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St. Francis Medical Center, an operating division of Catholic Healthcare West Southern California Region[1] and Service Employees International Union, Local 399.[2] Case 21–CA–33315

June 6, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On December 15, 2000, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and an answer to the Respondent's exceptions. The Respondent filed an answer to the General Counsel's cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[3] and conclusions only to the extent consistent with this Decision and Order and to adopt the recommended Order and notice as modified below.[4]

We adopt the judge's finding, for the limited reasons set out in further detail below, that the Respondent violated Section 8(a)(1) by refusing to remove from various work areas flyers that disparaged and personally attacked an employee because of her union activities. We further find, contrary to the judge, that the Respondent did not violate Section 8(a)(1) by disparately enforcing its no-solicitation, no-distribution rule as to posting materials in the workplace, and we thus dismiss this allegation.

I. BACKGROUND

The Respondent is a California corporation that owns and operates a hospital and health care facility in Lynwood, California. During the period relevant to the issues in this case, employee Heang (Happy) Botelho worked as a tray line technician in the nutrition department, where she had worked for 11 years. Botelho was active in the Union's organizing campaign, and nearly every day from January through March 1999,[5] she distributed union literature outside the hospital after her shift. The Respondent was aware of her participation in, and support of, the Union's campaign.

The events at issue allegedly occurred in the hospital's nutrition department from Friday, March 26 to Monday, March 29. Although the parties presented radically different versions of these events, it is undisputed that at certain times during the relevant period, multiple copies of a flyer were posted in work areas and in nonwork areas. Some of the copies contained handwritten comments that targeted and attacked Botelho because of her union activities.[6] The complaint alleged that the Respondent violated Section 8(a)(1) by condoning the posting of these offensive flyers, and by disparately enforcing its no-solicitation, no-distribution rule by allowing the flyers to be posted.[7]

[1] On March 19, 2001, after the exceptions and briefs had been filed, the Respondent filed a Notice of Substitution of Counsel and Change in Corporate Identity. This filing noted, among other things, that effective January 1, 2002, the Respondent, St. Francis Medical Center, an operating division of Catholic Healthcare West, Southern California Region, would be known and organized as St. Francis Medical Center, A California Non-Profit Religious Corporation.

[2] We have amended the caption to reflect the disaffiliation of the Service Employees International Union from the AFL–CIO effective July 29, 2005.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] In cross-exceptions, the General Counsel contended that the judge failed to order that the appropriate notice be posted in both Spanish and English. Because the judge stated, in the remedy section of her decision, that "[t]he Board's traditional remedy of posting in English and Spanish is sufficient in this case," . . . we are satisfied that her failure to specify the Spanish-language posting in the recommended Order was inadvertent. Accordingly, and because the record reflects that many of the employees in the nutrition department regularly speak Spanish, we shall modify the Order to require the Respondent to post the notice in both Spanish and English. We have also modified the notice in accordance with *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

The General Counsel further contended that the Respondent's conduct in this case warrants certain special remedies. We agree with the judge that the traditional remedies are sufficient in this case.

[5] All dates are 1999 unless otherwise indicated.

[6] The flyer was a photocopy of a page that originally appeared in a union publication. The flyer featured Botelho's picture and the message: "She works in Nutrition, a department made up of mostly immigrants with limited English skills. She believes her co-workers are considered easier to intimidate and are picked on more frequently by supervisors." Comments that disparaged Botelho for supporting the Union (e.g., "Idiot," "Stop being used," and "If you're so unhappy here get another job") were handwritten on some of the flyers.

[7] The no-solicitation, no-distribution rule states as follows:

> 1. Associates of the Medical Center may not solicit during working time for any purpose.
> 2. Associates of the Medical Center may not solicit at any time for any purpose in immediate patient care areas . . . or any other area that would cause disruption of health care operations or disturbance of patients.
> 3. Associates may not distribute literature during working time, for any purpose.

