

Good Samaritan Medical Center and Camille A. Legley, Jr.

1199 SEIU United Healthcare Workers East Camille A. Legley, Jr. Cases 01–CA–082367 and 01–CB–082365

December 16, 2014

DECISION AND ORDER

BY MEMBERS MISCIMARRA, JOHNSON, AND SCHIFFER

On August 8, 2013, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent Employer, Good Samaritan Medical Center, and the Respondent Union, 1199SEIU United Healthcare Workers East, each filed exceptions and a supporting brief. The General Counsel filed limited exceptions and a supporting brief as well as a brief in partial support of the judge's decision. The Union filed an answering brief.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions as modified below and to adopt the recommended Order as modified³ and set forth in full below.

The judge found, and no party disputes, that Charging Party Camille A. Legley, Jr. engaged in activity protected under Section 7 of the National Labor Relations Act when, during an orientation session for new employees,

¹ In its answering brief, the Union asks the Board to strike or to disregard those portions of the General Counsel's brief in partial support of the judge's decision that argue for or assume a contrary conclusion. To the extent that portions of the General Counsel's brief in partial support of the judge's decision contain arguments beyond the scope of the General Counsel's limited exceptions or that contradict the judge's decision, we have disregarded those arguments.

² There are no exceptions to the judge's dismissal of allegations that the Union violated the Act when union delegate Darlene Lavigne insisted that employees had to join the Union and that union delegate Neal Nicholaides threatened Charging Party Camille Legley on December 20, 2011.

The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ We shall modify the judge's recommended Order to conform to the Board's standard remedial language and in accordance with our decisions in *Excel Container, Inc.*, 325 NLRB 17 (1997), *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enf. 354 F.3d 534 (6th Cir. 2004), and *Don Tortillas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014). We shall substitute new notices to conform to the modified Order and in accordance with *Durham School Services*, 360 NLRB 694 (2014).

he challenged union delegate Darlene Lavigne's assertion that employees were required to join the Union. The judge further found that Legley's purported misconduct at the orientation session did not cost him the Act's protection. The judge concluded that the Union violated Section 8(b)(1)(A) and (2) of the Act by causing Legley's discharge, that the Employer violated Section 8(a)(3) and (1) when it discharged Legley, and that the Employer violated Section 8(a)(1) by maintaining its workplace civility policy. We agree with these findings and conclusions, but only for the reasons set forth below.⁴

I. FACTS

On November 28, 2011,⁵ the Employer offered Legley a job as a part-time boiler operator working Friday and Saturday nights. He was told to come in on December 5 to take a physical examination and fill out paperwork, and to report on December 19. On December 5, Legley met with Jen Patnaude, the Employer's human resources manager, and three other individuals. All found Legley difficult, and Patnaude voiced her concern to Facilities Manager Sean Brennan. Brennan replied that he wanted to give Legley the job because the shift was hard to staff and Legley had interviewed well. The job offer was not retracted.

On December 19, Legley and other new hires attended an orientation session, where the first order of business was a presentation by union delegate Darlene Lavigne. In the course of her remarks, Lavigne told the new employees that the Employer was a union shop where union membership was required. Legley raised his hand and said that it was his understanding that the law prohibited a union from requiring membership. Lavigne replied that Legley had to join the Union to work at the Employer. Later, Legley pointed out to Lavigne a statement in the Union's literature that an employee does not have to become a member but may become an agency fee payer instead. The judge found that, at most, Legley raised his voice when he said he did not have to become a union member. Nonetheless, Lavigne became upset and repeated that Legley had to become a member. She then asked Legley his name and department and told him that "she knew the people who worked down there and she

⁴ The judge applied the framework articulated in *Atlantic Steel Co.*, 245 NLRB 814 (1979), to find that Legley's purported misconduct at the orientation session did not cost him the Act's protection. We agree that Legley retained the protection of the Act, but we need not pass on whether the *Atlantic Steel* framework is applicable here.

For the reasons stated by the judge, we adopt his finding that the Union violated Sec. 8(b)(1)(A) of the Act by threatening Legley with unspecified reprisals because of his protected activity.

⁵ Unless otherwise indicated, all dates refer to 2011.

was going to warn them that he was coming and that they would not put up with him.”

After orientation, Lavigne reported what Legley had said to MaryEllen Leveille, the Union’s lead administrative organizer for the Steward Healthcare system, of which the Employer is a part, and said that Legley was mean to her. Lavigne then called Neal Nicholaides, a union delegate at the Employer,⁶ and related her experience with Legley, including the fact that Legley had asserted that he did not have to become a union member. Nicholaides mentioned the Employer’s code of conduct; specifically, the two discussed that it was strange that a new employee would break the code of conduct on his first day of work. Nicholaides reported the Legley incident to Brennan and Senior Director for Environment Health and Safety Scott Kenyon.

