UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

REPLY 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

On April 15, 2020, Dignity Health d/b/a Mercy Gilbert Medical Center ("MGMC" or the "Hospital") timely filed its Exceptions to the Decision of Administrative Law Judge Ariel L. Sotolongo ("ALJ"), JD(SF)-09-20 ("ALJD") and Brief in Support. Charging Party Service Employees International – United Healthcare Workers West (the "Union") filed an Answering Brief on April 29, 2020. The General Counsel did not file an answering brief.

MGMC's Exceptions are directed to the ALJ's Decision finding merit in two allegations in the Consolidated Complaint, General Counsel Exhibit ("GC Exh.") 1(l) (the "Complaint"). First, the ALJ found that during a staff meeting on August 28, 2018, Emergency Department Director Dawn Kimball created the impression of surveillance of organizing activities by identifying an employee, J.P. Placencio, as someone who was contacted by the Union. ALJD pp. 4, 13. Second, the ALJ found that Respiratory Therapy Manager Joshua Harrison interrogated Mr. Placencio about his Union activities during a conversation on September 27, 2018. ALJD pp. 6, 14. The Union's Answering Brief contends the ALJ's findings were correct. For the reasons described more fully below, the ALJ's Decision should be reversed in pertinent part.

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

The ALJ erred by failing to consider evidence concerning Ms. Kimball's knowledge of the Act's proscription of surveillance, including through her TIPS training,[1] and incorrectly treated as irrelevant evidence concerning the Hospital's lawful communications with employees,

[1] Ms. Kimball described the reference to TIPS as follows: "We learned TIPS, the acronym TIPS, that we cannot threaten, interrogate, promise anything if someone doesn't go with the Union, we can't surveil people. So we were given that training very early in this process. And so our organization wanted us to make sure we were not doing anything that was against the law and that we supported our employees regardless of what choices they wanted to make." Transcript of Hearing held July 23-24, 2019 ("Tr.") 51.

including the bulletin that Ms. Kimball explained she relied on to guide her meeting on August 28. ALJD p. 3 n. 3. It is undisputed that during the meeting Ms. Kimball assured staff about their legal right to form a union, and expressed her genuine support for their organizational rights. Nevertheless, the Decision incorrectly concludes that while describing reports by other employees who claimed they were contacted, Ms. Kimball called out Mr. Placencio as someone who was contacted by the Union, perhaps without realizing the import of doing so.

It was illogical for the ALJ to conclude the alleged identification occurred with no precipitating incident, not even any alleged comment by Mr. Placencio during the meeting that might have caused Ms. Kimball to refer to him at all. ALJD p. 4. Mr. Placencio acknowledged the incident had no impact on the course of the meeting; he claimed the meeting simply continued as it had. *Id.* The generic claim that Mr. Placencio's description of the incident was "more detailed" does not explain these lapses; at minimum, Ms. Kimball's description and reliance on the bulletin, which was entered into evidence, provides a clearer and more direct scripting of the meeting than Mr. Placencio's summary in his testimony. None of the purported detail in Mr. Placencio's testimony supports the alleged identification of him.

It also was illogical to conclude that in the context of reports by other employees who recently were contacted by the Union, Ms. Kimball identified only Mr. Placencio, who never made such a report to her. The ALJ's contention that it was more likely Ms. Kimball identified Mr. Placencio because it occurred "shortly after [she] learned that [he] was one of the union organizers," ignores this important context. *Id.* Ms. Kimball testified that she had recently received reports from several staff complaining about being contacted, yet not even Mr. Placencio contended that any of those staff were identified during the meeting. The ALJ's observation also was not supported by evidence. Ms. Kimball testified that she could not recall

when she received the video of Mr. Placencio publicly speaking to coworkers about a campaign, but believed it occurred in August. Tr. 31. She did not know whether she even received the video before the preshift meeting was held. Tr. 76. The ALJ assumed that she recently learned about Mr. Placencio's Union activity and used that assumption to support an unwarranted conclusion that she more likely identified him during the meeting.