II. DISCUSSION

A. Condoning Posting of Disparaging Flyers

According to Botelho, when she arrived at work on Saturday, March 27, she found 50 to 60 flyers posted "on every imaginable surface," including walls, ceilings, patient carts, and employee lockers.[8] She went to her supervisor, Luis Carillo, and asked him to remove the flyers, but he refused. One coworker confronted her in Carillo's presence, yelling, "Stop being used . . . Union is bullshit." Botelho testified that Carillo did nothing. Botelho further testified that she found the flyers throughout her work area during her shift (6:30-3:00), and that Carillo repeatedly refused her requests to take them down.

According to Carillo, when he arrived at work at 5:30 a.m. on Saturday, he discovered about 50 to 60 flyers posted throughout the workplace. Contrary to Botelho's testimony, Carillo testified that he immediately removed the flyers within reach, and he had housekeeping remove the rest. Carillo further testified that Botelho never asked him, and he never refused, to remove the flyers. In addition, Carillo testified that he questioned employees about the flyers but received no response as to who was responsible for them.

Although the judge did not explicitly credit Botelho's version of Saturday's events—or explicitly discredit Carillo's version—she found that the Respondent "did not . . . heed [Botelho's] requests to have the flyers removed," and therefore she implicitly discredited Carillo's testimony.[9] Accordingly, the judge effectively found that Carillo took no action in response to Botelho's complaint when Botelho saw the flyers posted on Saturday, March 27. Relying solely on that finding, we conclude that the Respondent violated Section 8(a)(1) by permitting the posting of the offensive flyers and thereby condoning abusive behavior toward Botelho. See, e.g., *Champagne Color, Inc.*, 234 NLRB 82 (1978) (respondent violated Section 8(a)(1) where supervisor witnessed single incident of abuse of prounion employee by antiunion employee and failed to respond adequately).[10]

B. Disparate Enforcement of No-Solicitation/No Distribution Rule

As stated above, the complaint further alleged that the Respondent violated Section 8(a)(1) by disparately enforcing its no-solicitation, no-distribution rule as to the flyer postings.[11] The General Counsel sought to prove this allegation by comparing the Respondent's inaction regarding the posted flyers in this case to its decisions to discipline prounion employees who violated its no-solicitation, no-distribution rule at other times in the past. The General Counsel relied on evidence produced in a related case as well as documentary evidence to show that union supporters were disciplined for discussing the

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> 4. Associates may not distribute literature at any time, for any purpose, in working areas. Working areas are all those areas in the Medical Center except the cafeteria, gift shop, associate lounges, lobbies, and parking areas.

The Respondent has a separate rule for postings:

> Bulletin Boards are located throughout the Medical Center. Everyone is urged to look frequently for changes and announcements of Medical Center policies, personnel policies, and other important matters. All information and notices posted on these bulletin boards must have the prior approval of Human Resource Services.

Finally, the Respondent had a rule prohibiting discourteous or abusive treatment of coworkers.

[8] Botelho testified that she first found the flyers in the workplace on Friday, March 26. In contrast, both her supervisor, Luis Carillo, and the evening supervisor, Virginia Apodaca, testified that they did not see any flyers on Friday. The judge declined to resolve this dispute, stating that it made little difference which version was accurate.

[9] Member Schaumber observes that the judge failed to make explicit fact and credibility findings in this case, a failure that created unnecessary ambiguity and reviewing difficulties. Throughout her decision, the judge cited both parties' widely conflicting versions of the facts without, in most cases, resolving those conflicts or stating which facts or witnesses she credited. See *Lewin v. Schweiker*, 654 F.2d 631, 635 (9th Cir. 1981) (courts have consistently required explicit credibility findings where such credibility is a critical factor in the decision). Moreover, in those few instances when disputed testimony was credited, the judge failed to articulate any specific reasons why one witness was credited over another. See *NLRB v. Cutting, Inc.*, 701 F. 2d 659, 666-667 (7th Cir. 1983) (rejecting ALJ's credibility findings because the judge gave no reasons for crediting witnesses, and thus the findings "provide no basis for assessing the relative credibility of the witnesses"). Such unsupported findings are not cured by a boilerplate credibility statement which adds nothing to permit meaningful review. See *K-Mart Corp. v. NLRB*, 62 F.3d 209, 213 (7th Cir. 1995) (judge's "boilerplate comment concerning general credibility determinations," without further explanation, was inadequate for review). Despite these deficiencies in the judge's decision, Member Schaumber finds enough in the existing record to support the complaint allegation.