The next day, December 20, Legley told union delegate Kevin Jordan about what had happened at orientation. Jordan took Legley to Nicholaides to recount the incident. Nicholaides told Legley that Lavigne had complained to the head of human resources and the head of the Union. At lunch that day, Nicholaides told Patnaude, Kenyon, and Regional Human Resources Director Tom Watts that Legley was rude to Lavigne during orientation and had “negative behavior” during his meeting with him earlier that day.⁷ Based on their testimony, the judge found that Kenyon and Patnaude were aware that Legley had questioned Lavigne about the need to become a member of the Union. Kenyon, Patnaude, and Watts decided to discharge Legley, and he was discharged that afternoon. The reason given was violation of the Employer’s workplace civility policy, which states:

Steward recognizes that excellent care is best delivered in a work environment of respect and cooperation.

As a Steward workforce member I will:

- Treat all coworkers and individuals with respect, patience and courtesy;
- Never engage in abusive or disruptive behavior;
- Not tolerate any threats of harm—either direct or indirect—or any conduct that harasses, disrupts or interferes with another workforce member’s work or performance or that creates a hostile work environment.

II. DISCUSSION

We address first whether the Union and the Employer violated the Act in connection with Legley’s discharge.

⁶ The former title for union delegate was “steward.”

⁷ The record sheds no light on this second bout of “negative behavior.”

We then turn to the legality of the Employer’s Workplace Civility Policy.

A. Discharge of Legley

1. Allegation against the Union

Section 8(b)(2) makes it unlawful for a labor organization or its agents “to cause or attempt to cause an employer to discriminate against an employee in violation of [Section 8(a)(3)].” Section 8(a)(3), in turn, provides that it is unlawful for an employer “by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization,” subject to a proviso permitting union-security agreements. To determine whether union conduct violated Section 8(b)(2), the Board has in the past primarily applied either a duty-of-fair-representation framework⁸ or the framework established in *Wright Line*.⁹ As found below, under either of

⁸ See *Operating Engineers Local 18 (Ohio Contractors Assn.)*, 204 NLRB 681 (1973), enf. denied on other grounds 555 F.2d 552 (6th Cir. 1977). “When a union prevents an employee from being hired or causes an employee’s discharge, it has demonstrated its influence over the employee and its power to affect his livelihood in so dramatic a way that we will infer—or, if you please, adopt a presumption that—the effect of its action is to encourage union membership on the part of all employees who have perceived that exercise of power.” Id. at 681; see also *Acklin Stamping Co.*, 351 NLRB 1263, 1263 (2007); *Graphic Communications Local 1-M (Bang Printing)*, 337 NLRB 662, 673 (2002).

Over the years, the Board has characterized the union’s rebuttal burden under the duty-of-fair-representation framework in different ways. In *Operating Engineers Local 18 (Ohio Contractors Assn.)*, supra, the Board observed that “the inference may be overcome, or the presumption rebutted, not only when the interference with employment was pursuant to a valid union-security clause, but also in instances where the facts show the union action was necessary to the effective performance of its function of representing its constituency.” 204 NLRB at 681. In *Glaziers Local 558 (PPG Industries)*, the Board stated: “A union may, however, rebut this presumption by evidence of a compelling and overriding character showing that the conduct complained of was referable to other considerations, lawful in themselves, and wholly unrelated to the exercise of protected employee rights or other matters with which the Act is concerned.” 271 NLRB 583, 585 (1984) (internal quotations omitted), enf. denied 787 F.2d 1406 (10th Cir. 1986).

⁹ *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983); See *Security, Police & Fire Professionals of America (SPFPA) Local 444 (Security Support Services, LLC)*, 360 NLRB 430, 435–436 (2014); *Teamsters “General” Union No. 200 (Bechtel Construction Co.)*, 357 NLRB 1844, 1851–1852 (2011), enf. 723 F.3d 778 (7th Cir. 2013); *Town & Country Supermarkets*, 340 NLRB 1410, 1411 (2004); *Freight Drivers, Local 287 (Container Corp. of America)*, 257 NLRB 1255, 1258–1259 & fn. 18 (1981).

In at least one case, the Board based its 8(b)(2) determination on whether the conduct over which the union sought discipline was protected by the Act. *Longshoremen Local 333 (ITO Corp. of Baltimore)*, 267 NLRB 1320, 1320–1321 (1983).

these standards, the Union's conduct clearly violated the Act.

