

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

COLUMBIA SUSSEX MANAGEMENT,
LLC D/B/A ANCHORAGE HILTON

and

UNITE HERE! LOCAL 878, AFL-CIO

Case 19-CA-215741

**RESPONDENT'S ANSWERING BRIEF TO CHARGING PARTY'S EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Pursuant to Section 102.46(b), Respondent CP Anchorage Hotel 2, LLC d/b/a Anchorage Hilton ("Respondent") hereby answers the Charging Party's Exceptions to the Decision of the Administrative Law Judge ("ALJ") as follows:

Statement of the Case

This case involves the lawful termination of Norberto (Bill) Rosario from his employment at the hotel known as the Anchorage Hilton or Hilton Anchorage. Mr. Rosario was terminated after he intentionally and willfully chose not to follow his employer's well known protocol for reporting suspected mold (a protocol he was well aware of and had followed before) and covering it up so that potential mold could not be timely discovered and remediated by others. This case went to hearing because the Charging Party (or referring to herein as Union) and Mr. Rosario argued that Mr. Rosario was only doing what someone (never identified) told him to do and the "real" reason he was terminated was because he took photos of the suspected mold and provided them to the Charging Party (photos the union later used in its ongoing boycotting campaign against the Anchorage Hilton).

As the ALJ's Decision explains, "Rosario attempted at hearing to develop a

counternarrative that legitimized his failure to comply with [the protocol]. .. This testimony, however, was disjointed to the point of incoherence.” (ALJ Decision: 5:26-39). As the ALJ noted, Mr. Rosario “appeared to struggle through this testimony, his noticeably distraught comportment suggesting that he had not convinced himself of his own story.” *Id.*¹ Presumably, he could not – because it was not credible and a far cry from what had occurred.

Mr. Rosario knowingly and blatantly violated one of his employer’s most known safety protocols concerning an issue that was being taken seriously by Anchorage Hilton’s management. At the time this incident occurred, the Anchorage Hilton was going to great lengths to timely remediate suspected mold and any concerning conditions. Mr. Rosario was the only employee known to management to have intentionally violated the reporting protocol and to do so in such a blatant and deceptive way. The decision to terminate his employment was made because of the seriousness of his offense and the fact that there was no indication that such conduct would not occur again because when the incident was investigated Mr. Rosario did not take responsibility for his actions or acknowledge that the conduct was wrong. At hearing, he still would not.

The only relevance the photos had to the entire matter is that they were how Anchorage Hilton ultimately learned of the suspected mold. Once management saw the photos (months after they were taken), they discovered the suspected mold and investigated the matter to figure out why it had not been timely remedied. The fact that Mr. Rosario took or even shared the photos had no bearing on the decision to terminate his employment.

The Charging Party attempts to undermine the ALJ’s succinct yet thorough and well-

¹ See also ALJ Decision, 16, n. 18 which refers to further credibility issues with Mr. Rosario’s testimony at hearing.

reasoned and balanced findings of fact by suggesting that the ALJ somehow “failed” or “ignored” to take into account certain evidence or arguments raised by the Charging Party. For example, they try to suggest that the ALJ should have considered whether the level of discipline imposed was “consistent” or if the ALJ committed err by “ignoring” the fact that Mr. Rosario may have engaged in protected activity by denying that he gave the photos at issue to the Charging Party. Yet, the fatal flaw to the Charging Party’s exceptions is that there was no evidence of record for the ALJ to “fail” to take into consideration. There has been no one else that has engaged in the same willful and deceptive conduct as Mr. Rosario. There are no comparator cases to evaluate whether or not the Respondent’s act of termination was “consistent” with other reactions to similar situations. Similarly, there was no “ignoring” of key evidence. Mr. Rosario was not terminated for providing the Charging Party with the photographs or denying that he gave the photographs to the Charging Party. Mr. Rosario was terminated for his failure to follow the protocol and report the mold and intentionally hiding it so it could not be timely remedied.