[10] Botelho testified that she was so shaken by the events of the weekend that she called in sick on Sunday. On Monday morning when she returned to work, she again found numerous flyers posted in the work area. According to Botelho, she complained to her supervisor, Kirby, but he refused to remove the flyers. Botelho then complained to several upper-level managers, and the flyers were removed. In addition, Food Service Director Nunez addressed the nutrition department employees and warned them not to post any more flyers. Kirby passed away before the hearing. In the absence of Kirby's testimony, and in light of the timely corrective response to Botelho's complaints by upper-level managers on Monday, we find it unnecessary to address Botelho's testimony about Kirby's alleged failure to remove the flyers.

[11] The complaint alleges that the Respondent permitted the antiunion flyers to be posted "in spite of the fact that [the] flyers and other written materials . . . were posted by employees in violation of Respondent's [no-solicitation, no-distribution] rule, which rule has at all times been strictly enforced by Respondent to limit solicitation and distribution of literature in support of the Union."

Union and for passing out union-related literature.[12] Based on this evidence, the judge found that the Respondent disparately enforced its rule in this case by allowing employees to post antiunion flyers. We do not find that the evidence supports this conclusion.

As stated above, the Respondent maintains one rule for solicitation and distribution and a separate rule for posting materials. The finding in the earlier case that the Respondent disparately enforced its rule against union solicitation and distribution is not relevant to the Respondent's alleged disparate action here regarding postings. In the circumstances of this case, the comparison between solicitation/distribution and posting is a comparison of "apples to oranges."

We have found that on Saturday, March 27, Carillo condoned the posting of offensive flyers by refusing to remove them.[13] However, the General Counsel has not produced any evidence that the Respondent has acted disparately in regard to what else it permits to be posted. Without this predicate against which to compare the Respondent's actions regarding posting in this case, we cannot find that the Respondent disparately enforced a no-solicitation no-distribution rule against union supporters, as alleged in the complaint. We therefore reverse the judge and dismiss the allegation.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, St. Francis Medical Center, an operating division of Catholic Healthcare West, Southern California Region, Lynwood, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(b) and reletter the subsequent paragraphs accordingly.

2. Substitute the following for paragraph 2(a).

"(a) Within 14 days after service by the Region, post at its facility in Lynwood, California copies of the attached notice marked "Appendix." [14] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be translated into Spanish, and both Spanish and English notices shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in this proceeding, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 27, 1999."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. June 6, 2006

Robert J. Battista , Chairman

Peter C. Schaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT permit employees to post flyers and other written materials which disparage and personally attack

[12] In the related case, *St. Francis Medical Center*, 340 NLRB 1370 (2003), the Board adopted the judge's finding that the Respondent violated Sec. 8(a)(1) by strictly enforcing its rule against union-related solicitations and distributions while not enforcing the rule against non-union solicitations and distributions.

[13] This finding does not implicate the Respondent's rule regarding posting. That rule regulates bulletin board postings. The violation here does not concern the bulletin board. Rather, the violation is that the Respondent refused to remove offensive antiunion materials after being requested to do so by the offended employee.

