

**Sodexo America LLC and Patricia Ortega**

**Sodexo America LLC, and Keck Hospital of USC, formerly known as USC University Hospital and Service Workers United**

**Keck Hospital of USC, formerly known as USC University Hospital and National Union of Healthcare Workers.** Cases 21–CA–039086, 21–CA–039109, 21–CA–039328, and 21–CA–039403

June 13, 2013

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN  
AND BLOCK

On July 3, 2012, the National Labor Relations Board issued a Decision and Order Remanding in Part in this proceeding, finding that the Respondents violated Section 8(a)(1) of the Act by maintaining an unlawfully broad off-duty employee no-access rule.<sup>1</sup> The Board severed and remanded to the Administrative Law Judge the issue of whether Respondent Keck Hospital of USC's disciplining of four employees for violating the unlawful rule also violated Section 8(a)(1).<sup>2</sup>

On January 18, 2013, Administrative Law Judge William G. Kocol issued the attached decision. Respondent Keck Hospital of USC filed exceptions, and the Acting General Counsel filed an answering brief. The Acting General Counsel also filed a limited exception.

The National Labor Relations Board has considered the decision and the record in light of the exceptions<sup>3</sup> and brief and has decided to affirm the judge's rulings, find-

<sup>1</sup> *Sodexo America, LLC*, 358 NLRB 667 (2012) (*Sodexo I*).

<sup>2</sup> *Id.*, slip op. at 3.

<sup>3</sup> The Respondent Keck Hospital of USC requests a stay of the Board's proceeding in this case. In support, it contends that the Board lacks jurisdiction over this case because the administrative record in the underlying proceeding, *Sodexo I*, supra, has been filed with the U.S. Court of Appeals for the District of Columbia Circuit, and that the court has, on its own volition, "ordered all further proceedings in the case held in abeyance pending further order" in light of its *Noel Canning* ruling. Therefore, Keck Hospital argues, the Board should stay further proceedings pursuant to the order of the court. The request is denied. In *Sodexo I*, we found unlawful the Respondents' no-access rule for off-duty employees. We issued a final order based on that finding, and it is now currently before the court. But we severed and remanded to the judge for further proceedings the issue of the legality of the discipline meted out pursuant to the unlawful no-access rule. Thus, the Board retained jurisdiction over that part of the case. Moreover, the Board's jurisdiction over that part of the case is not affected by the possibility that an adverse decision by the court might moot the remanded proceedings. See, e.g., *Pacific Beach Hotel*, 357 NLRB 2209 (2011) (deciding an issue severed in 356 NLRB 397 (2011), *enfd.* sub nom. *NLRB v. HTH Corp.*, 693 F.3d 1051 (9th Cir. 2012), while that case was being reviewed by the Ninth Circuit and the court's decision could have mooted the case before the Board).

ings, and conclusions and to adopt the recommended Order as modified.<sup>4</sup>

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Keck Hospital of USC, formerly known as USC University Hospital, Los Angeles, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Threatening to arrest, verbally warning, suspending, demoting, or otherwise disciplining employees who violate unlawful rules by engaging in conduct that implicates the concerns underlying Section 7 of the Act."

2. Substitute the following for paragraph 2(c).

"(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful suspension and demotion of Michael Torres and the unlawful verbal warnings given to Alex Correa, Ruben Duran, and Noemi Aguirre, and within 3 days thereafter notify the employees in writing that this has been done and that the unlawful discipline will not be used against them in any way."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities.

WE WILL NOT threaten to arrest, verbally warn, suspend, demote, or otherwise discipline employees who

<sup>4</sup> We shall modify the judge's Order to conform to our standard remedial language and substitute a new notice to conform to the Order as modified.

violate unlawful rules to engage in conduct that implicates the concerns underlying the rights listed above.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights listed above.

WE WILL make Michael Torres whole for any loss of earnings and other benefits resulting from his unlawful suspension and demotion, plus interest compounded daily.

WE WILL compensate Michael Torres for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating his backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful verbal warnings given to Alex Correa, Ruben Duran, and Noemi Aguirre and the unlawful suspension and demotion of Michael Torres, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the unlawful discipline will not be used against them in any way.