There is no basis for a different outcome from the ALJ’s Decision. Mr. Rosario engaged in misconduct. His own testimony failed to exonerate him. Moreover, Mr. Rosario’s misconduct did not occur within the course of protected activity.

Background Facts

A. Anchorage Hilton’s Commitment to Addressing Mold

Since at least 2014, Anchorage Hilton has made a concerted effort to address the natural consequences of an aging building that has experienced some water damage over several decades

of harsh Alaska winters and many earthquakes.² However, Anchorage Hilton made a conscious effort to proceed with any necessary repair work in a way that also kept the safety of its guests and employees at the front and center.³ Consistent with these efforts, Anchorage Hilton developed a protocol and well-established practice that its employees were not allowed to disturb any of the material in or on the walls that may contain asbestos, lead, mold or any other potentially hazardous or unsafe materials.⁴ It made it clear to its employees through regular formal and informal training that only outside vendors – certified and skilled to perform testing and/or remedial work required – could perform work that would involve any potential unsafe material.⁵ Because asbestos and lead is significantly regulated by OSHA, Anchorage Hilton’s written policies and trainings were primarily focused on those two substances.⁶ Yet, the undisputed evidence presented at hearing is that employees were also advised that the policies and protocol applied to mold.⁷ The only substance employees were allowed to clean was mildew found on shower or tub tiles that could be easily wiped down; a task known as a “tile touch up”.⁸ But, even when that work was allowed – it was specifically limited and governed by a written protocol that required the use of a specific product and drying efforts.⁹

² Hearing Transcript (“T”) at 698 – 724. Citations to the transcript will be designated with a “T” and references to exhibits will be “JT” for joint exhibits, “GC” for exhibits introduced at hearing by General Counsel, “R” for exhibits introduced by Respondent and “CP” for exhibits introduced by Charging Party.

³ T at 728-729 (Mr. Bhattacharyya).

⁴ T at 626 -628 (Mr. Best); 724 -728 (Mr. Bhattacharyya), 858 (Mr. Tellis), 887-889 (Mr. Rader), 920-922 (Matthew Clark).

⁵ *Id.*; T at 860 (Mr. Rader); *see also* T at 634 and 700 (Mr. Fike).

⁶ GC 31, 38 and R 25, 26 and 46.

⁷ *See* T at 626 -628 (Mr. Best); 724 -728 (Mr. Bhattacharyya), 858 (Mr. Tellis), 887-889 (Mr. Rader), 920-922 (Matthew Clark).

⁸ T at 321 and 325 (Mr. Rosario) and 990 -991 (Mr. Rader).

⁹ R 11 (written policy for mildew removal in place in 2015). As Mr. Best testified, shortly after he Employer’s Answering Brief Charging Party’s Exceptions

Under no circumstances were employees ever allowed to cover up substance believed to be mold found under torn or unglued wallpaper by just wiping the exposed wall down and gluing the wallpaper back.¹⁰

B. Management’s Lawful Investigation Uncovered a Failure to Report Mold

Thus, when management of Anchorage Hilton learned that is exactly what a maintenance employee named Norberto (Bill) Rosario (Mr. Rosario) did in two separate guest rooms (Rooms 534 and 826) on or about August 19, 2017 and that he did not report the potential mold to anyone within management even though he was fully aware of his obligation to do so, his employment was terminated.¹¹

Contrary to the allegations of the General Counsel, Anchorage Hilton did not commence its investigation in an effort to gather evidence against Mr. Rosario. Mr. Bhattacharyya explained that when the photos came to their attention via an email sent by UNITE HERE! and subsequently forwarded to them by another Hilton property (unaffiliated with Columbia Sussex Management).¹² Upon receipt, he did not immediately jump to the presumption that the photos were taken or shared with the Union by Mr. Rosario. His first step was to cross reference the