[14] If this Order is enforced by a judgment of the United States Court of Appeals, the words in this notice reading "Posted By Order Of The National Labor Relations Board" shall read "Posted Pursuant To A Judgment Of The United States Court Of Appeals Enforcing An Order Of The National Labor Relations Board."

employee Heang (Happy) Botelho because of her activities and sympathies on behalf of and in support of Service Employees International Union, Local 399.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

ST. FRANCIS MEDICAL CENTER AN OPERATING DIVISION OF CATHOLIC HEALTHCARE WEST, SOUTHERN CALIFORNIA REGION

Julie B. Gutman, Esq., for the General Counsel.
Scott Davidson, Esq. (O'Melveny & Myers), of Los Angeles, California, for the Respondent.

DECISION

MARY MILLER CRACRAFT, Administrative Law Judge. This case was heard in Los Angeles, California, on March 16–17, 2000. The complaint alleges that St. Francis Medical Center, an operating division of Catholic Healthcare West, Southern California Region (Respondent) disparately enforced its no-solicitation, no-distribution rule by allowing employees to post flyers and other written materials disparaging employee Heang (Happy) Botelho because of her activities on behalf of Service Employees International Union, Local 399, AFL–CIO (the Union) while strictly enforcing its rule to limit solicitation and distribution of literature by employees in support of the Union in violation of Section 8(a)(1) of the Act.[1]

All parties were afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue the merits of their respective positions. On the entire record, including my observation of the demeanor of the witnesses,[2] and after considering the briefs filed by counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent is a California corporation owning and operating a hospital and health care facility in Lynwood, California. During the 12-month period ending December 31, 1998, Respondent derived gross revenues in excess of $250,000 and purchased and received goods valued in excess of $50,000 which were shipped directly to its Lynwood, California facility by suppliers located outside the State of California. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act. Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

At all material times, Respondent has maintained the following no-solicitation, no-distribution rule:

1. Associates of the Medical Center may not solicit during working time for any purpose.
2. Associates of the Medical Center may not solicit at any time for any purpose in immediate patient care areas . . . . or any other area that would cause disruption of health care operations or disturbance of patients.
3. Associates may not distribute literature during working time, for any purpose.
4. Associates may not distribute literature at any time, for any purpose, in working areas. Working areas are all those areas in the Medical Center except cafeteria, gift shop, associate lounges, lobbies, and parking areas.

The rule also provides that associates may post literature only on approved associate bulletin boards and only with prior permission. Another rule prohibits discourteous treatment or abusiveness toward coworkers.

Heang (Happy) Botelho, who has worked for Respondent for 11 years, is a tray line technician in the nutrition department. Her work involves filling patient trays on the day shift. There are approximately 10–20 employees on the day shift in the nutrition department. Her days of work are 4 of the 5 weekdays and every other weekend. Her hours are from 6:30 a.m. to 3 p.m.

Luis Carillo, Bill Kirby, and Virginia Apodaca are dietary department supervisors. Carillo works 5 a.m. to 1:30 p.m. on Fridays and Saturdays. On Sunday through Wednesday, he works from noon until 8:30 p.m. Kirby works on Sunday through Thursday from 5 a.m. to 1:30 p.m. Carillo, Kirby, and Apodaca report to Matt Nunez, food service director. He, in turn, reports to assistant administrator for professional and support services, Larry Stahl.

Botelho was active in the Union from January through March 1999. She distributed flyers outside the hospital after her shift. She did this almost every day in January, February, and March. Other employees also assisted in passing out flyers. However, Botelho was unaware of any other nutrition department employees who supported the Union or assisted in distributing flyers. She observed and spoke with Bill Kirby, Louis Carillo, Lydia Romero (customer SCA), and Larry Stahl while she was distributing flyers. Botelho also walked on a picket line on Martin Luther King Jr. Street on March 25 from 3:30 to 5 p.m. She held a picket sign which said SEIU 399 Local. On the second and third floor in intensive care unit (ICU) she observed Larry Stahl, Respondent's president, Gerald Kozai, Lydia Romero, administrative director of pastoral care, Brother Richard Hirby, and Louis Carillo watching the picketing.

