

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CAYUGA MEDICAL CENTER AT ITHACA,
INC.,

Petitioner,

Cases

03-CA-185233

03-CA-186047

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

**EMPLOYER'S EXCEPTIONS TO THE
ALJ'S DECISION AND ORDER**

Respectfully submitted,
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PRELIMINARY STATEMENT

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, as amended, Cayuga Medical Center at Ithaca, Inc. (“CMC”) takes exception to each of the following findings, legal conclusions, remedies, and orders contained in the January 8, 2018 decision of the Administrative Law Judge (“ALJ”).

EXCEPTIONS

1. The ALJ’s finding that CMC violated Section 8(a)(3) and (1) by suspending and discharging Anne Marshall and Loran Lamb for failing to perform the final critical safeguard in the blood transfusion process, the two-nurse bedside verification, and falsifying a medical document by indicating that they had. (ALJ Decision, pp. 46-51) (See Point One through Eight of CMC’s Brief in Support of its Exceptions for an explanation of why this determination was erroneous).

2. The ALJ’s finding that violation of the two-nurse bedside verification procedure was a widespread practice. (ALJ Decision, pp. 23-29) (See Point One of CMC’s Brief in Support of its Exceptions for an explanation of why this determination was erroneous).

3. The ALJ’s finding that “CMC chose to ignore that [the] failure to fully understand and comply with the transfusion policy was widespread” or a “routine and open practice.” (ALJ Decision, pp. 12, 23-29) (See Point One of CMC’s Brief in Support of its Exceptions for an explanation of why this determination was erroneous).

4. The ALJ’s finding that CMC should not have relied on the information from witness interviews with four ICU nurses who could not identify any specific instance of

when someone violated the all-important two-nurse bedside verification, by implying that CMC should have been aware that the nurses were lying because they did not want to be in trouble and CMC should have investigated further. (Decision, pp. 20-29, 50, 51) (See Point One of CMC's Brief in Support of its Exceptions for an explanation of why this determination was erroneous).

5. The ALJ's finding that there was confusion about the two-nurse bedside verification requirement. (ALJ Decision, pp. 37-39) (See Point One of CMC's Brief in Support of its Exceptions for an explanation of why this determination was erroneous).

6. The ALJ's finding that "CMC's claim that Marshall's and Lamb's failure to follow established procedures while performing and documenting a blood transfusion was so egregious as to necessitate their discharges is a ruse for its real motivation of removing Marshall's vocal support for unionization." (ALJ Decision, pp. 1-2) (See Point One through Eight of CMC's Brief in Support of its Exceptions for an explanation of why this determination was erroneous).

7. The ALJ's finding that the terminations were not supported by past practice even though the consistent past practice evidence shows that every employee who CMC learned has falsified the medical records has immediately been discharged, and even though the responsible nurse in the 2012 near miss incident involving a blood product administration was likewise promptly terminated. (ALJ Decision, pp. 39-46) (See Point Two of CMC's Brief in Support of its Exceptions for an explanation of why this determination was erroneous).

8. The ALJ's finding that every violation of the blood transfusion policy should be treated identically, specifically disregarding that the two-nurse bedside verification

procedure is the final and most critical safeguard that ensures the proper blood product is used, and that because this is the final safeguard from instant death, such practice is taught in nursing school, is established national practice, and used by all nurses who testified and at the previous employers of those nurses who testified on the subject. (ALJ Decision, pp. 8, 37-39, 44, fn. 10) (See Point Two, Section B of CMC's Brief in Support of its Exceptions for an explanation of why this determination was erroneous).

9. The ALJ's finding that because the patient ultimately received the correct blood, the patient was "never at risk in this particular situation," in other words, applying a No-Harm, No-Foul standard to blood transfusions. (ALJ Decision, pp. 15-16, 50) (See Point Three of CMC's Brief in Support of its Exceptions for an explanation of why this determination was erroneous).

10. The ALJ's finding that testimony from CMC management, Ames, Crumb and Rauper, about "being very upset with the severity of this situation [is] contrived." (ALJ Decision, p. 17) (See Point Three of CMC's Brief in Support of its Exceptions for an explanation of why this determination was erroneous).

11. The ALJ's finding that Daniel Sudilovsky, Chairman of the Pathology Laboratory of Medicine and Director of Laboratories, gave "partially contrived" testimony when explaining the "dire possible effects of this incident." (ALJ Decision, p. 31) (See Point Three, pp. 22-23 of CMC's Brief in Support of its Exceptions for an explanation of why this determination was erroneous).

12. The ALJ's finding that *Jackson Hospital Corp.*, 355 NLRB 643, 645 (2010), which highlights the heightened danger in blood transfusions as reason to support discharge, did not apply because Patient SF was actually given the correct unit of blood

and therefore was “never at risk in this particular situation.” (ALJ Decision pp. 15-16, 50) (See Point Three, pp. 21-22 of CMC’s Brief in Support of its Exceptions for an explanation of why this determination was erroneous).

13. The ALJ’s exclusion of evidence showing that the New York State Education Department’s Office of the Professions found sufficient evidence of professional misconduct to warrant prosecution of Ms. Marshall and Ms. Lamb. (ALJ Decision, p. 35, fn. 33) (See Point Three, p. 23 of CMC’s Brief in Support of its Exceptions for an explanation of why this determination was erroneous).

14. The ALJ’s unnecessary and highly insulting finding/attack on the patient for being medically and mentally fragile, and therefore inferring that the patient’s complaint was not legitimate. The ALJ’s finding goes so far as to state that the patient was in a “dark place” and this was the reason the patient made the complaint rather than Ms. Marshall’s obstinate refusal to perform the two-nurse bedside verification which the patient knew from previous experience was CMC policy. (ALJ Decision, pp. 47-48) (See Point Four of CMC’s Brief in Support of its Exceptions for an explanation of why this determination was erroneous).

