

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

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**DIGNITY HEALTH d/b/a MERCY  
GILBERT MEDICAL CENTER,**

**Respondent,**

**and**

**Case No.     28-CA-229160  
                  28-CA-238137**

**SERVICE EMPLOYEES INTERNATIONAL  
UNION – UNITED HEALTHCARE WORKERS  
WEST,**

**Charging Party**

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**BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE  
ADMINISTRATIVE LAW JUDGE  
BY DIGNITY HEALTH d/b/a MERCY GILBERT MEDICAL CENTER**

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## **I. INTRODUCTION AND STATEMENT OF THE CASE**

The Consolidated Complaint in this case involves claims by a single employee of Dignity Health d/b/a Mercy Gilbert Medical Center (“MGMC” or the “Hospital”), Jon Paul Placencio, alleging violations of the National Labor Relations Act (the “Act”) in connection with an organizing campaign in which he participated on behalf of the Charging Party, Service Employees International Union – United Healthcare Workers West (the “Union”). General Counsel Exhibit (“GC Exh.”) 1(l) (the “Complaint”). In pertinent part, the Complaint alleges that during a staff meeting on August 28, 2018, Emergency Department Director Dawn Kimball created the impression of surveillance of organizing activities by identifying Mr. Placencio as someone who was contacted by the Union. Complaint ¶5(a). The Complaint also alleges that Respiratory Therapy Manager Joshua Harrison interrogated Mr. Placencio about his Union activities and support during a conversation on September 27, 2018. Complaint ¶5(b). MGMC timely answered denying any unfair labor practices occurred. GC Exh. 1(n).

Following a hearing on July 23 and 24, 2019, Administrative Law Judge Ariel L. Sotolongo (ALJ) rendered his Decision on March 19, 2020. JD(SF)-09-20 (ALJD). In pertinent part, the ALJ found merit in the Complaint allegations above. In particular, he found that during the August 28 meeting, Ms. Kimball discussed staff complaints about unwelcome contacts by organizers, provided staff assurances that they have a right to join a union, and offered her personal support for union membership. The ALJ also found she pointed toward Mr. Placencio and said she knew the Union contacted him. ALJD p. 4. Despite the absence of coercion during the meeting, and despite Mr. Placencio’s known Union advocacy, the ALJ found that Ms. Kimball unlawfully created the impression that Mr. Placencio’s protected, concerted activities were under surveillance in violation of Section 8(a)(1) of the Act. ALJD p. 13. The ALJ also found that on September 27, Mr. Harrison asked Mr. Placencio whether he had heard about the

Union, and when Mr. Placencio denied it, repeatedly asked him whether he was the same “JP” whom staff in his department reported was involved in organizing. ALJD p. 6. The ALJ incorrectly concluded that by doing so, Mr. Harrison engaged in unlawful interrogation of Mr. Placencio’s protected, concerted activities in violation of Section 8(a)(1) of the Act. ALJD p. 14.

These aspects of the Decision and the ALJ’s recommended Order, ALJD pp. 19-20, are factually unfounded and conflict with controlling Board authorities.<sup>1</sup> During discussions protected by Section 8(c) of the Act, MGMC and its representatives have consistently provided factual information to staff and reassured them about their rights to participate in, or choose not to participate in an organizing process. Ms. Kimball did not create the impression that any employee’s concerted activities were under surveillance or that any monitoring whatsoever was occurring; she reported factual information that had lawfully been shared with her without interference with any protected rights. Mr. Harrison likewise did not engage in unlawful interrogation of Mr. Placencio during a conversation in which it is undisputed he was introducing himself as a new supervisor from another department at the Hospital. The ALJ failed to resolve the inconsistent, conflicting claims by Mr. Placencio, whose fabrications of events contradicted the testimony of multiple witnesses and available documentary evidence. For the reasons described more fully below, the ALJ’s Decision should be reversed in pertinent part.

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<sup>1</sup> The Administrative Law Judge recommended dismissal of the remaining paragraphs of the Complaint, including those alleging that: (1) Surgical Department Director Brian Biggs and Emergency Department Manager Dawn Reh surveilled employees who were engaged in distribution of literature outside MGMC, Complaint ¶5(c); during a meeting with Mr. Placencio on February 7, 2019, Ms. Kimball told him not to speak to coworkers near their work stations, directed Mr. Placencio to send questions from employees to her, created the impression of surveillance concerning protected activities and interrogated him about questions he received from coworkers, Complaint ¶5(d); MGMC retaliated against Mr. Placencio after he publicized his involvement in the Union’s organizing campaign, by instructing him to complete voluntary check-off lists, Complaint ¶6(a), and by disproportionately assigning him to patient screening assignments. Complaint ¶6(b). The ALJ’s recommended dismissal of these allegations was correct, and therefore they are not subjects of these Exceptions.