became the Chief Engineer at the end of 2015, he stopped the use of the Zep product described in the written policy. T at 632-633 (Mr. Best). While Mr. Rosario testified that he and others continued to use the product – or a similar one - on “mold” the interpreter’s use of the term “mold” was incorrect. As both the interpreter and Mr. Rosario explained, “mildew”, “mold” and “fungus” are referred to interchangeably in Spanish. T at 309 -311 (Mr. Rosario and Interpreter). Yet, as Mr. Fike (the outside vendor that completed the remediation work at Anchorage Hilton as well as 100s of other hotels throughout the Western U.S.), mildew and mold are not the same substance. See T at 708-709 (Fike – his company was called to address mold not mildew). There was no dispute that the protocol in place at Anchorage Hilton for mold was that no employee was allowed to touch or clean it. See T at 626 -628 (Mr. Best); 724 -728 (Mr. Bhattacharyya), 858 (Mr. Tellis), 887-889 (Mr. Rader), 920-922 (Matthew Clark). Even Mr. Rosario admitted that in his investigation interview. See JT 6 at 8-9.

¹⁰ *Id.*

¹¹ JT 2 and 3.

¹² See R 28 (email sent 9/25/17 by UNITE HERE! forwarded on 9/26/17).

room numbers against the binder of testing and remediation paperwork kept by management to see if the rooms had been identified as having a presence of any possible mold.¹³ Mr. Bhattacharyya did this because neither recognized the room numbers as one of the rooms that had been previously identified.¹⁴ When he learned there were no written records – they asked the other managers that would be in a position to have had notice of the condition of the rooms.¹⁵ All denied any personal knowledge or notice of the alleged conditions.¹⁶ A personal inspection of the rooms was then done at which time the suspected mold was discovered in both rooms.¹⁷ It was also clear that the mold had been covered up.¹⁸ It was at this point that the investigation shifted from determining whether the allegations of mold in the room were accurate to determining who covered up the mold.¹⁹

In furtherance of trying to establish that information, management started by pulling the key interrogatory report for the two rooms for the month of August 2017 and a few days before and after.²⁰ Mr. Bhattacharyya then went through the reports to see who had been accessing the room, how many times, how often, if there were any consistencies between the two reports, and so forth.²¹ His review looked at *all* employees that accessed the room – including employees

¹³ T 760- 761 (Mr. Bhattacharyya).

¹⁴ *Id.*

¹⁵ *Id.* at 761-762.

¹⁶ *Id.*

¹⁷ *Id.* 762-768.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 768-778.

²¹ *Id.*

that were supervisors and not members of the bargaining unit.²² The handwritten notes on these reports clearly show that the investigation began with a wide lens and no one was targeted.²³ Mr. Bhattacharyya explained that the reports helped him narrow his investigation and he planned to continue his analysis of the data contained in the reports and conduct his investigation from there but then while he and Mr. Rader were at lunch, Mr. Rader released that one of the photos he had opened from the email circulated had automatically saved in his phone in his August 2017 photo folder – not in the photo for September 2017.²⁴ This led him to pull up the photo of Room 534 on his desktop back in his office and there he saw metadata the indicated the photo had been taken on August 19, 2017.²⁵ Neither Mr. Rader nor Mr. Bhattacharyya intentionally went searching for this information – it just came to Mr. Rader’s attention by happen stance.²⁶ The way in which the metadata information came to their attention is direct evidence that the focus of the investigation was not to find out who took the photos but instead whether the mold had been known to someone on staff and not just ignored but covered up.

The investigation focus only included efforts to determine who took the photos because that is where the evidence led them and ultimately they reasonably concluded that determining who took the photos would naturally help narrow down the real question at hand – who failed to report and covered up the concern.

Using the metadata along with the key interrogatory reports – Mr. Bhattacharyya and Mr. Rader determined that the most likely person to have been in the room at the time in question and

²² *Id.*

²³ R 29 and 30. T at 769-779.

²⁴ T at 779-780 (Mr. Bhattacharyya) and 900-902 (Mr. Rader).

