

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
SAN FRANCISCO BRANCH OFFICE**

DHSC, LLC, d/b/a AFFINITY MEDICAL CENTER,  
COMMUNITY HEALTH SYSTEMS, INC., and/or  
COMMUNITY HEALTH SYSTEMS PROFESSIONAL  
SERVICES CORPORATION, LLC,  
a single employer and/or joint employers, et. al.

and

Cases 08-CA-117890 et al.

CALIFORNIA NURSES ASSOCIATION/NATIONAL  
NURSES ORGANIZING COMMITTEE (CNA/NNOC)

**ORDER DENYING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AND  
MOTION TO DISMISS**

On October 31, 2016, Respondent Barstow filed a Motion for Summary Judgment, Alternatively Motion to Dismiss ("Motion") paragraph 54 of the above-captioned complaint. The General Counsel filed an opposition on November 1, arguing the Motion was procedurally deficient, and asking to file a substantive response if the Motion was not dismissed on procedural grounds. I determined the Motion was not procedurally deficient, and provided the General Counsel and the Union until November 14 to file substantive responses. The General Counsel responded on the record at the hearing and the Union filed a written response. Respondent Barstow filed a reply.

Complaint allegation 54 states:

- (A) During the period from about June 13, 2013 to June 26, 2014, Respondent Barstow filed and maintained a Complaint against the CNA/NNOC in the United States District Court for the Central District of California (District Court) in the matter of Hospital of Barstow, Inc. vs. California Nurses Association/National Nurses Organizing Committee, case number 5:13-cv-01063(DTB) (lawsuit) in a cause of action arising under Section 301 of the Labor Management Relations Act that sought to sanction the CNA/NNOC for filing unfair labor practice charges and preclude the CNA/NNOC from filing or processing such charges.
- (B) (1) The lawsuit, described above in paragraph 54(A), sought to enforce an unwritten purported agreement to arbitrate between the CNA/NNOC and Respondent Barstow.

(2) The lawsuit, described above in paragraph 54(A), is baseless and failed to plead the existence of the purported unwritten agreement between the CNA/NNOC, as described above in paragraph 54(B)(1).

(3) The lawsuit, described above in paragraph 54(A), asserted that the CNA/NNOC breached the purported unwritten agreement to arbitrate, as described above in paragraph 54(B)(1), because the CNA/NNOC filed unfair labor practice charges with the Board.

(C) Respondent Barstow filed the lawsuit, described above in paragraphs 54(A) and 54(B) and its subparagraphs, with a retaliatory motive because it seeks to enjoin activity protected by the Act.

(D) The lawsuit, described above in paragraphs 54(A) and 54(B) and its subparagraphs, was baseless as set forth in paragraphs 54(B)(1) and (2).

(E) The lawsuit, described above in paragraphs 54(A) and 54(B) and its subparagraphs, had an unlawful objective as set forth in paragraph 54(B)(3).

Summary judgment is appropriate if there is “no genuine issue as to any material fact” and “the moving party is entitled to judgment as a matter of law.” *Security Walls, LLC*, 361 NLRB No. 29, slip op. at 1 (2014) (quoting *Conoco Chemicals Co.*, 275 NLRB 39, 40 (1985)). “In ruling on a motion to dismiss” “the Board construes the complaint in the light most favorable to the General Counsel, accepts all factual allegations as true, and determines whether the General Counsel can prove any set of facts in support of his claims that would entitle him to relief.” *Detroit Newspapers*, 330 NLRB 524 at 2 fn. 7 (2000).

Respondent Barstow argues the allegation has essentially been litigated by the District Court and the Board. The District Court Judge in the federal lawsuit declined the Union’s request for attorney’s fees in connection with her dismissal of the lawsuit for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), using a legal standard Barstow asserts is akin to the one applicable to complaint allegation 54. Respondent Barstow further asserts that the Board essentially rejected the allegation when it declined to grant litigation costs to the Union in *Hospital of Barstow*, 361 NLRB No. 34 (2014). In declining the Union’s request, the Board found Barstow’s defenses, including the defense that the parties had an oral agreement to submit disputes to arbitration, were “without merit” but “not entirely frivolous.”

The substantive framework applicable to allegation 54 derives from the Supreme Court’s decision in *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002), which holds that to establish an unfair labor practice, the General Counsel must prove a lawsuit is both baseless and retaliatory.