The ALJ's reference to Ms. Kimball's denials about identifying anyone during the meeting certainly does not support crediting Mr. Placencio's accusation. The Union's Answering Brief does not attempt to explain the incongruous observation that Ms. Kimball, despite her refutations, did not specifically deny *pointing* at Mr. Placencio. ALJD p. 4. Mr. Placencio claimed that Ms. Kimball gestured toward him (she "just put her arm out" seemingly in his direction) while stating he was someone the Union contacted. Tr. 120. Ms. Kimball's testimony in response to the allegation could not be clearer:

> Q. Did you identify any particular staff as having made a report or complaint to you or been involved in any report or complaint to you about one of these contacts?
> A. Did I name who came to me with the concerns?
> Q. Yes.
> A. No.
> Q. Did you name anyone who was identified in any of the concerns expressed to you?
> A. No.
> Q. Did you identify any employee you believed was responsible for distributing personal contact information?
> A. Absolutely not.
> Q. Did you identify any employee who was involved in an organizing campaign?
> A. No. Tr. 54.

The ALJ's note that Ms. Kimball "did not specifically deny pointing at anyone during the meeting" may refer to the absence of any testimony by Ms. Kimball that she gestured anywhere, but is misleading given her denial that she "identif[ied]" any employee involved in organizing at all. ALJ p. 3, n. 5. This misdirection is exacerbated by the ALJ's further observation that she

did not deny pointing at anyone "even when she was recalled to the stand after [Mr.] Placencio had testified." Ms. Kimball denied identifying anyone in response to the Complaint allegation; she was the first witness called at the hearing. After Mr. Placencio testified, she was recalled to lay foundations for exhibits, GC 13 and Respondent Exhibit 5. Tr. 183, 246. Ms. Kimball did not prevaricate during recall; she did not testify about the meeting on August 28 at all.

Equally as troublingly, and as described previously, the ALJ credited Mr. Placencio's uncorroborated, impactless accusation about an identification that was unique to him, despite the recurrent false statements throughout his testimony, including among others:

- Mr. Placencio's false claims about alleged interrogation by Mr. Harrison and Ms. Kimball on September 27, which were flatly contradicted by both participants;
- Mr. Placencio's direct contradictions during his testimony about the false claims in his October 3 email concerning the event;[2]
- Mr. Placencio's false claims about surveillance by Brian Biggs and Dawn Reh in November, despite their consistent testimony they were never together outside the Hospital at the time he alleged;[3]
- Mr. Placencio's false claims concerning allegedly retaliatory assignments that were refuted by the extensive documentary evidence that the ALJ acknowledged damaged his credibility;[4] and
- Mr. Placencio's origination of a false rumor in his department claiming that technical employees' jobs were in jeopardy, which the ALJ found warranted Ms. Kimball's meeting with him in February 2019 setting the record straight.[5]

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[2] The contradictory testimony between Mr. Placencio, on the one hand, and Ms. Kimball and Mr. Harrison, on the other, concerning the discussion on September 27, as well as Mr. Placencio's conflicting claims in his October 3 email are detailed in MGMC's Brief in Support of Exceptions, pp. 13-17.

[3] The contradictory testimony between Mr, Placencio, on the one hand, and Mr. Biggs and Ms. Reh, on the other, concerning events outside the Hospital in November are detailed in MGMC's Answering Brief in Opposition to the General Counsel's Exceptions ("MGMC's Answering Brief"), pp. 3-4.

[4] The fact that thousands of pages of records entered into evidence concerning the retaliation claim resulted in "nothing more than a single sentence in its posthearing brief," as the ALJ observed, evidences the General Counsel's abandonment of Mr. Placencio's false claim. ALJD p. 18 n. 38.

In addressing the conflict between Ms. Kimball's denial and Mr. Placencio's accusation the ALJ did not even acknowledge the repeated fabrications in his testimony.