As an initial matter, to find that a union has violated Section 8(b)(2) in connection with an employer's action against an employee, "there must be some evidence of union conduct; it is not sufficient that an employer's conduct might please the union."¹⁰ The judge correctly found evidence of union conduct here. Lead Administrative Organizer Leveille testified that she and union delegate Nicholaides discussed the Employer's code of conduct during their conversation about Legley, and Nicholaides conceded that he might have mentioned the workplace civility policy when speaking with Legley. The latter conversation came about through the action of another union delegate, Jordan. Jordan testified that when he heard Legley's story, he immediately thought about the Employer's "zero tolerance" policy for disrespect and was concerned that Legley would face discipline. Nicholaides reported the Legley incident to management twice, once on December 19 (to Brennan and Kenyon), and again the next day (to Patnaude, Kenyon (again), and Watts). Nicholaides also told management that Legley had said, "If you guys don't want me here, I'll just go." Legley was promptly discharged for violating the workplace civility policy. These facts support an inference, which the judge drew and with which we agree, that when the Union's representatives reported Legley's conduct to management, they reasonably would have foreseen that Legley would be disciplined (at least) for violating the workplace civility policy. Moreover, Nicholaides repeated to management Legley's statement, "If you guys don't want me here, I'll just go." Based on the foregoing, we find that union conduct caused Legley's discharge. That conduct, in turn, violated the Act, under either of the two primary analytical frameworks applied by the Board.

We first apply the duty-of-fair-representation framework. "[W]henver a labor organization 'causes the discharge of an employee, there is a rebuttable presumption that [the labor organization] acted unlawfully because by such conduct [it] demonstrates its power to affect the employees' livelihood in so dramatic a way as to encourage union membership among the employees.'"¹¹ Thus, having found that the Union caused Legley's discharge, we must determine whether it rebutted the resulting presumption that it acted unlawfully in doing so. One way in which a union may rebut that presumption is by show-

ing that it acted pursuant to a valid union-security clause.¹² The other is by showing that its action "was necessary to the effective performance of its function of representing its constituency." *Id.*

Here, the Union caused Legley's discharge, it was not enforcing a union-security agreement, and it does not contend that the discharge was necessary to the effective performance of its function of representing its constituency. Quite to the contrary, the Union caused Legley's discharge for conduct that no party disputes was protected by the Act. Thus, the presumption of illegality that arises whenever a union causes the discharge of an employee stands unrebutted. Accordingly, applying the duty-of-fair-representation framework, the Union must be found to have violated the Act.

The same result follows from applying the *Wright Line* analysis. Under *Wright Line*, the General Counsel must first prove, by a preponderance of the evidence, that Legley's protected conduct was a motivating factor in the Union's adverse action. The elements commonly required to establish discriminatory motive are established in the record here: Legley engaged in protected activity, the Union had knowledge of that activity, and Lavigne's unlawful threat of unspecified reprisal shows the Union's animus against his protected conduct. We find that the General Counsel met his initial burden, and that the Union failed to meet its rebuttal burden by showing that it would have taken the same action absent Legley's protected activity.

We conclude, then, that the Union violated Section 8(b)(1)(A) and (2).

2. Allegation against the Employer

We further agree with the judge that the Employer violated the Act when it discharged Legley. "An employer violates the Act when it discharges an employee at the request of the union when it has reasonable grounds for believing that the request was unlawful." *Palmer House Hilton*, 353 NLRB 851, 852 (2009) (internal quotations omitted), *affd.* 356 NLRB 1 (2010). Here, the Employer learned of Legley's protected conduct at or near the same time as the Union's effective request that he be disciplined for that conduct. Further, the Employer has failed to show that it would have discharged Legley in the absence of his protected activity.¹³ Accordingly, we find that the Employer violated Section 8(a)(3) and (1) by discharging Legley at the Union's request.

¹⁰ *Toledo World Terminals*, 289 NLRB 670, 673 (1988).

¹¹ *Graphic Communications Local 1-M (Bang Printing)*, 337 NLRB at 673 (quoting *Operating Engineers Local 478 (Stone & Webster)*, 271 NLRB 1382, 1382 fn. 2 (1984)); see also *Acklin Stamping*, 351 NLRB at 1263.

¹² *Operating Engineers Local 18 (Ohio Contractors Assn.)*, 204 NLRB at 681.

¹³ Cf. *Town & Country Supermarkets*, 340 NLRB at 1412-1413.