15. The ALJ’s finding that Marshall’s dismissive attitude toward Patient SF was not a basis for which CMC could discipline Marshall because the Respondent did not provide evidence of past discipline of a nurse engaging in similar conduct. (ALJ Decision, p. 16) (See Point Four, pp. 25-26 of CMC’s Brief in Support of its Exceptions for an explanation of why this determination was erroneous).

16. The ALJ’s finding that CMC’s thorough and multi-layered investigation into a patient-initiated complaint was somehow evidence of a ruse rather than the behavior of

a responsible and prudent healthcare institution. (ALJ Decision, pp. 28-49) (See Point Five of CMC's Brief in Support of its Exceptions for an explanation of why this determination was erroneous).

17. The ALJ's finding that CMC should have conducted its internal investigation by "immediately contacting Marshall and Lamb" as soon as they learned of the incident and before conducting any further background investigation into the patient complaint. (ALJ Decision, pp. 48-40) (See Point Five, pp. 26-27 of CMC's Brief in Support of its Exceptions for an explanation of why this determination was erroneous).

18. The ALJ's finding that after learning about the 9/11/16 incident, "CMC embarked on an unprecedented investigation of the matter." (ALJ Decision, p. 7) (See Point Five of CMC's Brief in Support of its Exceptions for an explanation of why this determination was erroneous).

19. The ALJ's finding that draft termination letters and draft statements regarding the terminations was evidence of anti-union animus. (ALJ Decision, pp. 5., 35-37) (See Point Six of CMC's Brief in Support of its Exceptions for an explanation of why this determination was erroneous).

20. The ALJ's finding that the CMC's Just Cause Algorithm, which was designed to avoid staff feeling discouraged from reporting incidents regarding policies where there may be confusion, and that may ultimately result in reeducation rather than discipline, should somehow apply in this situation where: (1) both nurses admitted they were fully aware of the policy and chose to disregard it; and (2) the issue was not raised by a staff member confused about a policy but rather by a patient complaint. (ALJ

Decision, pp. 17, 36-37, 49) (See Point Seven of CMC's Brief in Support of its Exceptions for an explanation of why this determination was erroneous).

21. The ALJ's finding that Marshall and Lamb signing that they had performed the two-nurse bedside verification when they clearly had not and they knew they had not was not a falsification of a medical record but was rather an unintentional mistake made due to a lack of training. (ALJ Decision, pp. 10, 45-46) (See Point Seven of CMC's Brief in Support of Exceptions for an explanation of why this determination was erroneous).

22. The ALJ's finding that protected 8(c) free speech flyers regarding the perceived downsides of unionization distributed by CMC were evidence of anti-union animus. (ALJ Decision, pp. 5, 47) (See Point Eight of CMC's Brief in Support of its Exceptions for an explanation of why this determination was erroneous).

23. The ALJ's inconsistent finding that CMC's failure to contact Ms. Marshall while she was on vacation was further proof of the "ruse," but then finding that Ms. Marshall's refusal to answer CMC's numerous phone calls while she was on vacation was an example of Ms. Marshall's "strong-will" that the ALJ lauded and that led the ALJ to erroneously find that Ms. Marshall was a credible witness. (Decision, p. 48-49, p. 12, fn. 19) (See Point Five, pp. 26-27, & Point Six, p. 29, fn. 9 of CMC's Brief in Support of its Exceptions for an explanation of why this determination was erroneous).

24. The ALJ's finding that Shawn Newvine, a former employee who had stopped working at CMC two years before the date of the hearing, was not credible based on the fact that he couldn't remember certain details of unrelated CMC policies from years before, while at the same time rejecting his testimony concerning the all-important final two-nurse bedside verification which is not only CMC policy but also fundamental

nursing practice, knowledge and a National Safety Standard, because he seemed overconfident (ALJ Decision, p. 26, fn. 29) (See Point One, B, p. 16, fn. 6 of CMC's Brief in Support of its Exceptions for an explanation of why this determination was erroneous).

25. The ALJ's finding that Deborah Raupers was not credible based on the fact that she was CMC's representative at the hearing and had a chance to listen to other testimony before being called as a witness, and that she appeared nervous. (ALJ Decision, p. 33-34) (See Point One, B, p. 12, fn. 4 of CMC's Brief in Support of its Exceptions for an explanation of why this determination was erroneous).

26. The ALJ's finding that Scott Goldsmith was not credible because he knocked the microphone stand over and that this uneasiness was paradoxical with the demeanor of an employee who was honestly testifying on his employer's behalf. (ALJ Decision, p. 11, fn. 17) (See Point Four, p. 24, fn. 8 of CMC's Brief in Support of Exceptions for an explanation of why this determination was erroneous).

27. The ALJ's finding that CMC violated Section 8(a)(1) of the Act by one its supervisors/agents removing union literature posted on a CMC bulletin board. (ALJ Decision, pp. 6-7) (See Point Nine of CMC's Brief in Support of Exceptions for an explanation of why this determination was erroneous).

28. The ALJ's finding that clear Board precedent supported her finding that employees are privileged to post union flyers on any bulletin board throughout the facility. (ALJ Decision, p. 7) (See Point Nine of CMC's Brief in Support of Exceptions for an explanation of why this determination was erroneous).

29. The ALJ's entire remedy. (ALJ Decision, pp. 53-54) (See CMC's Brief in Support of its Exceptions for an explanation of why the ALJ's remedy was erroneous).

30. The ALJ's entire order. (ALJ Decision, p. 54-56) (See CMC's Brief in Support of its Exceptions for an explanation of why the ALJ's order was erroneous).

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