KECK HOSPITAL OF USC, FORMERLY KNOWN AS USC UNIVERSITY HOSPITAL

*Alice J. Garfield, Esq.*, for the General Counsel.

*Linda Van Winkle Deacon, Esq.*, for Respondent, Keck Hospital of USC.

*Chad T. Wishchuk, Esq. (Marks, Finch, Thorton & Baird, LLP)*, of San Diego, California, for Respondent Sodexo.

*Florice Orea Hoffman, Esq. (The Law Offices of Florice Hoffman)*, of Orange, California, for the Charging Party.

DECISION ON REMAND

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Los Angeles, California, on December 5, 2012, pursuant to the Board's Order remanding the case to me for further consideration. *Sodexo America, LLC*, 358 NLRB 647 (2012). In that case the Board found a no-access rule to be unlawful and that the Hospital disciplined Michael Torres, Alex Correa, Ruben Duran, and Noemi Aguirre pursuant to the unlawful rule. The Board remanded the case to me:

[W]ith instructions to reopen the record and determine whether the activity of the four-named employees implicated the concerns underlying Section 7. If so, the discipline violated Section 8(a)(1) of the Act.

In this regard the complaint, as amended, alleges:

10. (a) Since at least on or about December 2, 2009. Respondent Hospital, by issuing an employee rule book and by masking oral and Intranet announcements, has maintained the following rules:

Off-duty employees are not allowed to enter or re-enter

the interior of Respondent Hospital or any other work area outside Respondent Hospital except to visit a patient, receive medical treatment or to conduct hospital-related business.

1. An off-duty employee is defined as an employee who had completed his/her assigned shift.
2. Hospital-related business is defined as the pursuit of the employee's normal duties or duties as specifically directed by management.
3. Any employee who violates this policy will be subject to disciplinary action.

(b) On or about May 5, 2010, Respondent hospital, by Officer Fuentes, at its facility, threatened to arrest an employee if the employee did not leave the Respondent Hospital's facility.

12. (a) On or about the dates set forth opposite their names, Respondent Hospital engaged in the following conduct as to the employees of Respondent Hospital names below:

Date	Conduct
May 4, 2010	suspended Michael Torres
May 13, 2010	demoted Michael Torres
June 25, 2010	verbally warned Ruben Duran
June 25, 2010	verbally warned Alex Corea
June 25, 2010	verbally warned Noemi Aguirre

(b) Respondent Hospital engaged in the conduct described above in paragraph 12(a) because the named employees of Respondent Hospital assisted the NUHW and engaged in concerted activities, and to discourage employees of Respondent from engaging in these activities.

(c) Respondent Hospital engaged in the conduct described above in paragraph 12(a) because the named employees of Respondent Hospital were alleged to have violated the rules described above in paragraph 10.

At the hearing the parties stipulated that the activities of the employees covered these allegations in the complaint "implicate concerns underlying Section 7 of the Act."

CONCLUSION OF LAW

The Hospital has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act by threatening to arrest an employee if he did not leave the Hospital, verbally warning Alex Correa, Ruben Duran, and Noemi Aguirre, and suspending and demoting Michael Torres because they entered the Hospital while off duty to engage in conduct that implicate concerns underlying Section 7 of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent, having discriminatorily suspended and demoted an employee, must make him whole for any loss of earnings and other benefits. Backpay shall be computed with interest at the rate prescribed in *New Horizons*

for the Retarded, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatee(s) for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.*, 359 NLRB 518 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>1</sup>

#### ORDER

The Respondent, Keck Hospital of USC, formerly known as USC University Hospital, Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to arrest, verbally warning, suspending, demoting, or otherwise disciplining employees because they enter the Hospital while off duty to engage in conduct that implicate concerns underlying Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Michael Torres whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board

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<sup>1</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

or its agents, 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.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discipline and within 3 days thereafter notify the employees in writing that this has been done and that it will not be used against them in any way.

(d) Within 14 days after service by the Region, post at its facility in Los Angeles, California, copies of the attached notice marked "Appendix."<sup>2</sup> Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 1, 2009.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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<sup>2</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."