## **II. THE ALJ ERRED BY CONCLUDING THAT MS. KIMBALL UNLAWFULLY CREATED THE IMPRESSION OF SURVEILLANCE DURING A STAFF MEETING ON AUGUST 28, 2018**

### **A. Background Concerning MGMC's Lawful Communications with Staff Concerning Safe Practices and Protection of Personal Information**

In an effort to promote dialog about labor relations subjects, MGMC began publishing and distributing via email communications to staff in late July 2018.<sup>2</sup> Tr. 27, 29; GC 4. The Hospital's goal was to educate and respond to staff concerns uniformly and in a factual manner. Tr. 27. The first communication, dated July 27, provided guidance about safely protecting personal information. GC 4, p. 1. A supplement published on August 10 reported that a labor organization was known to be making efforts to obtain employees' information and to contact them seeking electronic signatures. *Id.* p. 3. Hospital leadership expressed their commitment to "respect each employee's right to choose representation" while urging employees to consider the rich culture that has been built working without representation. *Id.*

Safety issues again were addressed in a communication on August 15. *Id.* p. 4. Employees had reported concerns about emails requesting responses to automated messages and meeting requests. *Id.* The Hospital urged them to be cautious about responding to emails from unknown senders, that requested personal or financial information, or otherwise seemed suspicious or confusing. *Id.* The communication also provided information about the Federal Trade Commission's Do Not Call Registry and provided contact information for employees who wanted to obtain additional information or to file a complaint with the FTC. *Id.*

MGMC's communications to staff occurred in concert with efforts to support the Hospital's managers and directors in responding to labor relations issues. In August 2018, a memo was distributed to the leaders regarding an incident in which representatives of the

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<sup>2</sup> All dates refer to 2018 unless otherwise specifically noted.

California Nurses Association distributed flyers to employees at a sister facility. Tr. 50; GC 3. The memo reported that this was the first time locally that labor organizers had been on one of Dignity Health's campuses advocating the benefits of representation. *Id.* Leaders recently had participated in training concerning appropriate conduct and communications concerning labor relations matters, including "TIPS" training (referring to the statutory restrictions on threats, interrogation, promises and surveillance of protected activities). Tr. 50-51. The memo reminded them to use the TIPS training, help educate employees, and continue to have open and honest dialog about issues of mutual concern. *Id.*

**B. Ms. Kimball Discusses Staff Complaints Concerning Unwanted Personal Contacts During a Pre-Shift Meeting on August 28**

Starting in July 2018, Ms. Kimball was one of the leaders who received reports from staff about contacts by organizers. Tr. 23, 26, 28. Several complained to her that they were upset a Union organizer obtained their personal contact information. Tr. 25. Ms. Kimball regularly conducts pre-shift meetings that are open to her department. Tr. 24. During the meetings, notices and information, policy updates and other topics of interest to staff are discussed. Tr. 24-25. Ms. Kimball eventually decided to address the staff complaints at a preshift meeting on August 28. Tr. 23, 51.

During the meeting, which was held in the Emergency Department break room, Ms. Kimball explained that several staff complained to her about unwanted home visits or calls on their personal devices. Tr. 51-52. She told employees she wanted them to have accurate information in response to their concerns, tr. 25, and she brought a copy of one of the Hospital's safety updates to address the issues. Tr. 52. She read from the update and informed employees about their rights. Tr. 52-53. Some employees asked what they could do if they received an unwelcome contact. Ms. Kimball responded that they had rights; for instance, they could hang

up if they received a call they did not want to take, and they could contact the police if, as one employee reported, someone refused to leave their property. Tr. 53. Ms. Kimball did not identify the staff who brought concerns to her prior to the meeting. She spoke generally regarding the claims that were reported. Tr. 54.

Mr. Placencio, a technical employee who worked in the Emergency Department, attended the meeting. Tr. 111. He testified without contradicting Ms. Kimball's description of the coworkers' complaints. He confirmed that Ms. Kimball specifically assured staff about their legal right to form a union. Tr. 119. He recounted that she stated her husband was union represented and she expressed her support for employees' rights. *Id.* He also testified that at some point during the meeting, Ms. Kimball said she knew a union had contacted him. Tr. 120. When she did so she pointed in his direction. *Id.* Mr. Placencio did not respond and the meeting continued. *Id.*

**C. Ms. Kimball Did Not Unlawfully Create the Impression of Surveillance of Protected, Concerted Activities During the Meeting on August 28**

The ALJ correctly concluded that MGMC's email communications to staff were lawful and protected by Section 8(c) of the Act. ALJD p. 3 n. 3.<sup>3</sup> It was appropriate and promoted the purposes of the Act for MGMC to educate and inform employees about their rights, including by responding to staff complaints about unwanted contacts from unknown individuals using their personal devices and coming to their homes.<sup>4</sup>

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<sup>3</sup> Section 8(c) of the Act broadly protects an employer's right to communicate with employees about labor organizing. *See, e.g., NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469 (1941). In doing so Section 8(c) "implements the First Amendment" to the U.S. Constitution, such that "[A]n employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

<sup>4</sup> *See, e.g., Steam Press Holdings, Inc. v. Hawaii Teamsters*, 302 F.3d 998, 1009 (9th Cir. 2002) ("Collective bargaining will not work, nor will labor disputes be susceptible to resolution, unless

MGMC's safety updates concerning protection of personal information were protected by Section 8(c) and did not even allegedly violate the Act. Ms. Kimball's use of an update to amplify the same message during a meeting with staff necessarily was protected as well. It is undisputed, and the ALJ concluded that at the preshift meeting on August 28, Ms. Kimball reported to staff about complaints she received concerning unwanted contacts, and provided accurate information to promote their safety. It is undisputed, and the ALJ concluded that she provided specific assurances about employees' right to form a union and stated she personally supports employees' rights. ALJD p. 4. The ALJ acknowledged that Ms. Kimball testified forthrightly denying that she singled out any staff member as involved in organizing. ALJD p. 3. There was a complete absence of coercion during the informal preshift meeting, during which some staff participated by asking questions about how they should respond to unwanted contacts. Nevertheless, the ALJ credited Mr. Placencio's testimony that, during the meeting, Ms. Kimball pointed at him and said she knew he was someone who was contacted by the Union. *Id.* That allegation was false, and in any event falls well short of establishing that she created the impression MGMC was engaging in unlawful surveillance.

