

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

**HF MANAGEMENT SERVICES, LLC
a/k/a HEALTHFIRST**

and

CASE 10-CA-186533

**LORI A. EBERHART
an Individual**

*Sarah S. Bencini, Esq. and Lisa Shearin, Esq.,
for the General Counsel.
Andrew P. Marks, (Littler Mendelson, P.C.)
of New York, New York, for the Respondent.*

DECISION

STATEMENT OF THE CASE

DONNA N. DAWSON, Administrative Law Judge. This case was tried in Winston-Salem, North Carolina on April 19, 2017. The Charging Party, Lori Eberhart filed the charge giving rise to this case on October 18, 2016. The General Counsel issued the complaint on January 13, 2017.

The General Counsel alleges that Respondent, by its Chief Executive Officer, Pat Wang, violated Section 8(a)(1) of the Act by sending all its employees the following email on July 25, 2016, G.C. Exh. 4.

To: All Employees
Subject: Senior Health Partners

As the third largest provider of Managed Long Term Care (MLTC) in the State, it's not surprising that we come under the microscope from time to time. As you may know, another article that is critical of our service authorization processes at Senior Health Partners was published today, this time in the Daily News.

You all know from personal experience that the health and well-being of our members is why we are here. For more than 20 years, Healthfirst has been bringing people together who believe in our mission to deliver quality, affordable healthcare to underserved New Yorkers. Nothing about that mission has changed.

5 We work in a very complex and highly-regulated industry. Managed Long Term Care is relatively new as a mandatory program and is still evolving. The State made the decision not all that long ago to convert these services from fee-for-service to managed care to try and get more consistency and quality in return for its investment of taxpayer dollars. The path to that outcome has not always been clear cut or obvious, though as you know, I am a believer in tolerating these transitions and doing the best we can because I think the programs will eventually settle down and be better for beneficiaries overall. In the meantime, we must constantly strive to ensure that our members have the services they need according to the rules of the program. In fact, we were already working with the member cited in the article to address her concerns and ensure a full assessment of her evolving needs.

15 In light of these recent articles and a program audit of SHP that was conducted this Spring, we should realistically be prepared for the possibility of additional press on our MLTC program. While I know that articles like this can be distressing or distracting, it is important to remain focused on our work, which is to serve our members. So rather than add to the distraction by commenting on each article, I want to encourage you to remember the fundamentals of our Trailblazer culture and to support our SHP colleagues who are caring, compassionate, hard-working professionals and may be feeling disheartened by these recent developments. On that note, please give a shout out to our SHP staff who work so hard for our members every day. I thank you.

25 Please remember that only designated Healthfirst representatives are permitted to speak with the press. If you are contacted, please refer the inquiry to Bill McCann (wmccann@healthfirst.org or 212-801-1657) or Cheri Ryan (cryan@healthfirst.org or 212-549-4515) immediately.

30 If you are unsure how to handle an inquiry from the public, you can contact Bill, Cheri, or your supervisor. Please also reach out to your supervisor, your HR Business Partner, or other communication channels with any questions or concerns you may have.

Thank you and best regards.

35 Pat Wang

(GC Exh. 4).

40 It is the following sentence in the email that the General Counsel contends violates Section 8(a) (1): “Please remember that only designated Healthfirst representatives are permitted to speak with the press.”

For the reasons stated below, I find that Respondent did not violate the Act as alleged.

45 On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

Although the test of how a reasonable person would read the email is an objective one, I note that there is no evidence that any employee, including the Charging Party read it or would read it to restrict talking to the press about wages, hours and other terms and conditions of employment.¹ I conclude that the General Counsel has not established that the email is so broad or ambiguous such that it would be so understood by a reasonable person. In this vein, I would distinguish this case from *Leather Center, Inc.*, 312 NLRB 521, 525 (1993), which is cited by the General Counsel. In *Leather Center* the rule against talking to the media was promulgated during an organizing campaign and accompanied by other rules evidencing antiunion animus.²

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The complaint is dismissed.

Dated, Washington D.C. September 14, 2017



Donna N. Dawson
Administrative Law Judge

¹ There is no dispute that the Charging Party, along with Respondent’s other employees, received the email in question. In fact, the Charging Party merely testified that she received the email, and had no further communications with anyone at Healthfirst about any of the issues discussed in the email. (Tr. 37).

² The General Counsel asks that I draw an adverse inference from the failure of Respondent to produce CEO Pat Wang at the hearing. I decline to do so despite the fact that I denied Respondent’s petition to revoke the General Counsel’s subpoena compelling Wang to appear at the hearing. Respondent admitted in its answer that Wang is its CEO and that she authored the July 25 email. It is highly unlikely that she would have testified, as the General Counsel alleges, that she drafted the email “in response to her concern that employees would seek the support from the press about their terms and conditions of employment.” This is particularly so in view of the fact that the General Counsel did not allege that Wang composed and sent the email pursuant to an illegal motive. Adverse witnesses rarely fall into a party’s hands like an overripe grape and make their case for them.

Moreover, an adverse inference may not be used as a substitute for affirmative evidence in establishing a prima facie case, *Laird Printing, Inc.*, 264 NLRB 369, 377 fn. 12 (1982); *NLRB v. Chester Valley, Inc.*, 652 F.2d 263, 271 (2d Cir. 1981). The General Counsel’s evidence in this case did not meet its initial burden in establishing a violation of the Act.

³ 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.