

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

**KINGMAN HOSPITAL, INC. d/b/a
KINGMAN REGIONAL MEDICAL CENTER**

and

Case 28-CA-119729

SCHON HAGER, an Individual

GENERAL COUNSEL'S REPLY BRIEF

**TO: Gary W. Shiners, Executive Secretary
Office of the Executive Secretary**

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Pursuant to Section 102.46(h) of the Board's Rules and Regulations, Counsel for the General Counsel (General Counsel) files this Reply Brief to Respondent's Answering Brief to General Counsel's Exceptions to the Decision (ALJD) of Administrative Law Judge Melissa Olivero (ALJ) in the captioned case.

I. Introduction

In its Answering Brief, Kingman Hospital, Inc. d/b/a Kingman Regional Medical Center (Respondent or KRMC) asserts that the ALJ correctly found that Schon Hager (Hager) did not engage in protected concerted activity and that Hager's activities were not for the purpose of mutual aid or protection. (RAB 7-12)¹ Respondent further argues that Hager engaged in misconduct that was uncovered after her discharge and which disqualifies her from reinstatement and full backpay. (RAB 12-13)

Respondent's arguments overlook the basis of General Counsel's Exceptions, the reasoning behind the well-established Board principles upon which such exceptions rely, the factual distinctions in the instant case, and the Board's recent decision in *Hoodview Vending Co.*, 362 NLRB No. 81 (2015), which issued after the General Counsel's Exceptions were

¹ RAB __ refers to Respondent's Answering Brief to General Counsel's Exceptions followed by the page number. ALJD__ refers to JD-08-15 issued by the ALJ on February 20, 2015, followed by the page number. RX__ refers to Respondent exhibit followed by exhibit number.

filed. Further, Respondent's arguments to limit the remedy are inconsistent with the ALJ's credibility findings, witness testimony, and documentary evidence which show that Respondent was aware of the claimed misconduct and yet took no action during Hager's employment. Respondent's arguments lack merit and should be rejected by the Board.

II. Argument

A. Hager's Protected Concerted Activity for Mutual Aid or Protection

In response to General Counsel's Exception 1, Respondent asserts that Hager's conversation with Redman was not concerted activity because she "did not mention any sort of group concern or action[,] did not seek the assistance of Redman, or anyone else, in addressing her concerns about her discipline, [Imaging Services Director Lisa] Noyes' management style, or the other issues that she discussed with Redman[, and] involved only her own discipline and opinions." (RAB 8) Respondent argues that inherently concerted activity cannot be found "where there is no evidence of an object of initiating, inducing, or preparing for group action or some relation to group action." (RAB 9) Respondent further claims that the inherently concerted doctrine cannot be reconciled with *Meyers Industries*,² or *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12 (2014), unless the activity "was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees." (RAB 10) Respondent further argues that, even if Hager's conversations with Redman were concerted, they were not for mutual aid or protection because Hager did not communicate that either Redman's or Hager's jobs were in danger, and the conversations did not inure to the benefit of all

² *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984); *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986).

employees, but were instead Hager's "personal opinions regarding her discipline, Noyes' management style, and other subjects of interest only to Hager." (RAB 10-11) According to Respondent, "an employee acting to benefit himself or herself [must] at least solicit assistance from a coworker[, but] Hager did not ask Redman to do anything, let alone do something for Hager." (RAB 11-12)

Respondent's arguments do not undermine the General Counsel's Exceptions, which describe how Hager's conversation with Redman was protected concerted activity for mutual aid or protection, and that Respondent explicitly relied on the conversation to terminate her. Moreover, Respondent's argument that the doctrine of inherently concerted activity is inconsistent with *Meyers Industries* was soundly rejected in *Hoodview Vending Co.*, 362 NLRB No. 81, which issued after the General Counsel's Exceptions were filed. In *Hoodview Vending Co.*, the Board refused to overrule the doctrine of inherently concerted activity, noting that the doctrine has coexisted with *Meyers Industries* for over 20 years, and that the doctrine applies equally to conversations about wages and job security, both of which are "a vital term and condition of employment and the 'grist on which concerted activity feeds.'" *Id.*, slip op. at 1 fn. 1.

The Board rejected any requirement that the conversation must be for the purpose of mutual aid or protection in conversations involving wages and job security, instead finding that "discussions of job security, like wage discussions, are 'inherently concerted,' and as such are *protected*, regardless of whether they are engaged in with the express object of inducing group action.'" *Id.* Under the circumstances of the case, the Board further noted that requiring that the discussion must be for the purpose of mutual aid or protection impliedly "hinges on the unsupported inference that [the conversation was initiated] out of

the fear [that the discriminatee] would be discharged and therefore was acting to benefit herself alone.” *Id.*

The Board adopted the rationale in its earlier vacated decision where it reversed the administrative law judge’s holding that that the discriminatee’s conversation with another employee was not protected concerted activity because nothing was said expressly or impliedly contemplating any future action for mutual aid and protection of employees. *Id.*, slip op. at 1; *Hoodview Vending Co.*, 359 NLRB No. 36, slip op. at 2 (2015). The discriminatee asked another employee if he had seen a help wanted advertisement in which the employer was seeking a route driver, and there was no discussion that either of the employees was at risk of termination, although the employee believed that termination was insinuated. *Hoodview Vending Co.*, 359 NLRB No. 36, slip op. at 2.

