel cites numerous cases where an employee retained the protection of the Act despite calling his or her supervisor a "fucking liar" or "fucking asshole." (GCAB 12). Putting aside the fact that Connelly's outburst was not a "conversation," and Respondent refers the Board to Burke's e-mail drafted at the time the incident occurred (GCX 29), opposing counsel's assertion in this regard is out of touch with the reality of the workplace.

Presumably, Respondent lives in "Pleasantville" because it operates a hospital where it expects that each employee will conduct his or herself in a professional and civil manner. While this concept may seem outrageous to opposing counsel,[7] employers have always had and will continue to have the right to discipline an employee for engaging in misconduct similar to that engaged in by Connelly. See Texas Instruments Inc. v. NLRB, 637 F.2d 822, 830 (1st Cir. 1981) ("[n]ot all conduct that can, in some general sense, be characterized as an exercise of a right enumerated in section 7 is afforded the protection of the Act." (citing NLRB v. Local 1229, IBEW, 346 U.S. 464 (1953)) Maryland Drydock Co. v. NLRB, 183 F.2d 538, 540 (4th Cir. 1950) ("it is not an unfair labor practice to [discipline] an employee for exhibiting a defiant and insulting attitude

[7] One has to wonder whether misconduct similar to that engaged in by Connelly is tolerated by the supervisors in Subregion 34.

towards his [supervisor]"). Further, opposing counsel's reliance on cases that arise in the industrial setting to make its point, and its apparent position that the use of the word "fuck" is determinative of whether an employee loses the protection of the Act in a hospital setting, only serves to highlight why the Atlantic Steel factors and cases arising under those factors are poorly suited for cases of this nature.

For all of the foregoing reasons, and for all of the reasons set forth in Respondent's Brief in Support of Cross-Exceptions to the Decision, the Board should reverse the judge's findings with respect to Connelly's written warning.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was electronically filed with the Board, and was electronically mailed or sent via U.S. Mail, on February 6, 2013 to the following parties of record:

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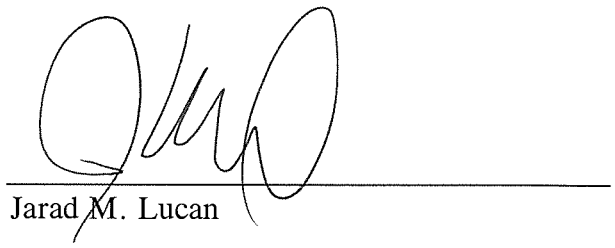

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