[1] The charge was filed by the Union on May 12, 1999. Complaint issued on September 29, 1999. Unless otherwise referenced, all dates are in 1999.

[2] Credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

B. Events of March 26–29

Over the weekend of Friday, Saturday, and Sunday, March 26, 27, and 28, flyers were posted in the nutrition department on almost every imaginable surface. Although Botelho claims these postings began on Friday, Respondent's witnesses uniformly testified that they saw no postings until Saturday. It makes little difference which version is accurate.

According to Botelho, on Friday, March 26, when she checked her schedule upon arrival at 6:15 a.m., she saw posted on the bulletin board a flyer containing her picture. Apparently this flyer was prepared by the Union as part of its organizing effort. Aside from the picture, the flyer stated, "[Botelho] works in Nutrition, a department made up of mostly immigrants with limited English skills. She believes her co-workers are considered easier to intimidate and are picked on more frequently by supervisors."

Usually, only employee schedules are posted on the bulletin board. Without reading the flyer, Botelho immediately went to her supervisor's office and asked that the flyer be removed. According to Botelho, Carillo, the supervisor on duty, said that employees had a right to put the flyer up. Botelho went back to the bulletin board and checked her schedule and decided to remove the flyer herself. She worked in the tray line for awhile. Then she went to the ice machine. She saw the same flyer hanging on the top of the ice machine. She observed the same flyer on a wall behind the tray line and another flyer by the clock in the tray room. She also observed the flyer inside patient carts and on top of patient carts. She returned to the tray line and at 7 a.m. when her supervisor came to the tray line she asked Carillo to remove the flyers. According to Botelho, he said no, other employees had a right to express their opinion.

According to Botelho, while Carillo was in the area, Botelho's coworkers Willie Rodriquez, Antonio Bennett, Patty Abasio, Joe Serra, and Aldo Altio asked Botelho why she called them immigrants with limited English skills. Botelho countered that she was an immigrant with limited English skills and she was not ashamed of that. In Botelho's view, her coworkers were hostile toward her and continued talking to her in a similar vein. She asked Carillo to control the situation. Carillo spoke in Spanish to them. Carillo and the coworkers laughed. Botelho does not speak or understand Spanish. Carillo testified that he did not recall any employees harassing Botelho or laughing at her. He did not see any employees yelling at or confronting Botelho. Carillo recalled that employees were upset about the statement in the flyer that they were immigrants with limited English skills. I credit Botelho's version of this encounter.

At about 8:30 a.m., Botelho spoke with Willie Rodriquez by the ovens. Rodriquez had a copy of the flyer which he handed to Botelho. He told her that the Union was just using her. Botelho asked Rodriquez where he obtained the flyer. Rodriquez responded that it was in the supervisor's office and he made a photocopy of it. Rodriquez said he put a copy of the flyer on the bulletin board. Botelho saw another copy of the flyer posted on the bulletin board and on a trip back from the lady's room, she noticed that "idiot" had been written on the flyer on her forehead. She took the flyer down at this point and went to her supervisor's office. She asked for his help again and, according to Botelho, he once again refused saying employees had a right to express their opinions. Botelho thought she recognized the handwriting of the "idiot" comment as that of Antonio Bennett. She asked Carillo to stop Bennett from harassing her. Carillo refused. While she was in Carillo's office, she saw a stack of flyers on Carillo's table. At a later point, she saw Bennett emerge from Carillo's office with another flyer and write something on it with a marker.

