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**Sacred Heart Medical Center and Washington State Nurses Association.** Case 19–CA–29150

September 26, 2008

**SUPPLEMENTAL DECISION AND ORDER**

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On June 30, 2006, the National Labor Relations Board issued its Decision and Order in this proceeding, finding that the Respondent, Sacred Heart Medical Center, did not violate Section 8(a)(1) of the Act by promulgating, maintaining, and enforcing a policy that prohibits its employees from wearing “RNs Demand Safe Staffing” union buttons in those parts of the Respondent’s medical facility where employees might “encounter patients or family members.”<sup>1</sup> The Union, Washington State Nurses Association, petitioned the United States Court of Appeals for the Ninth Circuit for review of the Board’s Order.

On May 20, 2008, the court granted the petition for review, reversed the findings of the Board, and remanded the case to the Board with instructions to “reinstate the ALJ’s Decision and Order.”<sup>2</sup> The judge had found that the Respondent’s conduct violated Section 8(a)(1) of the Act.

We accept the court’s remand as the law of the case.<sup>3</sup> Accordingly, as instructed by the court, we adopt the findings of the administrative law judge as set forth in her decision,<sup>4</sup> and we adopt the judge’s recommended Order as modified.

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Sacred

<sup>1</sup> 347 NLRB 531 (2006). Member Liebman dissented.

<sup>2</sup> *Washington State Nurses Assn. v. NLRB*, 526 F.3d 577, 585 (9th Cir. 2008).

<sup>3</sup> Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board’s powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

<sup>4</sup> The judge’s decision is attached.

Heart Medical Center, Spokane, Washington, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

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

Dated, Washington, D.C. September 26, 2008

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Peter C. Schaumber, Chairman

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Wilma B. Liebman, 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 promulgate, maintain, or enforce a policy that unlawfully prohibits our employees from wearing union buttons.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by the Act.

WE WILL rescind the memorandum of February 27, 2004, which requested that you not wear the buttons reading “RNs Demand Safe Staffing” in any area where you might encounter patients or family members.

SACRED HEART MEDICAL CENTER

*Stephanie Cottrell, Atty.*, for the General Counsel.  
*Bruce Bishoff, Atty.*, of Bend, Oregon, for the Respondent.  
*Linda Machia, Atty.*, of Seattle, Washington, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

MARY MILLER CRACRAFT, Administrative Law Judge. The issue in this case is whether Respondent, Sacred Heart Medical Center, violated Section 8(a)(1) of the Act<sup>1</sup> by requesting removal of a button in any areas where patients or patients' families might see the button. The Washington State Nurses Association (the Union) button stated, "RNs Demand Safe Staffing." Respondent allowed other union buttons to be worn throughout the hospital, including patient care areas.

On the entire record,<sup>2</sup> including briefs filed by all parties, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent is a State of Washington corporation which operates an acute care medical facility in Spokane, Washington. During the 12 months preceding issuance of the complaint, Respondent had gross revenue in excess of \$250,000 and it purchased and received goods valued in excess of \$5000 directly from suppliers located outside the State of Washington. 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 that it is 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. FACTS

Respondent and the Union have maintained a collective-bargaining relationship for at least the past 20 years. Currently, there are about 1200 registered nurses in the bargaining unit. The parties' most recent contract expired in January 2004. During bargaining for a successor contract, one of the issues was nursing staff levels. Bargaining commenced in the fall of 2003. A contract was ratified in May 2004.

The parties stipulated that even though union buttons have been worn by nurses throughout the hospital for many years, Respondent had no occasion to request removal of a button until February 27, 2004, when Respondent requested that the button depicted below the "Safe Staffing" button be removed pursuant to the terms of a February 27, 2004 memorandum.

<sup>1</sup> Sec. 8(a)(1) of the Act provides that an employer may not interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by Sec. 7 to, inter alia, form, join, or assist labor organizations and to bargain collectively through representatives of their own choosing.

<sup>2</sup> The charge was filed by the Union on March 2, 2004. The complaint issued on June 30, 2004. Trial was on October 7, 2004, in Spokane, Washington.



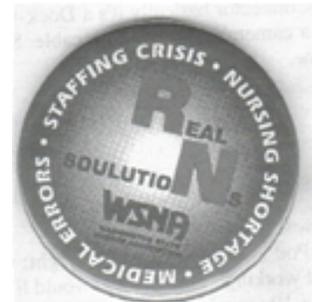
The February 27, 2004 memorandum referred to in the parties' stipulation is as follows:

It has come to our attention that some staff are wearing buttons which say, "RNs Demand Safe Staffing." We know that staff have worn a variety of buttons over the years for different purposes, and we have no objection to most messages. This message, however, disparages Sacred Heart by giving the impression that we do not have safe staffing. We cannot permit the wearing of these buttons, because patients and family members may fear that the Medical Center is not able to provide adequate care.

It is difficult for us to understand why nurses would wear these pins at the risk of upsetting their patients, particularly since we have come to agreement with [the Union] at the bargaining table on issues related to staffing and how staff will be involved when staffing issues arise.

To assure that patients do not become alarmed or fearful about patient care at Sacred Heart, effective immediately, it is our expectation that no staff member will wear these buttons in any area on our campus where they may encounter patients or family members.