B. Employer Rule

Finally, we affirm the judge's finding that the Employer's workplace civility policy, which it used to justify Legley's discharge, violates Section 8(a)(1). In doing so, we rely solely on the third prong of *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004), which holds that an employer rule is unlawful if the rule has been applied to restrict the exercise of Section 7 rights.¹⁴

ORDER

A. The National Labor Relations Board orders that the Respondent, Good Samaritan Medical Center, Brockton, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they question whether employees are required to join 1199 SEIU United Healthcare Workers East or any other union.

(b) Maintaining its workplace civility policy.

(c) 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) Within 14 days from the date of this Order, offer Camille Legley full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Legley whole for any loss of earnings and other benefits suffered as a result of his unlawful discharge in the manner set forth in the remedy section of the judge's decision.

(c) Compensate Legley for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

¹⁴ Under the third prong of *Lutheran Heritage Village*, supra, application of a rule or policy to restrict the exercise of Sec. 7 rights makes the maintenance of that rule unlawful, and the Board has ordered rescission of rules found unlawful under *Lutheran's* third prong. See *Albertson's, Inc.*, 351 NLRB 254, 259, 262 (2007). Member Miscimarra and Member Johnson disagree that the unlawful application of an otherwise lawful rule should make it unlawful to *maintain* that rule. Similarly, they disagree that rescission is an appropriate remedy when an otherwise lawful rule or policy is unlawfully applied. In their view, the proper remedy would be an order that the employer cease and desist from applying such a rule in a manner that restricts the exercise of protected employee rights. See *Ivy Steel & Wire, Inc.*, 346 NLRB 404, 404 fn. 4, 405 (2006). They recognize, however, that the above-cited, more recent Board precedent is to the contrary, and no Board majority consisting of at least three members has voted to overrule the Board's rescission remedy for violations of this kind. For institutional reasons, therefore, they apply existing precedent here.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Legley, and, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

(e) Within 14 days from the date of this Order, rescind the workplace civility policy.

(f) 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 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.

(g) Within 14 days after service by the Region, post at its facility in Brockton, Massachusetts, copies of the attached notice marked "Appendix A."¹⁵ Copies of the notices, on forms provided by the Regional Director for Region 1, after being signed by the Employer's authorized representative, shall be posted by the Employer 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, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Employer customarily communicates with its employees by such means. Reasonable steps shall be taken by the Employer 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 Employer has gone out of business or closed the facility involved in these proceedings, the Employer shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Employer at any time since December 20, 2011.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 1 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Employer has taken to comply.

B. The National Labor Relations Board orders that the Respondent, 1199 SEIU United Healthcare Workers East, Brockton, Massachusetts, its officers, agents, and representatives, shall

¹⁵ 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."

1. Cease and desist from

(a) Causing or attempting to cause Good Samaritan Medical Center to discharge employees because they question having to become union members as a condition of employment.

(b) Threatening employees with unspecified reprisals for exercising their rights under Section 7 of the Act.

(c) In any like or related manner 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) Within 14 days from the date of this Order, notify Good Samaritan Medical Center that it has no objection to the reinstatement of Camille Legley to his former position.

(b) Make Legley 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 judge's decision.

(c) Compensate Camille Legley for the adverse tax consequences, if any, of receiving a lump-sum backpay award.

(d) Within 14 days from the date of this Order, notify Camille Legley in writing that it has no objection to his reinstatement to his former position and that it has told Good Samaritan Medical Center that it has no such objection.

(e) Within 14 days from the date of this Order, remove from its files, and ask the Employer to remove from its files, any reference to the unlawful actions taken against Legley, and within 3 days thereafter, notify him in writing that this has been done and that those actions will not be used against him in any way.

(f) Within 14 days after service by the Region, post at its offices and at any bulletin boards designated for the Union at the Good Samaritan Medical Center copies of the attached notice marked "Appendix B."¹⁶ Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Union's authorized representative, shall be posted by the Union 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, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Union custom-

arily communicates with employees by such means. Reasonable steps shall be taken by the Union to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Within 14 days after service by the Region, deliver to the Regional Director for Region 1 signed copies of the notice in sufficient number for posting by the Employer at its Brockton, Massachusetts facility, if it wishes, in all places where notices to employees are customarily posted.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 1 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Union has taken to comply.

APPENDIX A

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 discharge employees because they question whether employees are required to join 1199 SEIU, United Healthcare Workers East or any other union.

WE WILL NOT maintain our workplace civility policy.

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

WE WILL, within 14 days from the date of the Board's Order, offer Camille Legley full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Camille Legley whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL compensate Camille Legley for any adverse tax consequences of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security

¹⁶ 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."

Administration allocating Legley's backpay 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 discharge of Camille Legley, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL, within 14 days from the date of the Board's Order, rescind our workplace civility policy.