Moreover, for the reasons described in MGMC's Brief in Support, the claim that Ms. Kimball identified Mr. Placencio as someone who was contacted by the Union was harmless and certainly in no way coercive. 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). The Board repeatedly has rejected the "source of information" disclosure requirement, just as the ALJ should have here. At minimum, references to coworker reports such as by Ms. Kimball are sufficient to prevent employees from jumping to conclusions about unlawful surveillance. *SKD Jonesville Div. L.P.*, 340 NLRB 101 (2003). As the Board held in *North Hills Office Services*, 346 NLRB 1099, 1104 (2006), "volunteering information concerning an employee's union activities by other employees such as occurred here, particularly in the absence of evidence that management solicited that information, *does not create an impression of surveillance*."[6]

Signaling the abandonment of the ALJ's misstatement, the Union's Answering Brief takes a different approach. The Union refers at least four times to the alleged "secrecy" of Mr. Placencio's organizing, although there was no evidence adduced at the hearing regarding the purported secrecy of his activities and the ALJD did not use the term "secret" once in his

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[5] *See* MGMC's Answering Brief, pp. 9-13.

[6] The Union's efforts to distinguish the multiple authorities cited in MGMC's Brief in Support, pp. 10-12 have no merit. *Conley Trucking*, 349 NLRB 308 (2007), cited by the Union, is in accord. There, the ALJ concluded that the supervisor's statement to an employee "I heard you, Tim Gilbert, and Steve Del[a]bar were trying to get a union in here" created the impression of surveillance. The ALJ specifically distinguished *SKD Jonesville*, noting that nothing in the discussion suggested the supervisor lawfully acquired the information about organizing.

Decision. The Union glosses the lack of evidence by asserting that communications with the Union "*would have been* secret" and speculating that Ms. Kimball divulged information that "*could only* have been acquired" improperly. Union's Answering Brief p. 7. This is just the type of rhetorical leap of faith that the ALJ appropriately scolded the General Counsel for asserting with respect to the surveillance allegation the Decision recommends dismissing. ALJD p. 15 n. 33. In fact, Mr. Placencio did not engage in his activities in secret; to the contrary, Ms. Kimball learned of his Union advocacy because he made a speech to coworkers at an event held at a local sister facility. Tr. 31, 76-77. It may be true, as the Union asserts, that Mr. Placencio "did not want his status as an organizer to be known," Union's Answering Brief, p. 7; and Mr. Placencio may not have wanted "to be outed as a Union supporter" to management. *Id.* p. 9. But there is no way Ms. Kimball could have known that at the time of the August 28 meeting. The Union's sole citation of evidence concerning Mr. Placencio's desire to prevent management from discovering his otherwise open, public organizing among his coworkers, involves his denial that he was participating in a campaign during a discussion with Mr. Harrison on September 27, one month after the preshift meeting involved here. Days later, Mr. Placencio corrected that denial and publicized his involvement in a campaign publicly via email to the entire organization.

"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). The ALJ echoed this reasoning in his Decision.[7] But it is exactly what the ALJ has required here by concluding that Ms. Kimball spoke unlawfully when she reported during a meeting about coworker reports of Union contacts, that Mr. Placencio was

[7] At least in the context of activity occurring on the employer's property, the ALJ concluded, "employers need not avert their eyes nor wear blinders where employees are openly and publicly engaging in protected activity." ALJD p. 15.

someone who allegedly was contacted by the Union. The ALJ improperly assumed that failing to name the source of the report specific to Mr. Placencio's conduct was inherently unlawful. To the contrary, her alleged report about information she lawfully received cannot possibly be unlawful. That aspect of the ALJ's Decision should be reversed.