First, the ALJ erred by crediting the testimony of Mr. Placencio over Ms. Kimball's denial that she identified anyone associated with organizing during the meeting. In doing so, he disregarded the substantial evidence of lawful communications by MGMC preceding the preshift meeting, the TIPS training provided to leaders including Ms. Kimball, and the Hospital's

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both labor and management are able to exercise their right to engage in uninhibited, robust, and wide-open debate"); *NLRB v. Lenkurt Elec. Co.*, 438 F.2d 1102, 1108 (9th Cir. 1971) ("It is highly desirable that the employees involved in a union campaign should hear all sides of the question in order that they may exercise the informed and reasoned choice that is their right"); *Southwire Co. v. NLRB*, 383 F.2d 235, 241 (5th Cir. 1967) ("The guaranty of freedom of speech... goes to the heart of the contest over whether an employee wishes to join a union. It is the employee who is to make the choice and a free flow of information ... informs him as to the choices available").

reminders to leaders to communicate positively with employees about their rights. These facts constitute important background to the surveillance allegation in the Complaint because they clearly establish that Ms. Kimball knew prior to the meeting that surveillance, and creating the impression of surveillance of protected activities, is improper and interferes with employee rights. Yet the ALJ ignored this evidence; he viewed MGMC's lawful communications in particular as not "ultimately relevant" even though they were directly tied to Ms. Kimball's preparations for the preshift meeting and the staff's prior knowledge and understanding of the issues. ALJD p. 3 n. 3. The ALJ incorrectly assumed that Ms. Kimball would not have appreciated the significance of singling out a staff member in the manner that Mr. Placencio falsely claimed that she did, and therefore concluded she must have done so.

Compounding the problem of attributing to Ms. Kimball lack of knowledge concerning the impropriety of suggesting surveillance of protected activities are the undisputed facts and the ALJ's own finding that Ms. Kimball informed staff during the meeting that she supports their organizational rights and that her own husband is a member of a labor union. Yet the ALJ found, despite the personal assurance of support by Ms. Kimball, that without any precipitating incident or apparent motivation to do so she singled out Mr. Placencio as someone who was contacted by the Union. According to Mr. Placencio, he did not speak up during the meeting, there was no known reason for Ms. Kimball to have referred to him during the meeting, and the alleged identification had no apparent impact on the course or direction of the meeting after it occurred. Had Mr. Placencio been identified in the manner he claims, necessarily he would have responded; other staff would have responded; or the meeting could well have ended in recriminations. None of those developments ensued. The incident alleged by Mr. Placencio was completely without any effect on the meeting or its participants, because it did not occur.

The ALJ failed to consider the possibility that Mr. Placencio fabricated the alleged incident on August 28, just like he fabricated at least three other claims in support of the Complaint. Mr. Placencio testified about alleged unfair labor practices occurring on September 27 and in November, about which he was flatly contradicted by multiple witnesses with no reason to distort their statements. As described below, the testimony of Ms. Kimball and Mr. Harrison both established that Mr. Placencio's claims concerning interrogation on September 27 were false and inherently implausible; even Mr. Placencio acknowledged that his earlier claims about the incident in an October 3 email were wildly inaccurate. And the testimony by Mr. Biggs and Ms. Reh demonstrated that they were never even together at the time Mr. Placencio falsely claimed he observed them allegedly surveilling his distribution of literature outside the Hospital in November. Tr. 205, 211, 220, 227. Mr. Placencio similarly falsely claimed retaliation based on alleged disproportionate assignments to a screening function that he claimed he disliked. The documentary evidence demonstrated that during the period at issue, Mr. Placencio spent a minority of his time in the screening role, and his assignments were comparable to those he received in the past.<sup>5</sup>

Second, the claim that Ms. Kimball identified Mr. Placencio as someone who was contacted by the Union was in no way coercive or unlawful. After all, the meeting involved a discussion about contacts by Union organizers and staff complaints about invasions of their privacy. Some staff wanted to know how to respond if they were confronted by an unwelcome contact. Mr. Placencio may subjectively have felt singled out because he believed he might be

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<sup>5</sup> The ALJ observed that the documentary evidence demonstrated the claims concerning retaliation against Mr. Placencio were "highly misleading," ALJD p. 10, and diminished Mr. Placencio's credibility. ALJD p. 8 n. 14. The evidence, in fact, established that Mr. Placencio's claim that he had been assigned "in Triage over the last 3 months 90% of my shifts" was a complete fabrication. GC 10, p. 9.

the target of staff complaints. However, Ms. Kimball did not allegedly accuse him of being an instigator of contacts or a subject of any of the complaints. She allegedly identified him as someone who was contacted by the Union, just like other staff members who made such reports to her. No reasonable staff member at the August 28 meeting would assume that Ms. Kimball was aware of Mr. Placencio's alleged Union contact based on improper means. Staff, including Mr. Placencio, reasonably would infer that she must have become aware by a staff report, and that inference would have been accurate.