GOOD SAMARITAN MEDICAL CENTER

The Board's decision can be found at – www.nlrb.gov/case/01-CA-082367 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



APPENDIX B
NOTICE TO MEMBERS AND 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 on your behalf with your employer
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT cause or attempt to cause Good Samaritan Medical Center to discharge employees because they question having to become union members as a condition of employment.

WE WILL NOT threaten employees with unspecified reprisals for exercising their rights under Section 7 of the Act.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights set forth above.

WE WILL, within 14 days from the date of the Board's Order, notify Good Samaritan Medical Center that we have no objection to the reinstatement of Camille Legley to his former position.

WE WILL make Legley whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, less any net interim earnings, plus interest.

WE WILL compensate Camille Legley for the adverse tax consequences, if any, of receiving a lump-sum back-pay award.

WE WILL, within 14 days from the date of the Board's Order, notify Camille Legley in writing that we have no objection to his reinstatement to his former position and that we have told Good Samaritan Medical Center that we have no such objection.

WE WILL, within 14 days from the date of the Board's Order, remove from our files, and ask the Employer to remove from its files, any reference to the unlawful actions against Camille Legley, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that those actions will not be used against him in any way.

1199 SEIU UNITED HEALTHCARE WORKERS
EAST

The Board's decision can be found at www.nlrb.gov/case/01-CB-082365 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



Kevin J. Murray, Esq. and *Karen Hickey, Esq.*, for the General Counsel.

Betsy Ehrenberg, Esq., for 1199 SEIU.

Lori Armstrong Halber, Esq. and *Joseph W. Ambash, Esq.*, for Good Samaritan Medical Center.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard these consolidated cases in Boston, Massachusetts, on April 17 and 18, 2013. The charge and the amended charge in Case 01–CA–082367 were filed on June 4 and July 17, 2012. The charge and the amended charge in Case 01–CB–082365 were filed on June 4, July 6, and August 15, 2012. The consolidated complaint that was issued on January 31, 2013, and amended on March 4, 2013, alleges as follows:

1. That the Employer and the Union have maintained and enforced a collective-bargaining agreement covering certain employees employed at the Good Samaritan's facilities and plant operations department at the hospital and offsite facilities.

2. That the contract contains a union security provision requiring employees, after 30 days of employment, either to become union members or to pay an agency fee to the union as a condition of employment.

3. That on or about December 19, 2011, Camille Legley at an orientation program for new employees, complained to the Union concerning the requirement that unit employees become members of the Union and asserted his right to refrain from becoming a union member.

4. That on or about December 19, 2011, the Union by its delegate Darlene Lavigne (a) threatened employees that they could not become employees unless they joined the Union and (b) threatened Legley with unspecified reprisals because he asserted the right to not join the Union.

5. That on December 20, 2011, the Union by its delegate, Neal Nicholaides, threatened Legley with unspecified reprisals because he asserted his right to not join the Union.

6. That on December 19 and 20, the Union reported Legley's conduct at the orientation meeting to the Employer.

7. That on December 20, the Employer terminated Legley's employment.

8. That by the foregoing conduct, the Union caused the Employer to terminate the employment of Legley because he asserted his right to not join the Union and that the Employer discharged Legley for the same reason.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

It is admitted and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(1), (6), and (7) of the Act. It also is admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

The Respondent employer is a part of the Steward Health Care System and it has had a collective-bargaining history with 1199, SEIU for many years. The extant collective-bargaining

agreement contains typical union security and dues-checkoff provisions.

In September 2011, Camille Legley responded to a job advertisement placed by the Respondent. This called for someone to work as a part-time boiler operator to work on Friday and Saturday nights. Legley first met with Sean Brennan, the facilities manager, and the lead boiler operator, Kevin Jordan. Then, after some correspondence between Legley and Jordan, he also met with Neal Nicholaides, who worked as a refrigeration mechanic and who also is a union delegate.

On November 28, the Respondent offered Legley the job and he was told to report on December 19 for orientation. He also was notified that he should come to the hospital on December 5 in order to take a physical examination and to fill out some forms.

On December 5, Legley arrived at the hospital and was interviewed by Jen Patnaude, the human resources manager. He also spoke to Jennifer Dorsey in relation to filling out forms and to nurse Eileen Rainey regarding a physical. All of these people described their interactions with Legley as being somewhat difficult, albeit no one described his conduct as being overly rude. Whatever their reactions, Legley nevertheless had been hired and was scheduled to report to work on December 19. There is no indication that after these interactions on December 5 or at any time prior to December 19, Patnaude or anyone else from the Employer decided to retract the job offer that had already been made to Legley.