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

The Union's Answering Brief, p. 12 contends that the ALJ's factual findings concerning Mr. Harrison's alleged interrogation of Mr. Placencio cannot be questioned here, based on the mere "blanket denials" by management. To the contrary, both Mr. Harrison and Ms. Kimball testified in detail about their discussion with Mr. Placencio, which followed the same pattern as multiple discussions they conducted with other staff in the same area that day. They testified consistently about their use of a Hospital publication to script their dialog, and specifically denied the implausible claims about repetitive questioning in an open area surrounded by patients and staff. *See* MGMC's Brief in Support pp. 13-14. By contrast, Mr. Placencio's testimony demonstrated the falsity of his prior claims concerning the discussion, including his testimony (i) contradicting the claim in his email drafted just days after the event in which he claimed both Ms. Kimball and Mr. Harrison interrogated him; (ii) contradicting his claim that Ms. Kimball and Mr. Harrison coerced him to oppose the Union; and (iii) contradicting his claim that he was accused of being the "ringleader" for an organizing campaign. *Id.* pp. 14-17. The ALJ did not even acknowledge these or other fabrications in Mr. Placencio's testimony.

The ALJ also improperly presumed coercion as a result of the discussion. Neither the ALJ, nor the Union in its Answering Brief, dispute that two of the five factors under the Board's traditional test, *Rossmore House*, 269 NLRB 1176 (1984), *affd.* 760 F.2d 1006 (9th Cir. 1985),

lack of hostility to organizing and the open location of the alleged questioning, are decidedly against finding interrogation here. With respect to a third factor, the ALJ incorrectly found Mr. Harrison was a "high level" supervisor despite that he was the first level of supervision above a group of staff "charge nurses," and who was supervised by a Director reporting to a chief Nursing Officer. Tr. 12-14. It is plainly incorrect to assert this initial line of leadership sits at a "high level" in the organization. *Rossmore House, supra* at 1176 (Factor involves consideration of "how high" the individual was in the employer's hierarchy). Mr. Harrison, the alleged questioner, was not even a member of Mr. Placencio's department and the presence of Ms. Kimball, someone Mr. Placencio accused a month earlier of "outing" him as a known Union advocate, further discounts the allegedly intrusive nature of the discussion.

The fifth factor under *Rossmore House*, which both the ALJ and the Union assert has particular weight, involves the falsity of Mr. Placencio's response to the questioning. Here the Union contends that Mr. Placencio was "nervous that answering truthfully would lead to retaliation, which is strong evidence of coercive interrogation in violation of the Act." Answering Brief p. 13. If Mr. Placencio's rote denials that he was involved in a campaign to a low level manager he did not know from another department really constitutes such "strong evidence," then what to make of the October 3 email by Mr. Placencio, publicizing his Union support and activities publicly and organization-wide?

At minimum, Mr. Placencio's timely self-disclosure six days after the incident demonstrates very powerfully 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). Mr. Placencio used the alleged incident on September 27 as fodder for a public campaign communication that even Mr. Placencio, in his testimony, acknowledged contained completely false, polemical claims to suit his own purposes in connection with his organizing efforts.

The totality of the circumstances here do not suggest coercive interrogation. *See Volair Contractors, Inc.*, 341 NLRB 673 (2004) (No interrogation where supervisor asked employees why they were wearing union T-shirts and made negative remarks about his experience with unions); *Spring City Knitting Company*, 285 NLRB 426 (1987) (No interrogation even though supervisor asked employee why she supported the union and was wearing a union emblem); *Keystone Lamp Manufacturing Corp.*, 284 NLRB 626 (1987) (No violation where supervisor questioned employees who were wearing union buttons at work about the meaning of the buttons and why the employees were wearing them). Mr. Placencio's conduct following the discussion concedes he was not coerced. The ALJ should not have found otherwise.

IV. CONCLUSION

The ALJ's Decision should be reversed in pertinent part.

Respectfully submitted this 13th day of May, 2020

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CERTIFICATE OF SERVICE

I certify that I have this 13th day of May, 2020, caused an electronic copy of the foregoing **Reply 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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