Turning first to the “baseless” element, “[A] lawsuit lacks a reasonable basis, or is ‘objectively baseless,’ if ‘no reasonable litigant could realistically expect success on the merits.’” *BE&K II*, 351 NLRB 451, 457 (2007) (quoting *Professional Real Estate Investors v. Columbia Pictures Industries*, 508 U.S. 49, 60 (1993)). The District Court’s decision to deny the Union’s request for attorney’s fees in connection with the dismissal of the complaint rested on a different and higher standard. Specifically, Judge Snyder noted that the level of misconduct required before a court appropriately imposes sanctions must meet a “high threshold.” She cited to

*Mendez v. County of San Bernardino*, 540 F.3d 1109, 1132, (9<sup>th</sup> Cir. 2008), which stated: “Even in a case where the district court described a litigant’s arguments as ‘totally frivolous,’ ‘outrageous,’ and ‘inexcusable’ and called his behavior ‘appalling, [the Ninth Circuit] nonetheless refused to equate this characterization of conduct as synonymous with a finding of bad faith.” She concluded that Barstow had not shown “the clear subjective bad faith” required for sanctions under the “demanding” standards for awarding attorneys’ fees. This is a higher standard than required under *BE&K*, and I therefore find the first *BE&K* element of allegation 54 was not litigated before the District Court.

With regard to the Board’s decision to deny the Union’s request for litigation costs in the decision cited above, the Board did not single out the defense related to the alleged oral agreement, but was considering all of the defenses. The Board has denied litigation expenses when at least some of a respondent’s defenses were not frivolous. See *Houston County Electric Cooperative*, 285 NLRB 1213 (1987). Moreover, the Board applied the “debatable rather than frivolous” standard articulated in *Heck’s*, 215 NLRB 765 (1974), which is similar to, but distinct from, the “baseless” standard in *BE&K*.

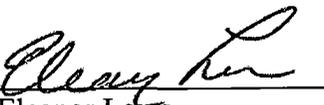
Turning to the second *BE&K* criterion, “the Board held that retaliatory motive may be inferred from, among other things, the facts that the lawsuit was filed in response to protected activity; that the employer-plaintiff bore animus toward the union-defendant and particularly toward its protected activity; and that the lawsuit obviously lacked merit.” *Milum Textile Services Co.*, 357 NLRB 2046, 2049 (2014), citing *Allied Mechanical Services*, 357 NLRB No. 1223 (2011). Neither the Court nor the Board passed on whether the lawsuit was retaliatory. The Board had no occasion to consider the lawsuit at all, much less whether or not it was retaliatory. The Court likewise did not apply *BE&K* or analogous criteria to determine whether the lawsuit was retaliatory. Notably, neither the Board nor the Court faced the issue raised in allegation 54, *i.e.*, whether the lawsuit violated Section 8(a)(1).

Though I find summary judgment and dismissal are unwarranted for allegation 54 as a whole, it is clear that, as of September 26, 2013, the second amended complaint alleged the existence of an “oral” agreement. Accordingly, the General Counsel will be asked to explain the factual basis for sub-paragraph 54(B)(2) at the outset of the hearing on January 30, 2017.

Accordingly, the motion is denied.

SO ORDERED.

Dated: December 5, 2016, San Francisco, California.

  
Eleanor Laws  
Administrative Law Judge

Served by email and U.S. Mail upon the following:

Counsel for the General Counsel – Region 8

Stephen Pincus, Esq.  
Aaron Sukert, Esq.

stephen.pincus@nlrb.gov  
aaron.sukert@nlrb.gov

Counsel for the General Counsel – Region 9

Daniel Goode, Esq.

daniel.Goode@nlrb.gov

Counsel for the General Counsel – Region 11

Ashley Banks, Esq.  
Timothy Mearns, Esq.  
Shannon Meares, Esq.

ashley.banks@nlrb.gov  
timothy.mearns@nlrb.gov  
shannon.meares@nlrb.gov

Counsel for the General Counsel – Region 21

Robert MacKay, Esq.

robert.mackay@nlrb.gov

Counsel for the General Counsel – Region 31

Carlos Gonzalez, Esq.  
Amanda Laufer, Esq.  
Joelle Mervin, Esq.

carlos.gonzalez@nlrb.gov  
amanda.laufer@nlrb.gov  
joelle.mervin@nlrb.gov

Counsel for the General Counsel – Region 32

Noah Garber, Esq.