An orientation program was set up for the morning of December 19, and this was attended by Legley and other new hires. This was scheduled in two parts; the first being conducted by Union Delegate Darlene Lavigne. The second part of the orientation was to be addressed by a representative of the hospital. The other new employees were Kim Derby, Francaise Gaston, and Aisha Patel. Of these, Derby testified in this case.

The evidence shows that on the morning of December 6, the group met in the lobby at around 8 a.m. and because the elevators were out of order, they had to walk up the stairs to the conference room on the fifth floor. Everyone including Legley was grumbling by the time they ascended. Perhaps because he was 72 years old at the time, Legley was the last person to arrive at the conference room and the orientation program had already begun. When he arrived, he was somewhat surprised to see that it was a union delegate who was running the meeting.

It is my conclusion that during this meeting, Lavigne told the employees about the benefits of the Union; told the employees that this was a union shop where membership was required; and passed out an application for union membership that contained a dues-checkoff authorization. She also handed out a form providing for a voluntary check-off authorization for the Union's political action fund. Lavigne told the new hires that they needed to sign the forms and return them to her. At some point during the meeting, Legley raised his hand and stated that it was his understanding that the law prohibited a union from requiring union membership. His testimony as corroborated by Derby, was that Lavigne replied that he had to join the union in order to work at the hospital and that they had to complete the forms that she had distributed.

A little later in the meeting, Legley while reading through the Union's literature noticed that there was a sentence that stated that an employee did not have to become a member but could become an agency fee payer instead. When he spoke up and referred Lavigne to this sentence, she became upset and stated that he had to become a member. She asked for his name and which department he worked. Derby credibly testified that Lavigne told Legley that she "knew the people who worked down there and she was going to warn them that he was coming and that they would not put up with him."

Although Lavigne asserted that Legley interrupted her every two seconds, this is denied by him and his account is supported by Derby. (She testified that others also asked questions of Lavigne.) There was no credible evidence that Legley accused Lavigne of being a liar or that he made any statements that could be construed as being threatening or profane. At most, both Legley and Lavigne raised their voices when he said he didn't have to become a union member and she said that he did.

The evidence does not show that Legley, in asking these questions or making these statements, acted in an overly aggressive manner. It may be that Lavigne became upset by Legley's questioning of her, but his questions regarding the requirement of union membership clearly constituted activity that is protected by Section 7 of the Act. Moreover, the evidence convinces me that nothing that he said or did at this meeting could compel a conclusion that he lost the protection of the Act by virtue of any misconduct on his part. The fact that Legley asked a couple of questions about the union membership requirement is clearly within his legal rights.

In any event, Legley filled out, signed, and turned in the union membership and dues-checkoff form but did not sign the political action checkoff authorization.

Shortly after the orientation session, Lavigne called Union Representative Leveille and essentially told her that Legley was mean to her. Among other things, it is conceded that Lavigne reported that Legley said that he understood that he did not have to become a union member. Lavigne then called Nicholaides, another union steward who covered the boiler room employees. She related her experience with Legley, including the fact that Legley had asserted that he didn't have to become a union member. Nicholaides in turn reported what Lavigne told him to tell human resources and to his supervisors, Sean Brennan and Scott Kenyon.

When Legley reported to work on December 20, he talked to Kevin Jordan, who in addition to being the lead boiler operator is also a union delegate. Legley told Jordan about what happened at the orientation meeting with Lavigne. The two men then went to the plumbing shop and spoke to Nicholaides and another union delegate whose name is Gerry Monahan. Jordan asked Legley to tell them what happened and he did so, explaining that Lavigne got angry at him because he questioned her about her assertion that he had to become a union member. At this point, Nicholaides said that Lavigne had complained to the head of human resources and to the head of the Union. He also told Legley that because of "you" she didn't get anyone to contribute to the union's political action fund. Sensing that he might be in trouble, Legley acknowledged that he might have said that he wasn't sure if he wanted to work there. Notwith-

standing this conversation, Legley worked for the remainder of the day.

At a luncheon held that day, Nicholaides spoke to Patnaude, Scott Kenyon, and Tom Watts, all of whom are company managers. He told them that Legley had been rude to Lavigne during the orientation program and he also related his morning conversation with Legley describing Legley as having "negative behavior."

In his testimony, Kenyon agreed that he was aware that Legley had questioned Lavigne about the union membership requirement during the orientation meeting. And it appears from the evidence that during the luncheon meeting, Patnaude discussed the fact that Legley had raised this question. She states that she told the others that when she had previously interviewed Legley (on December 5), she had not wanted to hire him. (But as noted above, she did not veto his hiring.)