“Whether an employer has created an impression of surveillance [depends on] whether the employee would reasonably assume from the statement their union activities had been placed under surveillance.” *Flexsteel Industries*, 311 NLRB 257, 257 (1993). The standard is an objective one, and focuses on employer conduct evidencing unlawful surveillance of concerted activities. “The test for whether an employer unlawfully creates an impression of surveillance is whether under the circumstances, the employee could reasonably conclude from the statement in question that his protected activities are being *monitored*” by the employer. *North Hills Office Services Inc.*, 346 NLRB 1099, 1104 n. 24 (2006) (Emphasis supplied). The General Counsel bears the burden of establishing the employer unlawfully created the impression of surveillance of employees' concerted activities. *Grouse Mountain Lodge*, 333 NLRB 1322, 1323 (2001).

Ms. Kimball testified without contradiction that she told staff at the preshift meeting she received reports from coworkers, and wanted to share her responses to those coworkers so that all members of the Department could benefit. She did not even allegedly tell employees that they were being monitored and she gave no indication that the Hospital was surveilling their activities. Her statement that she received information voluntarily furnished from coworkers provides no basis, certainly not an objective one, for employees to believe that their activities

were being monitored. The ALJ concluded, however, that Ms. Kimball recently had learned of Mr. Placencio's involvement in organizing after a staff member at another hospital sent an unsolicited video of him speaking at an employee meeting there. ALJD p. 3. Although the ALJ found that Ms. Kimball's knowledge of Mr. Placencio's activity was not the result of any improper surveillance, he reasoned that because she did not tell him about the video she left Mr. Placencio to wonder how she knew about the Union contact. ALJD p. 13. The answer is, Mr. Placencio knew Ms. Kimball could have been informed by a report provided from any one of the employees with whom he spoke in connection with his organizing activities, or who attended any of the meetings at which he spoke, including the one that was recorded by a coworker. There is no basis, and the ALJ found none, for assuming she knew because of a coercive program of surveillance by MGMC, the existence of which was not even alleged.

The ALJ misstated the law in his Decision by stating, "when an employer tells employees that it is aware of their protected activities, *but fails to identify the source of this information*, an unlawful impression of surveillance is created because employees could reasonably surmise that employer monitoring has occurred." *Id.* (Emphasis supplied). Certainly explaining to an employee specifically how the employer has learned of protected conduct would preclude a claim concerning an implied impression of surveillance. *See Park 'N Fly, Inc.*, 349 NLRB 132 (2007) (Supervisor telling employee that he knew the employee had spoken with a union representative because a coworker reported it did not create the impression of surveillance); *Bridgestone Firestone South Carolina*, 350 NLRB 526, 527 (2007). However, the Board does not require as a condition to an employer's factual claims about employee conduct that the speaker must cite her sources to prevent any possible misunderstanding. As the Board reasoned in dismissing a similar claim based on a supervisor's statement that he knew the employee was

going to engage in organizing in *SKD Jonesville Div. L.P.*, 340 NLRB 101, 102 (2003):

[A] statement as to what someone has heard could be based on (1) what he had heard from the grapevine *or* (2) what he had picked up from spying. There is no reason to infer the latter as the source over the former. (Emphasis original.)

Even in cases where the identification of a union supporter is both deliberate and explicit, the Board has dismissed similar claims where the speaker did not refer to the specific source of his or her knowledge. *See, e.g., The Guard Publishing Co.*, 344 NLRB 1142, 1144 (2005) (Dismissing allegation that employer created impression of surveillance in a letter to employees stating, “I am encouraged that some employees have already requested that their union signature cards be withdrawn,” despite that the statement cited no source for the employer’s knowledge); *St. Luke’s Episcopal-Presbyterian Hospitals*, 331 NLRB 761 (2000) (Supervisor’s failure to confirm or deny that a particular coworker reported the employee had been soliciting petition signatures in a patient care area in violation of the employer’s policy did not create the impression of surveillance); *Sacramento Recycling & Transfer*, 345 NLRB 564, 565 (2005) (Statement to employee that “I understand you are one of the guys that were involved in starting the Union” did not express surveillance). In *Waste Mgmt. of Ariz., Inc.*, 345 NLRB 1339 (2005), a supervisor said that he was “aware that the employees had a union meeting,” and the Board held that there was no unlawful impression of surveillance:

The General Counsel has not shown that the union meeting was held in secret. Thus, [the supervisor’s] statement that he knew that employees had held a union meeting would not have reasonably implied that [the supervisor] had monitored employees’ activities, given the various other ways in which [the supervisor] might have learned of the nonsecret meeting. [The supervisor] did not say or even suggest that he had learned of the meeting in any covert manner, nor did he suggest that he had any detailed knowledge about the extent of the employees’ organizing activity. *Id.* at 1339.

Here, the ALJ found Mr. Placencio assumed improper spying, without finding any reasonable basis for it. Ms. Kimball spoke generally to staff about reports concerning contacts

by the Union, and in an environment that was free from any interference and included positive assurance concerning employees' protected rights allegedly stated that Mr. Placencio received a contact as well. There could not have been any basis, and certainly no reasonable basis for Mr. Placencio to question how she knew; he had been engaged in organizing activity since July and therefore was known by his coworkers as someone who had been contacted by the Union because he was someone who contacted them. Mr. Placencio spoke openly at meetings that were not even allegedly conducted privately or in secret, including one that resulted in a report to Ms. Kimball. In short, the fact that Ms. Kimball eventually discovered Mr. Placencio's advocacy was not unusual or even surprising, and would not give anyone, including Mr. Placencio, a reason to assume that improper surveillance was occurring.