On the following day, Saturday, March 27, Botelho reported to work at 6:15 a.m. Another flyer with her picture on it was posted on the bulletin board. Written on it was, "stop being used, aren't you the same as them, Union is bull shit." Attached was a handwritten note stating,

> Some of us just know better. We have minds of our own. We know how to talk for ourselves. We don't need someone with less intellegence [sic] talking for us. The UNION is here only for one reason, *Union Dues.* Ask them if it wasn't for Dues would do it for free. You know the answer. RONNIE

According to Botelho, she went to Carillo's office and asked him to come and look at the posting. Carillo followed Botelho but refused to remove the poster. Botelho confronted coworker Ronnie Rainwater who yelled at her, "[S]top the Union, stop this bull shit." Botelho continued her duties that day and saw posters, "All over, everywhere I turned, is all over."

According to Carillo, when he reported to work on Saturday around 5:30 a.m., there were 50–60 posters all around the kitchen containing Botelho's picture. He removed all the flyers he could reach and called housekeeping to remove the remainder that he could not reach. However, before housekeeping arrived, Botelho reported to work and was very upset. She said she was going to sue the Union. Carillo tried to calm her down and told her that housekeeping was coming to take the flyers down. Carillo told her he had removed all he could reach and put them in the trash. Carillo did not know who put up the flyers. He asked the employees around 7 a.m. who put up the flyers. They all said they did not know.

Virginia Apodaca first became aware of flyers around 1 p.m. on Saturday. Carillo told her when he reported to work on Saturday, there were flyers all over the place. He told Apodaca that he took them all down but if Apodaca saw any more she should take them down. Around 4:45 p.m., Apodaca saw a flyer on the wall to the left of the tray line around the clock. She asked the group of three or for employees who were working who posted the flyer and no one said anything. Apodaca said, whoever did this, don't do it again. She asked for assistance in removing it. She threw the flyer away. The flyer had a picture and typewritten text. There was no handwriting on the flyer. Apodaca removed 15 additional flyers that day. Apodaca did not work on Sunday or Monday.

On Sunday, March 28, Botelho was scheduled to work. However, she called in sick and did not report to work on Sunday. Carillo worked from noon to 8:30 p.m. that date. Bill Kirby was morning supervisor that date. Kirby and Carillo spoke around 1 p.m. Kirby said he found a few more flyers and he put them in the trash. Carillo told Kirby about what happened on Saturday too. Carillo did not see any flyers on Sunday.

On Monday, March 29, Botelho arrived at 6:15 a.m. She saw the same flyer posted in numerous locations. On one of them

was handwritten, "If you're so unhappy here get another job." Another said, "[T]hink before you talk?" and teardrops were shown coming from one of Botelho's eyes. Botelho gathered some of these flyers and went to her supervisor's office. Bill Kirby was supervising that morning.[3] According to Botelho, Kirby told her that employees were entitled to put these flyers up. Botelho worked in the cafeteria that day. She saw Kirby in the cafeteria and asked him to help her remove some of the flyers which were posted around the area. He refused.

Finally, Botelho went to human resources. Julie, a human resources representative, called Kirby and told him to remove the flyers immediately. On her return to the cafeteria, Botelho saw Bobby Bland, director of public safety. She told him her supervisor would not help her remove the flyers and asked him to help her remove the flyers and he did so. Bland corroborated Botelho. Bland became aware of leaflets posted in the nutrition department when Botelho informed him of them on Monday around 6:30 or 7 a.m. He followed her into the food preparation area and she showed him about 15 to 25 flyers. According to Bland, Botelho told him that her supervisors would not remove the flyers. Bland began removing the flyers. He contacted engineering to bring a ladder. Engineering removed the rest. Bland thought there may have been handwriting on some of the flyers—he remembered something about not being idiots and get a job. Bland told Botelho to report the incident. Bland saw Kirby while he was removing the flyers. Kirby said he had contacted house keeping about getting a ladder. Bland stated that this was not tolerated.

Later, Matt Nunez, food service director, inquired of Botelho if anything was wrong. She asked Nunez to speak to Bland and she went to employee health because she felt ill. According to a memorandum prepared by Nunez, Bland told Nunez that Botelho claimed her supervisor would not help her remove the flyers.

