

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

**FIRST AMERICAN ENTERPRISES
D/B/A HERITAGE LAKESIDE**

and

**UNITED FOOD AND COMMERCIAL
WORKERS UNION LOCAL 1189**

**Cases 18-RC-212417
18-CA-211284
18-CA-212666
18-CA-21677**

**FIRST AMERICAN ENTERPRISES D/B/A HERITAGE LAKESIDE’S REPLY TO
GENERAL COUNSEL’S ANSWERING BRIEF**

INTRODUCTION

Petitioner United Food and Commercial Workers Union Local 1189 (“General Counsel”), by its Answering Brief, requests that the Board reject Respondent First American Enterprises’ (“First American”) exceptions, filed on March 7, 2019. For the reasons set forth below, the Board should disregard the General Counsel’s response and accept Respondents’ exceptions.

ARGUMENT

I. The August 2017 conversation between Derek Joswiak and Darla Buesser was not an unlawful “interrogation.”¹

The General Counsel attempts to create a controversy by inflating the facts and mischaracterizing the exchange at issue in stating that Joswiak “interrogated and coerced” Buesser. (GC Br. at 3.)² Merely claiming that the interaction between Joswiak and Buesser amounted to an unlawful interrogation does not make it so. The Board has determined that in

¹ The General Counsel concedes that, although it believes this conduct to constitute an unfair labor practice, it is not objectionable conduct upon which to overturn the election. (GC Br. at 7 n. 4.)

² Respondent will refer to the General Counsel’s Answering Brief to Respondent’s Exceptions to the Decision of the Administrative Law Judge as “GC Br” and to its own Brief in Support of Exceptions to the Administrative Law Judge’s Decision and Order as “FAE Br.”

order for an alleged interrogation “[t]o fall within the ambit of § 8(a)(1), either the words themselves or the context in which they are used must suggest an element of coercion or interference.” *In re Rossmore House*, 269 NLRB 1176, 2277 (quoting *Midwest Stock Exchange v. NLRB*, 635 F.2d 1255, 1267 (7th Cir. 1980)). Not only does the context indicate that this discussion was entirely placid and amicable, but the General Counsel does not allege any right with which Joswiak interfered or about which he coerced Buesser.

In other words, there is simply no evidence that Joswiak, by merely asking Buesser whether she had made certain comments to Hafele or informing her that he heard that this occurred, interfered with a protected activity. Joswiak neither asked nor demanded that she cease engaging in any conduct or instruct her to act in any manner so as to “interfere” with any action that Buesser intended or wanted to take related to Local 1189.³ (Tr. 78:14–20; 235:4–10.) The Act does not prohibit this kind of inquiry. *See Rossmore House*, 269 NLRB at 1177 (“If section 8(a)(1) of the Act deprived the employers of any right to ask non-coercive questions of their employees during such a campaign, the Act would directly collide with the Constitution. What the Act proscribes is only those instances of true ‘interrogation’ which tend to interfere with the employees’ right to organize.” (quoting *Graham Architectural Products v. NLRB*, 697 F.2d 534, 541 (3d Cir. 1983)).

Similarly, the General Counsel’s continued characterization of Joswiak’s inquiry as an “accusation” is also incorrect. (GC Br. at 3–6.) Contrary to the General Counsel’s insistence, it was not *Joswiak* making any accusation; rather, it was *Hafele*. (Tr. 79:3–4; 90:13–20; 167:19–

³ Even if Joswiak *did* believe that Buesser had made those comments and subsequently asked that Buesser not tell her coworkers that “the Union is the only thing that is going to save [their] job[s],” (Tr. 160:25–161:1), he would not have been prohibited from doing so. Joswiak, not Buesser, was in a position to make decisions regarding employment and, as an administrator, would have had an interest in ensuring that employees were not promulgating false information regarding someone else’s employment.

168:5.) Joswiak stated only that Hafele “fe[lt] that she could possibly lose her job if she [did not] join the Union” and that he “heard otherwise that people fe[lt] threatened that they’re going to lose their job if they [didn’t] join the Union.” (Tr. 234:6–13.) When Buesser denied that she had said anything of that nature, Joswiak told her that he believed her. (Tr. 234:13–16.) Buesser trusted that Joswiak was being genuine. (Tr. 90:21–23) (“Q: When Derek said he believed you, did you believe him? A: Yes.”) This evidence hardly suggests that Joswiak used an accusatory tone when speaking with Buesser or that *he* actually *accused* her of making those statements.