“Employers are not required to make themselves oblivious to what employees have chosen to make known and obvious, and their failure to do so is not coercive.” *Clark Equipment Co.*, 278 NLRB 498, 503 (1986). “Volunteering information concerning an employee’s union activities [provided] by other employees...particularly in the absence of evidence that management solicited that information, does not create an impression of surveillance.” *North Hills Office Services Inc.*, 346 NLRB at 1104. Ms. Kimball’s conduct at the August 28 staff meeting was proper. The ALJ improperly concluded that she created the impression of surveillance, and applied an incorrect assumption that failing to name the source of the report concerning Mr. Placencio’s conduct was inherently unlawful. The Decision should be reversed in pertinent part, and the Complaint allegation dismissed.

**III. THE ALJ ERRED BY CONCLUDING THAT MR. HARRISON UNLAWFULLY INTERROGATED MR. PLACENCIO REGARDING HIS UNION SUPPORT AND ACTIVITIES ON SEPTEMBER 27, 2018**

**A. Ms. Kimball and Mr. Harrison Round Together and Speak to Staff about MGMC's Wages Communication on September 27**

Starting in about September 2018, staff reported to Ms. Kimball that Union organizers were claiming that with representation, MGMC employees would earn the same pay as Union represented employees at Dignity Health facilities in California. Tr. 30. Mr. Harrison was receiving the same reports from staff in his department. Tr. 30, 103, 105. Based on the reports and confusion that was being caused, Human Resources prepared a Let's Talk: Wages communication to provide factual information to employees about their compensation. *Id.*

The Let's Talk: Wages communication was distributed on September 27. GC 4, p. 8. Ms. Kimball and Mr. Harrison decided it would be a good idea to use the publication as a guide during rounds to address the reported claims about wages. Tr. 30, 55, 106. During their labor relations training, both Ms. Kimball and Mr. Harrison had been encouraged to round in pairs to hold one another accountable and promote compliance with the TIPS. Tr. 55, 88-89, 105. Ms. Kimball also thought the opportunity was a good one to introduce Mr. Harrison to her staff, as he was new to his position. *Id.*

Ms. Kimball and Mr. Harrison each printed out and brought a copy of the Wages communication with them while rounding. Tr. 56, 106. They walked around the Emergency Department, and when they saw a staff member who was not busy, they asked whether he or she had a few moments to talk. *Id.* Initially, Ms. Kimball started by introducing Mr. Harrison. Tr. 56, 109. They reviewed the Wages communication. *Id.* They spoke with two nurses in one area, followed by a charge nurse, and then three technical employees, a total of seven or eight individuals. Tr. 56, 106. They saw Mr. Placencio at the health unit clerk (HUC) desk and

decided to speak with him as well. *Id.*

Ms. Kimball and Mr. Harrison approached Mr. Placencio together, and testified describing the discussion exactly the same way. Tr. 57, 122. They asked Mr. Placencio if he was busy, and he said no. Tr. 57. They spoke with him for a minute or so, Ms. Kimball first introducing Mr. Harrison and then discussing how the Hospital uses pay for performance to provide merit increases to staff. *Id.* Mr. Harrison also spoke in accordance with the practice they developed during their earlier discussions. Tr. 108. He addressed the claim reported by some staff that the Union claimed if they chose representation, employees would receive the same pay as the Union represented employees at Dignity Health facilities in California. Tr. 58, 107. He said that no one can promise any particular wages, because they must be negotiated in a collective bargaining process. *Id.*

Ms. Kimball testified that she stood by Mr. Harrison during the entire discussion, and that Mr. Harrison did not make any statement to Mr. Placencio or ask him any questions about his association with the Union. Tr. 58-59. The discussion seemed agreeable, Mr. Placencio nodding at various times as if appearing to agree with their statements, and at the end of the discussion he thanked Ms. Kimball and Mr. Harrison as they departed. *Id.* Ms. Kimball and Mr. Harrison proceeded to speak with another employee who was standing nearby, as they had when they approached Mr. Placencio and others previously. *Id.* During the discussion, there was no interrogation of Mr. Placencio whatsoever; neither Ms. Kimball nor Mr. Harrison asked Mr. Placencio whether he was involved in a campaign, or whether he supported the Union.

**B. Mr. Placencio Sends an Email to the Entire Organization Expressing Support for the Union and Accusing Ms. Kimball and Mr. Harrison of Unlawful Conduct During Their Discussion on September 27, Then Contradicts and Repudiates the Claim in His Testimony**

Almost a week after the discussion, on October 3 Mr. Placencio sent an email to the

employees and management of MGMC making dramatic claims about alleged unlawful conduct by both Ms. Kimball and Mr. Harrison on September 27. He testified that the genesis of the email was his belief that he had been dishonest while seeming to deny his involvement in the Union's organizing process. Tr. 127. He decided to come clean about his support for the Union not just to Ms. Kimball and Mr. Harrison, but in a very public way. Tr. 167. In his email, he claimed that *both* Ms. Kimball and Mr. Harrison had asked him "*point blank*" whether he was "*spearheading*" the effort to organize the Union; and he claimed that they "gave their best efforts to *coerce* me to believe that unions are not good." GC 5, p. 1. Those claims flatly were contradicted by Ms. Kimball and Mr. Harrison, and importantly in Mr. Placencio's own testimony he discredited and repudiated the emailed claims as well.