After visiting employee health, Botelho went to the office of Larry Stahl, assistant administrator for professional and support services. Brother Richard Hirby was in Stahl's office at the time. There is substantial agreement regarding the conversation which took place. Botelho complained of the posting of the flyer and harassment by her coworkers.[4] Stahl said he agreed with her and this should not happen. Brother Richard told Botelho that three of her coworkers had come to him to tell him that they were hurt by Botelho's comments in the flyer. Stahl called Nunez to his office and asked Nunez to investigate and make sure it did not happen again. Nunez said he would conduct an investigation immediately.

A meeting was called among Botelho's coworkers. She did not attend that meeting. Botelho felt. "[S]ick from anxiety," and went to her doctor. She left work and was on leave of absence until September 9.

In any event, Nunez met with his staff around 8:30 a.m. He told employees that the behavior of posting flyers would not be tolerated and employees should not be singled out. The employees were angry. They said the literature stated they were immigrants and illiterate. He asked employees who was responsible. No one claimed responsibility, "and that was the end of it." He told them they needed to come to him or go to administration if they were angry.[5] Later individual meetings with employees failed to discover who had posted the flyers.

C. Contentions

Counsel for the General Counsel argues that Respondent permitted employees to harass Botelho because of her union activities and to post materials which disparaged Botelho because of her union activities in violation of Section 8(a)(1). Counsel notes that Botelho's complaints were ignored and there was no meaningful investigation into the matter.[6] Counsel also asserts that Respondent violated Section 8(a)(1) by disparately enforcing its solicitation policy to allow posting of antiunion materials while strictly enforcing its policy against prounion postings or distributions.[7] Counsel argues that while Respondent failed to investigate the posting of antiunion flyers in violation of its policy, it nevertheless investigated and disciplined prounion employees for similar violations and invited employees to report questionable incidents of prounion conduct. Counsel notes that Respondent routinely disciplined employees for abusiveness and discourteous behavior but made no effort to determine who was responsible for the posting of the Botelho flyers.

Counsel for Respondent claims that Respondent did not direct, encourage or permit the posting of the flyers and did not acquiesce in, or condone, the posting of the flyers. Rather, Respondent took immediate action to express disavowal and disapproval of the conduct.[8] Moreover, counsel asserts that Respondent consistently enforced its lawful no-distribution rule in a nondiscriminatory manner.

D. Analysis

There is no dispute that Botelho was harassed by her coworkers because of her support for the Union.[9] Botelho's coworkers were insulted that she considered them immigrants with limited English skills and thus easier targets for intimidation by management. They posted numerous copies of flyers depicting Botelho and documenting her support for the Union. Although the Union initially published the newsletter containing Botelho's picture and her comments, 50–60 copies of the

[3] Kirby died prior to this proceeding.

[4] Stahl did not testify that Botelho mentioned harassment by her coworkers. However, he did not deny this. In any event, I credit Botelho that she mentioned harassment as well as the posting of flyers.

[5] Nunez questioned the evening staff jointly and individually.

[6] Counsel relies upon *Taylor Machine Products*, 317 NLRB 1187 (1995), enfd in relevant part 136 F.3d 507 (6th Cir. 1998) (permitting and condoning harassment of employees because of union activities violates the Act).

[7] Counsel cites *Funk Mfg. Co.*, 301 NLRB 111, 113 (1991); *South Nassau Communities Hospital*, 274 NLRB 1181, 1182 (1985) (disparate enforcement of no-distribution rule discriminatory).

[8] Counsel relies on *Knogo Corp.*, 265 NLRB 935 (1982), enfd in relevant part 727 F.2d 55 (2d Cir. 1984); *Giovanni's*, 259 NLRB 233 (1982) (employer did not condone employee harassment of prounion employees).