In an effort to disregard the evidence and the context in which this conversation occurred, the General Counsel emphasizes that the standard as articulated in *Rossmore House*, and applied by Judge Amchan, is an objective one. (GC Br. at 5.) While the test, which does not expressly contain a subjective element, does call for the evaluation of the totality of the circumstances surrounding the alleged interrogation, the Board in *Rossmore House* did not articulate that this test was to be analyzed pursuant to an objective standard, nor did it suggest that the subjective impression of the employee could not be considered. To be sure, it would lead to absurd results if an employee and employer had a discussion about a union-related matter that neither viewed as coercive or otherwise improper and did not restrain the employee from supporting (or interfere with her ability to support) the union, yet the employer could nonetheless be found to have committed an unfair labor practice. Buesser stated that she did not feel threatened and that she and Joswiak had and continue to have a good working relationship. (Tr. 89:19–90:2.) It is evident, therefore, given both the surrounding context and totality of the circumstances of this conversation—including the fact that Buesser did not feel threatened, intimidated, interfered with, or coerced—that this was not an “interrogation” in violation of the Act.

The General Counsel also argues that “Hafele never said” that “she would be fired if she did not join the Union.” (GC Br. at 3.) Judge Amchan also found “no evidence” that Hafele told Joswiak that Buesser “told her that she would be fired if she did not join the Union.” (Decision at 4:7–8); (GC Br. at 4.) It was because of this finding that he determined that it was “highly coercive” for Joswiak to have this conversation with Buesser and to discuss this “unfounded allegation” with Eric Everson, First American’s Senior Vice President of Operations. (Decision at 4:8–11); (GC Br. at 3–4.)

But this finding, and thus the determination of coercion, was incorrect. Hafele did believe her job was in jeopardy if she failed to join Local 1189 and testified to that belief multiple times at the hearing. Hafele informed Joswiak that Buesser told her that “the Union was going to be the only thing that was going to save [her] job.” (Tr. 234:12–14; 166: 13–18.) When testifying about her conversation with Buesser, Hafele used similar language: “[Buesser] had said that, you know, the Union is the only thing that is going to save your job, and when Heritage Manor comes over, we’re going to lose all seniority.” (Tr. 160:24–161:2.) Her testimony also indicates that this was the reason she signed up for Local 1189. (Tr. 161:9–13) (“Q: ... Were you personally concerned about your job when Heritage Manor came over? A: I was, yeah. Q: Did you decided to sign up for the Union then? A: I did.”)

Whether the word “fired” was actually used is irrelevant—though Buesser did recount that, during this discussion, “[Joswiak] said that [Hafele] came to him and said, [Buesser] said I could get fired if I didn’t join the Union.” (Tr. 87:22–25.) Perhaps Hafele misunderstood Buesser. But that would not change the fact that Joswiak had information directly from Hafele that her job was being threatened if she did not join Local 1189, and thus reasonably sought more information from Buesser.

Joswiak's awareness of this allegation, which was not unfounded, highlights why Judge Amchan's further conclusion that it was coercive for Joswiak to discuss the matter with Everson, and let Buesser know that he had done so, was incorrect. (Decision at 4:10–11.) Judge Amchan offers no explanation for why this was uniquely coercive, nor does General Counsel. (GC Br. 3–4.) And it also ignores that Joswiak also told Buesser that Everson did not think that she would threaten someone's job as Hafele had told him she had. (Tr. 75:22–76:6) At most, the entire situation is a misunderstanding and bears none of the hallmarks of a coercive interrogation in violation of the Act.

II. The neutral resident-centered policy existed prior to the time at which Local 1189 filed the petition and was not applied selectively or only in response to union-related discussions.

The General Counsel argues that employees were “not aware of” the resident-centered policy and that such policy did not exist until it was “typed up ... for the first time” in January 2018. (GC Br. at 7, 9.) The fact that a rule or policy is not reduced to writing does not mean that it does not exist. Many workplaces maintain a number of informal or unwritten policies related to dress code, internet usage, use of company phones, and a myriad of other subjects. Employers need not articulate their position on each and every matter in a handbook or other guidance document; to do so would be impractical and unwieldy. Many of these types of workplace norms are dictated by company culture and disbursed and maintained by employee conduct.