Mr. Placencio's email, first and foremost, radically distorts the conversation as it was recounted by Ms. Kimball and Mr. Harrison. Both testified, consistently and forthrightly, that they approached Mr. Placencio in an open forum on the unit where Mr. Placencio was stationed at the health unit clerk desk. They engaged in the same discussion with Mr. Placencio that they did with others that day, guided by the Wages communication, a copy of which each brought with them. They reviewed the reports staff had provided about false claims and promises by union organizers concerning wage rates, and they finished their discussion with him, just like the others that day, reiterating his right to choose to be represented. After the brief discussion with Mr. Placencio they thanked him for his time and proceeded to speak with another employee who happened to be nearby. No aspect of the descriptions provided by Ms. Kimball and Mr. Harrison can be characterized as coercive.

Mr. Placencio also testified contradicting his own claims in the email. In particular, he testified that his claims in the email that both Ms. Kimball and Mr. Harrison interrogated him

and attempted to coerce him to oppose the Union were *false*. Mr. Placencio testified specifically that Ms. Kimball said *nothing* during the entire discussion; she did not (and therefore could not have) engaged in any interrogation, she did not (and could not have) accused him of being a ringleader for organizing efforts or spearheading those efforts, and she did not (and could not have) coerced him in the exercise of rights. He claimed Mr. Harrison introduced himself and subsequently did *all of the talking*. Tr. 122.

The description in the email about being accused *point blank* of spearheading Union organizing also simply does not line up with Mr. Placencio's hearing testimony. He testified that Mr. Harrison asked him whether he had heard anything about a Union, which he claimed he answered falsely that he only had heard what was mentioned in the Hospital's emails. Tr. 123. He testified that Mr. Harrison said that the Union was making promises they couldn't keep, specifically assuring employees about cost-free medical care (and not wage rates, as both Ms. Kimball and Mr. Harrison testified). *Id.* He testified Mr. Harrison repeatedly asked, how is the Company going to pay for that, until the HUC desk phone ringing interrupted him. *Id.*

Mr. Placencio testified that after he completed taking not one but two calls at the HUC desk, with Ms. Kimball and Mr. Harrison allegedly standing idly by, Mr. Harrison again asked whether he heard anything about the Union. Tr. 124. Without waiting for an answer to that question, he testified, Mr. Harrison incongruously asked for his name, despite being introduced at the beginning of their discussion. *Id.* Mr. Placencio claimed he responded by pointing to the name tag on his uniform, and Mr. Harrison responded, "Jon Paul, or JP, do you go by JP?" and he responded he went by both. *Id.* Mr. Placencio testified that Mr. Harrison said it's strange that he had not heard about the Union because employees in the Respiratory Department were claiming they were being organized by someone named JP in the Emergency Department. *Id.*

Mr. Placencio claimed he did not respond, but Mr. Harrison allegedly persisted, insistently and repetitively asking “is it Jon Paul or JP, is it JP or Jon-Paul”? Tr. 125. According to Mr. Placencio, “he just kept saying it over and over again, becoming louder and louder each time” for *five to seven minutes*. *Id.* Mr. Placencio did not explain in his testimony how Mr. Harrison’s alleged conduct did not draw the concern of any others present in the work area at that time, including Ms. Kimball. Despite the dramatic characterization of the discussion, Mr. Placencio did not testify that Mr. Harrison accused him of being a ringleader or a spearhead for an organizing effort, “point blank” or otherwise.

Mr. Harrison’s testimony is in complete contrast to the repetitive questioning alleged by Mr. Placencio about his name and the implicit accusation he contends was being made about his Union involvement. Mr. Harrison testified forthrightly that the discussion was routine, involved a professional dialog in an open forum in the unit, and without any hint of interrogation or coercion. Ms. Kimball, in her testimony, categorically rejected the claim that Mr. Harrison interrogated Mr. Placencio with questions about the Union’s campaign; in particular she testified that the alleged questions about Mr. Placencio being involved in a Union campaign were “completely false.” Tr. 60. She testified that neither she nor Mr. Harrison asked about whether he was involved in a campaign, or organizing a Union to represent employees at MGMC. *Id.* She testified she was fully aware based on the training she received that such questions would constitute interrogation and would be improper conduct for any leader of the organization. “Employees have the right to do whatever they choose” when it comes to seeking out representation they desire, a mantra she and Mr. Harrison reiterated at the end of every discussion on September 27. Tr. 60-61. She testified that neither she nor Mr. Harrison engaged in any coercion regarding support of, or opposition to, Union representation. Tr. 61.

Subsequently, Ms. Kimball did not speak with Mr. Placencio about his email or the false claims contained in it. Tr. 61. Based upon advice from Human Resources, she did not proactively communicate about it with anyone. Tr. 64, 84. When staff asked her she responded that the email was false; she said she spoke with Mr. Placencio using materials prepared by the Hospital as a guide. Tr. 64. MGMC distributed talking points to leadership suggesting that, if asked about the incident, they should respond that “we believe in a culture of humankindness, due process, and our values of dignity and justice” and the issues would be addressed consistent with those values. The Hospital also reminded leaders of the continuing commitment that “we respect every employee’s right to support or not support a union.” RE 1.