Here, Hager discussed her discipline and Noyes’ management style to intimidate staff members so that ideas were repressed. (ALJD at 12:18-28) At the time, Hager was subject to risk of termination as she was on a final written warning and performance improvement plan. (ALJD at 9:22 to 10:12) Under the analysis utilized in *Hoodview Vending Co.*, job security conversations are inherently concerted, and Hager’s conversation is not disqualified from protected concerted activity even if she was solely concerned about her own termination, and even if there was no purpose for mutual aid or protection. *Hoodview Vending Co.*, 362 NLRB No. 81, slip op. at 1 fn. 1. Here, employee job security was at issue during Hager’s conversations for at least three reasons: 1) Hager’s job security was discussed regarding her current discipline and performance improvement plan; 2) the job security of any other employees who discuss their discipline or who engaged in similar conduct as led to the discipline; and 3) the job security of other employees who speak out about Noyes’

management style to repress staff ideas. Accordingly, and for reasons further explained in General Counsel's Exceptions, Hager's discussion about her discipline and Noyes' management style was both inherently protected concerted activity because she discussed issues of job security, and was for mutual aid or protection as she was addressing Noyes' management style to intimidate staff so that their ideas were repressed.

B. Appropriateness of Reinstatement and Backpay (Respondent Cross Exception)

Respondent asserts that it learned after Hager's termination that she had "committed significant misconduct during her employment that would have warranted her discharge" and that "the overwhelming evidence shows that shortly after Hager was discharged, KRMC learned that Hager failed to obtain the necessary licenses for a self-referred mammogram program that she oversaw at the Imaging Center." (RAB 12) It further asserts that Hager, as the Imaging Center Supervisor, was responsible to "ensure that all the necessary policies and licenses were in place to allow KRMC to perform self-referred mammograms" and "misled KRMC into believing that she had taken the steps necessary to obtain the proper authorization for KRMC to perform self-referred mammograms. (RAB 12-13) It claims that any remedy should be limited because KRMC "would have terminated Hager's employment if the issues related to the self-referred mammogram program that Hager implemented would have been known to KRMC while she was still employed." (RAB 13)

In essence, Respondent asks the Board to overturn the ALJ's credibility findings that KRMC knew of self-referred mammograms at the Imaging Center. 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 the Board that those credibility resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d

362 (3d Cir. 1951). Here, the ALJ rejected Respondent's claim, finding that Jennifer Campbell was not credible, and rejected Campbell's claim that KRMC was unaware of Hager's alleged failure to properly obtain the proper license. (ALJD at 16 fn. 37; 16:1-9) The ALJ found, based on credibility findings and documentary evidence provided by Respondent, that KRMC was aware of the self-referred mammograms by at least June 2013 when Hager emailed Campbell and others to list the physician as "unlisted" when performing self-referred mammograms. (ALJD at 16:1-9; RX 13) Further, Respondent failed to call witnesses who allegedly blamed Hager for self-referrals. (ALJD at 16:9-13) Instead of terminating Hager when KRMC was aware of the self-referred mammograms, Hager continued to work for KRMC for another six months and received no discipline related to the self-referred mammograms. (ALJD at 4:32-34; 9:22-33; 15:27)

The cases relied upon by Respondent are inapplicable. Contrary to the cases cited, Respondent was aware of the alleged misconduct during Hager's employment. It was aware of Hager's email, its content, and that it described the entries for the self-referred mammograms. (ALJD at 16:6-9) Cf. *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1277 (2005) (no reinstatement where the employer was aware of emails sent to personal email during employment, but was unaware until subpoena production at hearing that 22,000 pages of company records were attached to those emails); *Aldworth Co.*, 338 NLRB 137, 147 (2002) (no reinstatement where, at the time that a list was stolen the employer stated that it would fire the person who stole the list, but did not learn that the discriminatee was the individual who took the list until hearing)

In short, Respondent has failed to show that the ALJ's credibility findings should be overturned, and has not shown any circumstances to limit Hager's remedy based on the self-

referred mammograms or on the basis of the mammogram license. The ALJ correctly found that Respondent was aware of, and tolerated, the performance of self-referred mammograms at the Imaging Center. The ALJ recognized Respondent's knowledge, tolerance, and inaction, in her credibility findings which were supported by testimonial and documentary evidence. The Board should order Respondent to take whatever steps are necessary to make Hager whole for the unlawful termination, including reinstatement and backpay, without any limitation based on any feigned reliance on "misconduct" which it was aware of and tolerated for months without terminating or issuing discipline. Respondent should be ordered to reinstate Hager and make her whole consistent with the remedies in *Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

III. Conclusion

Respondent's Answering Brief to General Counsel's Exceptions, as discussed above, lacks merit and is not supported by legal precedent. It is respectfully requested that the Board should grant General Counsel's Exceptions and otherwise affirm the decision of the ALJ.

Dated Las Vegas, Nevada, this 22nd day of May 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of GENERAL COUNSEL'S REPLY BRIEF in KINGMAN HOSPITAL, INC., d/b/a KINGMAN REGIONAL MEDICAL CENTER, Case 28-CA-119729, was served by E-Gov, E-Filing, and E-Mail, on this 22nd day of May 2015, on the following:

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