²⁵ *Id.*

²⁶ *Id.*

have the skills and tools to re-glue the wallpaper was Mr. Rosario.²⁷ Thus, they requested an interview with him. It was through the interview that they confirmed that Mr. Rosario knew about the presence of potential mold and that he was the one to re-glue the wallpaper.²⁸ But, because Mr. Rosario denied he took the photos, stated that he was told to cover it up by a housekeeping supervisor (Zenaida Del Pilar) and claimed he reported the rooms to Mr. Best, their investigation continued.²⁹ They went back and asked Mr. Best to confirm that he had not been notified or called by Mr. Rosario about the rooms, checked the schedule and confirmed that Ms. Del Pilar had not worked the day in question (August 19) and interviewed Mr. Clark to determine if he had seen the potential mold or took the photos.³⁰ All of Mr. Rosario's alleged excuses were contradicted by the investigation's findings.³¹

C. Mr. Rosario's Testimony Was Not Credible

During his interview, Mr. Rosario's story changed multiple times regarding his involvement in the two guestrooms at issue.³² First he said he knew "nothing about them" or the photos.³³ He then admitted that he had been in the rooms, seen the mold but intentionally glued the wallpaper back.³⁴ In an effort to come up with an excuse for his wrongful conduct – he claims a housekeeping supervisor told him to do it. But, the housekeeping supervisor he named

²⁷ T at 790-791 (Mr. Bhattacharyya).

²⁸ *Id.*

²⁹ *See* JT 6 and T at 791, 800 – 811 (Mr. Bhattacharyya) and R 37.

³⁰ *Id.*

³¹ *Id.*

³² *See* JT 6.

³³ JT at 16.

³⁴ JT at 16-18.

had not even been working that day.³⁵ After first denying that he knew anything about the rooms – he then claimed that he called Mr. Best to report the suspected mold “that night” (which would have been on Saturday night when neither he nor Mr. Best were working). His story changed yet again – at the hearing – at which time he claimed that he did not report the mold to Mr. Best that night but instead – days later on Tuesday, August 22, 2017 – the same day he texted the photos to Local 878.³⁶ Coincidentally Mr. Rosario’s testimony concerning how and when he allegedly reported the mold to Mr. Best only changed after Anchorage Hilton produced Mr. Best’s phone records which show that no call was ever made on August 19, 2017 to Mr. Best by Mr. Rosario either from his personal cell phone or any work phone or anytime within the days immediately thereafter. His story also changed after the Anchorage Hilton produced Mr. Best’s schedule for that week.³⁷

D. Termination was Appropriate

Given the extensive efforts by management to eradicate the issue of suspected mold in the buildings and the history of union activity related to suspected mold at the property, such conduct of failing to report and intentionally covering up suspected mold (which is a violation of the standards of conduct)³⁸ could not be tolerated by management. If Anchorage Hilton had knowingly allowed such a cover-up or if a non-bargaining unit member had engaged in the same conduct as Mr. Rosario, neither Local 878 nor its international parent organization which has also been very vocal on these issues, UNITE HERE!, would have remained silent or agreed such conduct was acceptable.

³⁵ T at 1059 (Ms. Del Pilar) and R 34.

³⁶ See generally (Mr. Rosario).

³⁷ See R 34.

³⁸ R. 41 at 22 (#9, 18 and 23)

Anchorage Hilton did exactly what Local 878 and UNITE HERE! expected the employer to do – it took the issue of potential mold in its workplace and guestrooms seriously and held its employee accountable for ensuring a zero tolerance for any suspected mold found in the hotel.

No other employee has been known to engage in the same or similar conduct as Mr. Rosario and no one (other than Mr. Rosario) testified that such conduct was acceptable or allowed. But, when asked during management’s investigation into the matter what the employer’s protocol and expectation was for addressing suspected mold, Mr. Rosario agreed that no employee was allowed to touch any potential mold. He confirmed that the clear expectation throughout the entire maintenance department and management line was that employees were to report any suspected mold to the Chief Engineer – Mr. Rosario’s supervisor – so that the room could be locked down and addressed.