**C. The ALJ Erred by Finding Interrogation Occurred on September 27**

The ALJ erroneously concluded that Mr. Harrison “engaged in insistent and repetitive pressing of [Mr.] Placencio to admit his complicity in the Union organizing campaign, in the presence of his department head [Ms. Kimball],” in violation of Section 8(a)(1) of the Act. ALJD p. 14. Although both Ms. Kimball and Mr. Harrison forcefully denied any unusual or irregular conduct, or even any questioning of Mr. Placencio whatsoever, the ALJ discounted *both of their versions of the discussion* despite the complete absence of corroboration for any aspect of Mr. Placencio’s illogical account. The ALJ claimed he did so because he found Mr. Placencio’s version more detailed; and because it seemed unusual to him that Ms. Kimball and Mr. Harrison refrained from the impassioned response he would have expected given Mr. Placencio’s claims of unlawfulness in his email. To the contrary, given the efforts both leaders made to assure employees of their respect for organizational rights, not to mention preventing retaliation, their response should have been viewed as demonstrating patience, not acquiescence.

While reasonable credibility determinations are subject to deference, as the Supreme Court has explained the Board “is not free to prescribe what inferences from the evidence it will

accept and reject, but must draw all those inferences that the evidence fairly demands.” *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 378 (1998). The ALJ here treated conflicting evidence without evenhandedness or a complete examination. After all, the ALJ based his conclusion on the supposed detail provided by Mr. Placencio’s account but failed to even acknowledge the blatant inconsistencies and acknowledged contradictions in that testimony, particularly with regard to the October 3 email.

As described above, Mr. Placencio’s claims concerning interrogation by Mr. Harrison were uncorroborated by any evidence and thoroughly contradicted by Ms. Kimball and Mr. Harrison in their testimony. They described a short, routine discussion in a public forum and in the vicinity of other staff that was common to earlier, short routine discussions they had with others about the subject of wages. The discussion included communications protected by Section 8(c) of the Act and was supported by prepared material distributed by the Hospital that was admitted into evidence. The Wages communication was appropriate and Ms. Kimball’s and Mr. Harrison’s testimony describing their use of that communication also was appropriate. Ms. Kimball and Mr. Harrison rounded together on September 27 to support one another and to assure that the training they received regarding proscribed TIPS was observed. Their discussion with Mr. Placencio was lawful and devoid of any interrogation or other form of interference.

By contrast, Mr. Placencio alleged the discussion was implausibly lengthy and disruptive, involved interruptions by not one but two telephone calls, and included *over five minutes* of absurdly repetitive questioning about whether he went by Jon Paul or JP. Although he claimed that Mr. Harrison’s questioning about his name was prolonged and progressively became louder, no witness was called to confirm the disturbance or to verify any other aspect of Mr. Placencio’s testimony. Most compelling is that for all of the consideration Mr. Placencio testified was

involved in preparing the email he sent organization-wide on October 3, he testified that in that email he described the September 27 discussion *completely incorrectly*. Given that he had almost a week to draft the email, and in view of the very serious, public nature of the allegations he made, accuracy of the email would be critically important to the General Counsel's case. Yet Mr. Placencio's testimony contradicted his own claims:

- Mr. Placencio testified contradicting the claim in his email that Ms. Kimball and Mr. Harrison interrogated him about his Union activities and support; to the contrary, he testified Ms. Kimball *said nothing* during the discussion.
- Mr. Placencio testified contradicting his claim that Ms. Kimball and Mr. Harrison coerced him so as to cause him to oppose the Union; to the contrary, he did not testify about *any threats or coercion* directed toward his Union support. He testified that Mr. Harrison repetitively asked him whether he went by Jon-Paul or JP in a tacit effort to identify him as someone who was connected to reports about organizing in his own department.
- Mr. Placencio testified *contradicting his claim* that he was being accused "point blank" of acting as a "ringleader" for the Union's organizing campaign. He did not claim at the hearing that anyone directly accused him of acting as a "ringleader".

The ALJ did not even acknowledge these inconsistencies. Yet he asserted that the convoluted and utterly improbable, inconsistent claims by Mr. Placencio should be credited above the recitation of facts concerning another one of many positive discussions with employees by Ms. Kimball and Mr. Harrison, both of whom he strangely found overly dispassionate. The ALJ also never in his Decision addressed the basic flaws in Mr. Placencio's credibility arising out of the demonstrated fabrications by Mr. Placencio of several significant events. After all, the September 27 discussion with Ms. Kimball and Mr. Harrison is not the only incident about which Mr. Placencio testified concerning which he was flatly contradicted by two other percipient witnesses. Mr. Placencio testified that in November 2018, he was distributing literature outside the Hospital when he discovered Mr. Biggs and Ms. Reh standing outside, in close proximity, observing him and a fellow employee. However, Mr. Biggs and Ms.

Reh both testified that they were not outside the Hospital together; only Mr. Biggs went outside to speak with employees about what was transpiring near the administrative entrance. Mr. Placencio also fabricated or grossly exaggerated his claim that he was assigned to the screening function in the Emergency Department 90% of the time after he sent the October 3 email. The documentary evidence demonstrated that between October 1 and December 31, he was assigned to other functions *more often* than he was assigned as a screener, and his assignments were within the same range of regularity during the period prior to October.

Nor does the ALJ explain his unusual characterization of the alleged coercion he found in the discussion. He found that Mr. Harrison has a “high level” supervisor even though he was a first line supervisor (a manager) in a department other than Mr. Placencio’s own. And he found that the questioning was coercive because Ms. Kimball, his Department Director, was present for it despite that Mr. Placencio had accused Ms. Kimball a month earlier, on August 28, of already being aware of his Union activities. It is obvious from the testimony and the contrast established between it and the October 3 email that Mr. Placencio deliberately revised the version of events given in his email after Ms. Kimball conceded in her earlier hearing testimony that she was aware in August 2018 that he was involved in the Union’s organizing campaign. Mr. Placencio concluded that it would be illogical to accuse her of questioning him (as he did in the email) based on her prior knowledge, and therefore in his testimony contrived a new version of events in which *only Mr. Harrison* engaged in any questioning at all. The ALJ did not even address the fact that Mr. Placencio clearly dramatized the event in the October 3 email for publicity purposes, only to re-dramatize the incident in the narrower and much less public confines of the NLRB hearing in his testimony.