[9] Although Botelho recalled that the flyers were initially posted on Friday, March 26, Carillo testified that he saw no flyers on Friday. He and Botelho agreed that numerous flyers were posted on Saturday, March 27.

pertinent page were posted on one day alone. Botelho's supervisors were aware that she was harassed by the posting of these flyers and did not discipline or caution employees. Even if Respondent did not know which particular employees were responsible and even given Respondent's assertion that it was not aware of any flyers until Saturday, Respondent did not disabuse employees of the idea that posting such flyers would not be tolerated until Monday. There is no evidence that employees were ever warned that such incidents could lead to disciplinary action.[10] Thus, over the weekend, Respondent, by its inaction, condoned posting of these flyers. In fact, when Botelho asked for help, Carillo spoke to employees in Spanish, and everyone laughed, except Botelho.

In contrast to Respondent's strict enforcement of its no-solicitation, no-distribution rule against union supporters,[11] Respondent did not ask Botelho for the names of suspects[12]or heed her requests to have the flyers removed. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act by permitting employees to post flyers disparaging and personally attaching Botelho because of her support for the Union. In addition, I find that Respondent violated Section 8(a)(1) by disparately enforcing its no-solicitation, no-distribution rule strictly against supporters of the Union.

REMEDY

Counsel for the General Counsel contends that Respondent should be required to provide written assurance to Botelho that its unlawful conduct will not be repeated and should be required to read the remedial notice to employees in both Spanish and English as well as providing a copy of the notice to each nutrition department employee.[13] I decline to require written assurances to Botelho or the reading and copying of the notice. The Board's traditional remedy of posting in English and Spanish is sufficient in this case.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The Respondent, St. Francis Medical Center, an operating division of Catholic Healthcare West, Southern California Region, Lynwood, California, its officers, agents, successors, and assigns, shall

1.Cease and desist from

(a) Permitting employees to post flyers and other written materials which disparaged and personally attacked employee Heang (Happy) Botelho because of her activities and sympathies on behalf of and in support of the Union.

(b) Disparately enforcing its solicitation and distribution policies to limit solicitation and distribution of literature by employees in support of the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Lynwood, California, copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 26, 1999.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, San Francisco, California, December 15, 2000

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

[10] Apodaca's admonishment to three or four afternoon-shift employees not to repeat the posting of flyers does not rise to the level of such a caution.

[11] In a related case, *St. Francis Medical Center,* JD(SF)-81-00, issued simultaneously with this decision, I concluded that Respondent violated Sec. 8(a)(1) and (3) of the Act by counseling Carmen Bautista and Caroline Plaza and by warning Carmen Bautista, Victor Rios, and Jaime Duarte for violating the no-solicitation, no-distribution rule because these employees were acting on behalf of the Union. I also concluded that Respondent violated Sec. 8(a)(1) of the Act by enforcing its no-solicitation, no-distribution rule selectively and disparately by prohibiting Union solicitations and distributions while not enforcing the rule against nonunion solicitations and distributions and by prohibiting employees from speaking about the Union during working time while not prohibiting conversations about nonunion topics.

[12] Respondent invited employees to report any questionable actions employees made on behalf of the Union. Even if it is true, as Respondent's witnesses testified, that Botelho did not voice her suspicions to them regarding which employees were responsible for the postings, Respondent nevertheless failed to ask her for or invite her to provide this information.

[13] Counsel relies on *Pacific Bell,* 330 NLRB 271, 275 (1999); *J. P. Stevens & Co. v. NLRB,* 417 F.2d 533, 540 (5th Cir. 1969).

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[15] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT permit employees to post flyers and other written materials which disparage and personally attack employee Heang (Happy) Botelho because of her activities and sympathies on behalf of and in support of Service Employees International Union, Local 399, AFL–CIO.

WE WILL NOT disparately enforce our solicitation and distribution policies to limit solicitation and distribution of literature by employees in support of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

ST. FRANCIS MEDICAL CENTER, AN OPERATING DIVISION OF CATHOLIC HEALTHCARE WEST, SOUTHERN CALIFORNIA REGION