Through this present legal proceeding, the General Counsel and the Charging Party UNITE HERE! Local 878 (“Local 878”) asks this tribunal to ignore Mr. Rosario’s egregious and intentional gross misconduct and instead conclude that Anchorage Hilton decided to terminate Mr. Rosario – a long term employee – in an effort to retaliate him for his protected activity. Specifically, their allegation is that Anchorage Hilton terminated Mr. Rosario for providing photos of the suspected mold in the two Rooms to Local 878 and UNITE HERE!. But, the evidence presented by the parties over the course of five hearing days undeniably establishes by a preponderance of evidence that Mr. Rosario was not targeted for his protected activity and it was not his protected activity that was the focus of management’s investigation. The focus of management’s investigative efforts was the failure by someone on its team to not only fail to report the presence of suspected mold in two guest rooms but intentionally hide it

from discovery.³⁹

Legal Analysis

1. Charging Party's Argument that the ALJ "refused" to evaluate "same level of discipline"

The Charging Party argues that the ALJ "refused" to evaluate whether Mr. Rosario would have received the same level of discipline had he not engaged in the alleged protected activity. The only alleged protected activity in this case is the taking and sharing of the photographs. Mr. Rosario's covering up of the suspected mold was in no way protected. Since the ALJ concluded that the reason Mr. Rosario was terminated was because he did engage in the blatant act of failing to report the suspected mold and thereafter intentionally covering up so it could not be timely remedied was the reason for his termination, there was no need or requirement to evaluate if the same discipline would have occurred if he had not taken the photos. The photos are not what led to his termination. Thus, no further analysis is needed. It was already done. The ALJ did not "refuse" to engage in this analysis. The ALJ evaluated what conduct at issue led to his termination.

The ALJ correctly refused to "second guess the level of discipline imposed on [Mr.] Rosario, based on his tenure and value to the hotel" correctly holding that it is not her role to substitute in for management's business judgment when there is no evidence of disparate treatment. (ALJ Decision p. 12:23-39). This is an appropriate line for the ALJ to respect based upon well-established legal precedent. (see case law cited at ALJ Decision p.23:39). The

³⁹ T at 635-636 (Mr. Best explained that they had "to look for it" when they went up to the rooms to try and see if there was mold present as illustrated by the photos. He and Mr. Bhattacharyya had to "pull the wallpaper back away from the toilet" because it had been glued back down.

Charging Party's legal argument does not establish that this was not the correct approach under applicable law.

2. Charging Party's Argument that the ALJ "ignored" evidence of "inconsistent enforcement" and "absences of comparator discipline"

There was no comparator evidence for the ALJ to ignore. The undisputed evidence at hearing was that there were no other employees that engaged in the same misconduct as Mr. Rosario. No other employee had been accused or found to have intentionally or even negligently covered up potential mold. There was no "inconsistent enforcement" to consider and there was no reason to give any weight to the lack of any comparator discipline because there was an explanation for why none was presented. None existed. (ALJ Decision p. 18-28). Without any evidence to have "ignored", there can be no basis for this exception. The Charging Party's efforts to make this exception carry some weight is nothing more than an attempt at smoke and mirrors.

3. Charging Party's Argument that the ALJ Should Have Concluded that Mr. Rosario Was Terminated for Taking Photos

The ALJ rightfully concluded that Mr. Rosario was terminated for covering up the suspected mold with wallpaper. There is no evidence that he was terminated for "denying he had taken the photographs". The testimony presented was that even if he had admitted taking the photographs, his termination still would have occurred. Thus, whether or not the act of taking the photos was wholly irrelevant and has no bearing on any legal analysis under *Wright Line* or *Burnup & Sims*.

Conclusion

Despite the Charging Party's very elaborate attempts to try and identify some err upon which they can unravel the ALJ's Decision, there just is not one to be found. There is no merit to the exceptions raised just as there was no basis for the underlying claims pursued at hearing.

There is no evidence that Mr. Rosario was terminated for engaging in protected activity. He was terminated for clear misconduct - misconduct that was not disproved at hearing but only further established. His termination was a valid exercise of management's rights and there is no legal basis for this proceeding to grant Mr. Rosario or the Charging Party any relief from the same. The ALJ's Decision should be affirmed.

Respectfully submitted this 3rd day of January, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of January, 2020, I served a full, true and correct copy of the foregoing by email to:

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