The situation may be different in the event employees are disciplined for a rule that was not clearly articulated in a handbook or other policy document, but this is not the case here. Quality care management (“QCM”) forms are not disciplinary. (Tr. 193:25–194:4.) Rather, they are educational in nature and are a means by which expectations regarding a variety of subjects are communicated to staff in a uniform manner. (Tr. 193:10–24; 194:2–8; 228:1–25.)

Regardless of the topic of the particular form, First American's policy is that QCM forms are to be signed by staff in accordance with state regulation (Tr. 228:8–25; 229:1–10.)

Despite the General Counsel's protestations to the contrary, employees were aware of the resident-centered policy, even if they did not recognize it by that name. If, as the General Counsel alleges, employees had no knowledge of a policy that required that their conversations on the floor involve and engage the residents, they would not have testified to being aware that there were certain topics that were inappropriate to discuss around the residents. (Tr. 143:14–18; 143:25–144:3.)

For example, LeAnn Stevens, a certified nursing assistant, testified that she would discuss "things that would interest the residents because they enjoyed conversation with [them] also. *As long as it was appropriate*, [they] talked about anything." (Tr. 101:4–14) (emphasis added). She also confirmed that she made "it a point to involve the residents in [her] conversations." (Tr. 101:25–102:1.) Importantly, she also stated that, prior to January 2018, she would talk about Local 1189 at work "anywhere that anyone wanted to talk about it. [They] talked anywhere. Usually—usually the break room when [they] had time to talk *as long as it wasn't in front of the residents*." (Tr. 102:3–11) (emphasis added). Stevens thus understood—prior to January of 2018—that she was to engage residents in dialogue and not discuss inappropriate matters in front of them, whether related to Local 1189 or not. Amber Morgan, a certified nursing aide, also agreed that certain subjects were off-limits for discussion in the presence of residents. (Tr. 143:14–18; 143:25–144:3.)

Curiously, however, Stevens also testified that the QCM form "completely prevented [her] from advocating for the Union." (Tr. 126:19–21.) Not only did the QCM form expressly indicate that employees were free to have non-resident-centered discussions on their breaks and

during their off time, (Tr. 125:21–126:2), but Stevens’s testimony on this point is entirely incredible. She (and other employees) continued to openly support Local 1189—without reprisal—and did not hesitate to express their opinions during “heated” meetings with management regarding unionization (Tr. 127:16–130:4.) Even more telling, Stevens served as a union observer. (Tr. 126:22–24.) Undoubtedly, someone who claims to have been so utterly deterred from supporting a union would not have engaged in these types of pro-union actions. Because Stevens’s statements regarding the alleged affect that the QCM form had on her ability to support Local 1189 is not reliable, it should be disregarded.

Stevens and Morgan, whom the General Counsel called to testify, confirmed the prior existence of the resident-centered policy. The General Counsel offers no explanation as to how—despite the absence of a *written* policy—the employees came to that understanding. A more reasonable explanation, as noted above, is that staff had a general understanding that they were to involve the residents in their conversations and that, as a consequence, there were naturally certain subjects that were not suitable. The QCM form at issue, therefore, reminded employees that conversations that could not be extended to the residents should occur during “breaks or off time.” (Tr. 125:24–126:1.) Accordingly, the General Counsel’s claims that the policy was “disseminated” or “promulgated” for the first time in January of 2018 are incorrect.

The General Counsel also attempts to use First American’s lawful actions as evidence of anti-union animus which, as they insist, necessarily lead to the conclusion that the QCM form was issued in response to union activity. (GC Br. at 10–13); (Decision at 5:25–28.) That an employer disfavors unionization and uses lawful means to communicate this position to employees can somehow be used as evidence against it to establish that it committed unrelated unfair labor practices would be irrational. To allow an employer to post a lawful flyer or hold

captive audience meetings, while at the same time permitting such actions to substantiate allegations of an unfair labor practice would be to nullify those protections granted by the Act.

Neither Judge Amchan nor the General Counsel provide support for the assertion that employers are required to justify each action that it takes in maintaining pre-existing rules or policies. (GC Br. 9–10.) As discussed above, the resident-centered policy was not “promulgated ... a week after the representation petition was filed.” (Decision at 5 n. 6.) The case cited by Judge Amchan in support of his decision in this regard is factually dissimilar to the case at issue. *See Shore & Ocean Services, Inc.*, 307 NLRB 1051 (1992). In that case, the employer *did* grant certain benefits to employees after learning the petition had been filed; those facts were undisputed. The Board found that, absent a sufficient explanation, the timing of the benefit gave “rise to an inference of improper motivation and interference with employee rights.” *Id.* Unlike that case, First American did not implement a new rule during this period; rather, it reminded employees (again, without disciplinary consequences or a threat of such consequences if employees continued to have inappropriate conversations) of a pre-existing policy.