**D. The Alleged Questioning About Mr. Placencio's Identity Was Not Coercive**

The burden of proving unlawful interrogation is on the General Counsel. The test, set forth in *Rossmore House*, 269 NLRB 1176 (1984), *affd.* 760 F.2d 1006 (9th Cir. 1985), is "whether under all the circumstances the interrogation reasonably tended to restrain, coerce, or interfere with the rights guaranteed by the Act." *Id.* The Board considers such factors as:

1. Whether a history of employer hostility and discrimination existed;
2. The identity of the questioner and how high he/she was in the employer's hierarchy;
3. The place and method of interrogation, such as a supervisor's office, on the shop floor, or in a formal or informal atmosphere;
4. The nature of the information sought and whether the interrogator appeared to be seeking information on which to base taking action against individual employees; and
5. The truthfulness of the reply.

In this case, most factors militate against a finding of interrogation. The history of the Company's communications emphatically did not evidence hostility to Union organizing; to the contrary, the Company generally published its support of employee rights and individual leaders such as Ms. Kimball expressed their personal support as well. The Company maintains productive relations with labor organizations that represent a number of other of its facilities, as the Company and the Union both explained to MGMC staff. The questioner involved in this case, Mr. Harrison, was a low level Manager in a department other than Mr. Harrison's, and there was no risk of Ms. Kimball, his own department Director, discovering any information about his protected, concerted activities. According to Mr. Placencio, he already had been identified by Ms. Kimball as having been contacted by the Union during a preshift meeting on August 28. And the discussion that occurred on September 27 was in an open area of the Department at a central activity desk surrounded by other staff, who also engaged in discussions with Ms. Kimball and Mr. Harrison. Ms. Kimball and Mr. Harrison disclaimed any interference and reiterated their support for employee choice.

Mr. Harrison allegedly asked Mr. Placencio whether he was the same individual whom others in his department reported was an organizer for the Union, and Mr. Placencio, claiming discomfort, lied that he had no knowledge. That Mr. Harrison asked whether Mr. Placencio was the same individual others had spoken about might not be surprising; Mr. Harrison and Mr. Placencio had never met previously. The issue to be addressed by application of the totality of circumstances test here is whether allegedly asking Mr. Placencio if he was the individual others claimed was involved in Union organizing, in the informal environment in which it occurred and followed by assurance of his protected rights, “would reasonably have a tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.” *Multi-Ad Servs.*, 331 NLRB 1226, 1228 (2000), *enfd.* 255 F.3d 363 (7th Cir. 2001).

It would not. The discussion on September 27 occurred in an atmosphere free from coercion. Mr. Placencio obviously did not feel compelled to answer truthfully, and at least at the time he chose not to do so. By asking Mr. Placencio to self-identify as an advocate, Mr. Harrison did not even allegedly threaten any adverse action against him. As the Board frequently has held, statements “that [do] not suggest that the employees’ protected activities were futile, [do] not reasonably convey any explicit or implicit threats, and [do] not constitute harassment that would reasonably tend to interfere with employees’ Section 7 rights” simply do not violate the Act. *Trailmobile Trailer LLC*, 343 NLRB No. 17 (2004). *See Volair Contractors, Inc.*, 341 NLRB 673 (2004) (No unlawful interrogation occurred where supervisor asked two employees why they were wearing union T-shirts and made negative remarks about his experience with unions because the conversation occurred informally at the work site, in a context free from other unfair labor practices, and did not suggest that any “negative repercussion” might result from union membership).

Of course, Mr. Placencio did later respond to Mr. Harrison's questioning, accurately informing him as well as the MGMC community at large of his role in the organizing campaign in his October 3 email. Mr. Placencio attributed his desire to send the email to his regret over not having forthrightly discussed his Union involvement sooner. He chose to inform not only Mr. Harrison and Ms. Kimball, but all MGMC staff and management about his Union advocacy in a highly public manner. At minimum, this fact demonstrates that nothing that occurred on September 27 chilled Mr. Placencio's exercise of protected activities. "In the final analysis, our task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act." *Westwood Healthcare Center*, 330 NLRB 935, 939 (2000). Quite the contrary, here Mr. Placencio used the alleged incident on September 27 as fodder for a broader communication supporting his Union advocacy, and to suit his own purposes in connection with his campaign.

#### **IV. CONCLUSION**

The ALJ's Decision should be reversed in pertinent part, and the foregoing Complaint allegations should be dismissed in their entirety.

Respectfully submitted this 15<sup>th</sup> day of April, 2020



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## CERTIFICATE OF SERVICE

I certify that I have this 15<sup>th</sup> day of April, 2020, caused an electronic copy of the foregoing **Brief in Support of Exceptions to the Decision of the Administrative Law Judge**, containing the signature of counsel for Respondent in .pdf format, to be filed electronically using the National Labor Relations Board's E-Filing System.

I also certify that I have caused a copy of the foregoing document to be served via electronic mail on the following:

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