The decision to discharge Legley was made on December 20 by Patnaude, Kenyon, and Watts. The testimony of the Employer's witness was that Legley was discharged for violating the Employer's workplace civility policy. Legley was informed of the decision at around 3:45 p.m. by Sean Brennan. There was no evidence that any representative of the Union asked for or demanded that the Company discharge Legley, albeit the proximate cause of Legley's discharge was a direct consequence of union delegate Lavigne's complaints regarding the events that took place between herself and Legley at the orientation meeting.

The Workplace Civility Policy states:

Steward recognizes that excellent care is best delivered in a work environment of respect and cooperation.

As a Steward workforce member I will:

- Treat all coworkers and individuals with respect, patience and courtesy;
- Never engage in abusive or disruptive behavior;
- Not tolerate any threats of harm—either direct or indirect—or any conduct that harasses, disrupts, or interferes with another workforce member's work or performance or that creates a hostile work environment.

III. ANALYSIS

In the context of the orientation meeting, Legley's questions in a group of new employees about the legality of whether an employee is required to join a union constitutes protected concerted activity within the meaning of Section 7 of the Act.¹ Moreover, he was correct in his understanding of the law and Lavigne was not. See *NLRB v. General Motors*, 373 U.S. 734 (1963).

The Respondents argue that Legley, during this transaction engaged in conduct that overstepped the bounds of civility and thereby violated the company's workplace civility policy. But since Legley's questions and correct expressions of opinion, are protected by Federal law, the company's policy cannot be con-

¹ Among other things, Sec. 7 not only gives employees the right to join a union, it also gives employees a right to refrain from joining a union.

trolling. Simply put, when it comes to employee Section 7 rights, the statute trumps company policy and the Respondent cannot rely on its own policy as a defense to otherwise legally protected employee activity. *Special Touch Home Care Services*, 357 NLRB 4 (2011), enf. denied on other grounds 708 F.3d 447 (2d Cir. 2013).

The correct test for determining whether the discharge of other discipline of an employee who is engaged in protected concerted activity is the one enunciated in *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979), where the Board established a balancing test for these types of situations. In determining if an employee's conduct loses the protection of the Act, the Board will take into account and balance the following factors; (a) the place of the discussion; (b) the subject matter of the discussion; (c) the nature of the employee's outburst; and (d) whether the outburst was provoked by the employer's unfair labor practices.

In my opinion, Legley's statements and conduct at the orientation meeting do not meet the *Atlantic Steel* criteria for concluding that he engaged in misconduct that would justify his discharge. Nor in the absence of legally defined misconduct, can one separate the protected nature of his comments from the way he made the comments. As his behavior at the meeting did not meet the criteria of *Atlantic Steel*, Langley's statements regarding union membership and the tone in which he made the statements cannot be disentangled. Therefore, as the Company discharged Legley because of these protected statements, a *Wright Line* analysis is not even appropriate. *New York Party Shuttle, LLC*, 359 NLRB 1046 (2013).

Since it is my conclusion that the Employer discharged Legley because of the protected and concerted statements he made at the orientation meeting, I find that it has violated Section 8(a)(1) and (3) of the Act.²

It is the General Counsel's contention that the Employer's workplace civility policy, in addition to not affording a defense to Legley's discharge, also independently violates Section 8(a)(1) of the Act under *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). It is postulated that this rule would "reasonably tend to chill employees in the exercise of their Section 7 rights." It is noted that the rule does not explicitly restrict the rights of employees to engage in union or protected concerted activity.

In *Knauz BMW*, 358 NLRB 1754 (2012), a Board majority found that the Employer unlawfully maintained a "Courtesy" rule in its employee handbook. The rule stated that courtesy is the responsibility of every employee, that everyone is expected to be courteous, polite, and friendly to customers, vendors, and suppliers and fellow employees, and that no one should be "disrespectful or use profanity or any other language which injures the image or reputation of the Dealership." Applying *Lutheran Heritage Village-Livonia*, the Board held that the employees would reasonably construe the prohibition against "disrespect-

ful" conduct and "language which injures the image or reputation of the Dealership" as encompassing Section 7 activity. The Board explained that nothing in the rule or anywhere in the handbook suggested that communications protected by Section 7 were excluded from the rule's reach. Member Hayes, on the other hand, would have found that the courtesy rule was "nothing more than a common-sense behavioral guideline for employees." In his view, the Employer sought to promote civility and decorum in the workplace and prevent conduct that injured the dealership's reputation; purposes that would have been patently obvious to the Employer's employees.