Even though Judge Amchan erroneously discredited Director of Nursing Kristina Taylor’s testimony on this point, (FAE Br. at 13–15), the fact remains that other employees testified that they were generally aware that there were topics of conversation—even aside from those involving HIPAA-protected information or the “employee’s sex life”—that they should avoid with residents. (GC Br. at 8); (Decision at 6:11–13.) The Board does not take the position that all allegations of employer misconduct for which there is conflicting testimony or other evidence should be ruled in favor of the union. Instead, Judge Amchan’s task was to assess the evidence presented by both parties to determine whether the charging party—here, the General Counsel—has met its burden to establish that a violation of the Act occurred. *See Blue Flash*

Express, Inc., 109 NLRB 591, 591–92 (1954) (refusing to overturn the trial examiner’s findings, when presented with “a sharp conflict in testimony” and where witness testimony was such that “there was no inconsistency in the testimony of any witnesses which would enable the Trial Examiner to determine who was telling the truth,” that the General Counsel did not meet its burden of proof). The General Counsel failed to present more than speculation and inferential arguments with respect to the QCM form and the resident-centered policy, (FAE Br. at 15), and therefore, has not established that a violation occurred.⁴

III. The policy regarding the confidentiality of information contained in employees’ personnel files cannot be “reasonably interpreted” to restrict or limit employees’ Section 7 rights.⁵

Judge Amchan concluded that the “likely understanding of this rule would be that employees are not to discuss their wages or other employees’ wages.” (Decision at 7:35–36); *see also* (GC Br. at 16.) Whether employees would “likely understand” this policy to prohibit these actions is not the relevant inquiry. *See The Boeing Company*, 365 NLRB No. 154, 2017 BL 447608, at *4. Under the standard adopted by the Board in *Boeing*, “when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.” *Id.*

⁴ Even if an unfair labor practice occurs during the critical period, the Board will not direct that a new election take place when “it is virtually impossible to conclude that the misconduct could have affected the election results.” (Decision at 6:22–23.) “[T]he number of violations, their severity, the extent of dissemination, [and] the size of the unit” are among the factors considered. (Decision at 6:24–26 (*citing Clark Equipment Co.*, 278 NLRB 498, 505 (1996))); (GC Br. at 15.) The evidence does not suggest that the distribution of the QCM form actually inhibited any employee from voting in favor of unionization, there was only one allegation of misconduct related to the resident-centered policy, and no employee was coerced, interrogated, or terminated as a result of this policy. *See also* (FAE Br. at 16.)

⁵ The General Counsel concedes that, although it believes this conduct to constitute an unfair labor practice, it is not objectionable conduct upon which to overturn the election. (GC Br. at 16 n. 8.)

Given the context in which the policy at issue is included within the handbook, a rational employee would not reasonably interpret the prohibition on disseminating sensitive personal information about employees to prohibit her from discussing her wages with other employees. (FAE Br. at 17–18.) Furthermore, both Judge Amchan and the General Counsel ignore the realities of how employee handbooks are used in a majority of workplace settings. They maintain that, because First American did not expressly state that this particular policy was “applicable only to office personnel” and that the policy was contained within a handbook “applicable to all employees,” staff would necessarily interpret this policy as applying to a discussion regarding their own wages. (Decision at 7:25– 27); *see also* (GC Br. at 16.) Employee handbooks almost always contain information that is not applicable to every employee. First American’s handbook, for example, contains policies regarding overtime payment, but it does not prepare separate handbooks for exempt and non-exempt employees.

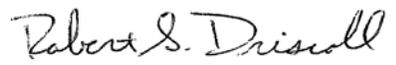
CONCLUSION

For the foregoing reasons, First American respectfully requests that the Board reverse the findings and conclusions of Judge Amchan with respect to the allegations contained in paragraphs 5(a)(i); 5(e), (g), (h); and 5(i) of the Complaint and rule that the results of the February 1, 2018 election should stand.

Dated this 4th day of April, 2019.

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