noah.garber@nlrb.gov

Counsel for the Respondents

Bryan Carmody, Esq.  
Affinity, Barstow, Bluefield,  
Greenbrier, Fallbrook, Watsonville

bryancarmody@bellsouth.net

Carmen DiRienzo, Esq.  
Affinity, Barstow, Bluefield,  
Greenbrier, Fallbrook, Watsonville

carmen.dirienzo@hotmail.com

Donald Carmody, Esq.  
Affinity, Barstow, Bluefield,  
Greenbrier, Fallbrook, Watsonville

doncarmody@bellsouth.net

Andrew Lammers, Esq.

andrew.lammers316@gmail.com



Affinity, Barstow, Bluefield,  
Greenbrier, Fallbrook, Watsonville

Leonard Sachs, Esq.  
CHSI

lsachs@howardandhoward.com

Tracy Litzinger, Esq.  
CHSI

tlitzinger@howardandhoward.com

Robert Hudson, Esq.  
CHSPSC

rHUDSON@fbtlaw.com

Katherine R. Cloud, Esq.  
CHS Community Health Services, Inc.

kcloud@rwjplc.com

Steven Chesler, Esq.  
Kentucky River

sches415@hotmail.com

Michael D. Gifford, Esq.  
Michelle M. Wezner, Esq.

mgifford@howardandhoward.com  
mwezner@howardandhoward.com  
chsi-nlrh-hh@howardandhoward.com

Community Health Systems, Inc.

Patrick McCarthy, Esq.

pmccarthy@howardandhoward.com

Counsel for the Charging Parties

Jane Lawhon, Esq.  
NNOC, CNA, CNA/NNOC

jlawhon@calnurses.org

Brendan White Esq.  
NNOC, CNA, CNA/NNOC

bwhite@nationalnursesunited.org

Antonia Domingo, Esq.  
United Steelworkers

adomingo@usw.org

Nicole Naro, Esq.  
NNOC, CNA, CNA/NNOC

ndaro@nationalnursesunited.org

Micah Berul, Esq.  
NNOC

mberul@calnurses.org

Bruce A. Harland, Esq.

bharland@unioncounsel.net

SEIU

Jacob White, Esq.  
SEIU

[jwhite@unioncounsel.net](mailto:jwhite@unioncounsel.net)

THOMAS D. MILLER  
CHIEF EXECUTIVE OFFICER  
QUORUM HEALTH CORPORATION  
1573 MALLORY LANE, SUITE 100  
BRENTWOOD, TN 37027

HAL MCCARD  
REGISTERED AGENT  
QHCCS, LLC  
1573 MALLORY LANE, SUITE 100  
BRENTWOOD, TN 37027

[hal\\_mccard@quorumhealth.com](mailto:hal_mccard@quorumhealth.com)

C.E. (MICKEY) BILBREY  
PRESIDENT & CEO  
QUORUM HEALTH RESOURCES, LLC  
105 CONTINENTAL PLACE  
BRENTWOOD, TN 37027

**DiCrocco, Brian**

---

**From:** DiCrocco, Brian  
**Sent:** Monday, December 05, 2016 3:14 PM  
**To:** Sukert, Aaron; Laufer, Amanda W.; Andrew Lammers, Esq. R ; Antonia Domingo, Esq. CP; Banks, Ashley L.; Brendan White Esq. CP; Bruce A. Harland, Esq. CP ; Bryan Carmody, Esq. R; Gonzalez, Carlos; Carmen DiRienzo, Esq. R ; Goode, Daniel; Donald Carmody, Esq. R ; HAL MCCARD; Howard & Howard PLLC; Jacob White, Esq. CP; Jane Lawhon, Esq. CP; Mervin, Joelle; Katherine R. Cloud, Esq. R ; Leonard Sachs, Esq. R; Micah Berul, Esq. ; Michael D. Gifford, Esq. R; Michelle Wezner, Esq. ; Nicole Naro, Esq. CP; Garber, Noah; Patrick McCarthy, Esq. R; Robert Hudson, Esq. R; MacKay, Robert; Meares, Shannon R.; Pincus, Stephen M.; Steven Chesler, Esq. R; Mearns, Timothy; Tracy Litzinger, Esq. R  
**Subject:** 08-CA-117890 - AFFINITY: ORDER DENYING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS  
**Attachments:** Order denying Motion to Dismiss MSJ.pdf

Dear Counsel,

Please see the attached document.

**Brian C. DiCrocco, Legal Tech.**  
**NLRB Division of Judges San Francisco**  
**628-221-8821**