In light of the majority opinion in *Knauz BMW*, and in light of the fact that the rule in this case, was applied to discharge an employee who engaged in protected speech in a concerted setting, I conclude that the application of this rule to employee protected, concerted, and/or union-related activity violated Section 8(a)(1) of the Act.

The General Counsel also makes a number of allegations against the Union including the allegations that its delegates threatened employees with reprisals and that the Union "caused or attempted to cause" the Employer to discharge Legley because of the statements he made at the orientation program.

The evidence does not show that anyone from the Union asked for, suggested, recommended, or demanded that the Employer discharge Legley. The Union therefore argues that under Section 8(b)(2) of the Act, there can be no finding that it "caused or attempted to cause" the Employer to take this action. And in this regard, a "cause or attempt to cause" must be shown by some evidence of union conduct. As noted *Wenner Ford Tractor Rentals, Inc.*, 315 NLRB 964, 965 (1994), it is not sufficient that an employer's action might simply please a union.

Although I think this a close call, it is my opinion that the Union's delegates, knowing of the Company's workplace civility policy, reasonably would have foreseen that Lavigne's complaints about Legley's "bad" behavior on his first day of employment, would likely lead to his discharge. As a consequence, her reports to her union colleagues which were transmitted to management, were in my opinion, the proximate cause of his discharge. I therefore conclude that in these circumstances, the Union is at least partially responsible for Legley's illegal discharge. Accordingly, I conclude that the Union caused or attempted to cause his discharge in violation of Section 8(b)(2) and 8(b)(1)(A) of the Act. Cf. *Town & Country Supermarkets*, 340 NLRB 1410, 1411 (2004), and *Paperworkers Local 1048 (Jefferson Smurfit Corp.)*, 323 NLRB 1042, 1044 (1997).

As to the alleged threats, I conclude that Lavigne told Legley that she knew the people in his department, that she was going to warn them that he was coming and that they would not put up with him. In this respect, I construe this as threat of unspecified reprisals and therefore a violation of Section 8(b)(1)(A) of the Act.

The General Counsel alleges that the Union violated the Act when its Agent Lavigne incorrectly told employees at the orientation that they had to join the Union in order to work at the hospital. While I find that this statement was made by her, it is also clear that the official information that was distributed to

² Even assuming that company management had a good-faith belief that Legley's behavior at the orientation program was worse than it was, that belief was, in my opinion, mistaken and his actual conduct was insufficient to warrant the conclusion that Legley overstepped the bounds of legally protected concerted activity. Therefore, under *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), the Employer cannot defend its action based on a good-faith belief.

the employees clearly stated that union membership was not required. Moreover, that was pointed out by Legley when he read that portion of the leaflet to the other employees. In these particular circumstances, I don't think that the Union should be held accountable for the mistaken statements of its agent when the official position of the Union was simultaneously made known to the employees. I therefore shall recommend that this allegation of the complaint be dismissed.

Finally, the General Counsel alleges that Union Delegate Nicholaides made a threat to Legley on December 20, 2012. However, I do not conclude that anything he said on that morning constitutes a threat of reprisal. He simply told Legley that management had been apprised of what had happened at the orientation meeting and that it was too late. To me this is not a threat, but rather an accurate assessment and prediction of what management was likely to do. I therefore shall recommend that this allegation of the complaint be dismissed.

CONCLUSIONS OF LAW

1. By discharging Camille Legley because of his protected concerted activity in questioning whether employees were required to join 1199 SEIU United Healthcare Workers East, the Employer, Good Samaritan Medical Center violated Section 8(a)(1) and (3) of the Act.

2. By applying the workplace civility policy to an employee who was engaged in concerted activity that is protected by Section 7 of the Act, the Employer violated Section 8(a)(1) of the Act.

3. By causing or attempting to cause the Employer to discharge Camille Legley because of his protected concerted activity, the Union violated Section 8(b)(1)(A) and 8(b)(2) of the Act.

4. By threatening Legley with unspecified reprisals because of his protected concerted activity, the Union violated Section 8(b)(1)(A) of the Act.

5. The aforesaid violations affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. Except as found herein, the other allegations of the complaint are dismissed.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having concluded that Good Samaritan Medical Center and 1199 SEIU United Healthcare Workers East are responsible for the unlawful discharge of Camille Legley, the Employer must offer him reinstatement, and jointly and severally make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), 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). The Respondents shall also be required to expunge from their respective files any and all references to the unlawful discharge and to notify the employee in writing that this has been done and that the unlawful discharge will not be used against him in any way. The Respondent Employer shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. The Respondent Employer shall also compensate Legley 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).

[Recommended Order omitted from publication.]