Other buttons worn by nurses during this same period of time included the following:



# WSNA SHMC RNs REMEMBER

# 98

The parties also agreed that Respondent's human resources personnel were approached by certain nurse managers expressing their concern as to the impact of the "Safe Staffing" button on patients and their families. Finally, the parties agreed that two witnesses who were not called to testify would testify similarly to witnesses who testified; that is, these witnesses would testify that while they were wearing the "Safe Staffing" button, they were not questioned by patients or patients' families about the button.

There is no evidence that any employee was disciplined for wearing the "Safe Staffing" button. Various employees were, however, asked to remove these buttons following issuance of the memorandum.

## Analysis

Employees have a protected Section 7 right to make public their concerns about their employment relation, including a right to wear union insignia at work. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945). In health care facilities, however, the right to wear union insignia may be limited to nonpatient care areas. In other words, a health care facility may lawfully prohibit union buttons in immediate patient care areas. *NLRB v. Baptist Hospital*, 442 U.S. 773, 781 (1979). Historically, however, Respondent did not seek to limit union insignia in any areas. Prior to February 27, 2004, Respondent allowed union insignia without regard to the distinction between patient care and nonpatient care areas.

Employer prohibitions on hospital employees' right to wear union buttons in nonpatient care areas, which refer to employment concerns, must be justified by evidence that the rule is "necessary to avoid disruption of health care operations or disturbance of patients." *Mt. Clemens General Hospital*, 335 NLRB 48 (2001), quoting *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 507 (1978) (hospitals or other health care institutions may be justified in imposing more stringent prohibitions in order to afford tranquil environment to patients). Additionally, the union button or insignia must be related to an employment concern and not so disloyal, reckless, or maliciously untrue as to lose the Act's protection. *Mountain Shadows Golf Resort*, 330 NLRB 1238, 1240 (2000), relying on *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953).

The General Counsel and the Charging Party argue that this case is controlled by *Mt. Clemens General Hospital*, supra,

arguing that Respondent has failed to show "special circumstances" privileging its prohibition. Additionally, they argue that Respondent's prohibition is presumptively invalid because it includes both immediate patient care areas as well as nonpatient care areas. In agreement, I find that Respondent's prohibition of the "Safe Staffing" button in areas other than those devoted to patient care obviously runs afoul of *Beth Israel Hospital*, supra, and its progeny, unless Respondent's prohibition was "necessary to avoid disruption of health care operations or disturbance of patients"<sup>3</sup> or unless the button is not protected by Section 7 of the Act.<sup>4</sup>

Respondent argues that its prohibition is valid because the "Safe Staffing" button would likely disturb patients, citing *Mesa Vista Hospital*, 280 NLRB 298, 298–299 (1986). However, as Respondent concedes, there is no direct evidence that the "Safe Staffing" button actually disturbed patients. Nevertheless, Respondent relies on the logical import of the language of the "Safe Staffing" button, arguing that one might logically deduce from the language "Nurses Demand Safe Staffing" that Respondent's current staffing levels were deemed "unsafe" by its nurses. Such an assertion, in Respondent's view, would likely disturb patients and patients' families because they would reasonably fear that their medical care was unsafe.

Respondent's argument that its prohibition is privileged by "special circumstances" must fail. First, Respondent bears the burden of proving "special circumstances." See, e.g., *Beth Israel Hospital*, supra, 437 U.S. at 507. There is no evidence that any of Respondent's patients were actually disturbed. In the absence of such evidence, Respondent's "special circumstances" argument is unproven. *St. Luke's Hospital*, 314 NLRB 434, 435 (1994) ("special circumstances" argument fails where record devoid of evidence to support supposition that patients might be upset by "United to Fight for our Health Plan" buttons and stickers); cf. *Pathmark Stores*, 342 NLRB 378, 379 (2004) (absence of evidence that slogan actually threatened customer relationship not fatal where slogan "Don't Cheat About the Meat!" reasonably threatened to create concern among customers about being cheated).

Second, Respondent did not limit its prohibition to patient-care areas. Respondent's rule required that the "Safe Staffing" buttons be removed in areas where patients or patients' families might see the buttons. This wide and unspecified geographic area is an overly broad prohibition on Section 7 activity. See, e.g., *Medical Center of Beaver County*, 266 NLRB 429, 430 (1983), relied upon by the Charging Party.

Third, the language on the "Safe Staffing" button did not disparage Respondent's services nor is it alleged to be disloyal, recklessly made, maliciously false, vulgar or obscene. Rather, the somewhat generalized statement, "RN's Demand Safe Staffing," presents a legitimate workplace concern and is protected by Section 7. See, e.g., *St. Luke's Episcopal-Presbyterian Hospitals*, 331 NLRB 761, 762 (2000) (employer violated Sec. 8(a)(1) and (3) by discharging a nurse who gave a TV interview

<sup>3</sup> *NLRB v. Baptist Hospital*, supra at 781. At fn. 11, the Court stated, "A hospital may overcome the presumption of showing that solicitation is likely either to disrupt patient care or disturb patients."

<sup>4</sup> *Jefferson Standard*, supra, 346 U.S. at 476–477.

in which she made a statement about inadequate staffing levels of medical teams in her department).

Finally, Respondent did not historically limit union insignia in patient-care areas. Thus, the “special circumstances” analysis applied in many cases where such patient-care area bans are present, is inapplicable here. See, e.g., *Evergreen Nursing Home*, 198 NLRB 775, 779 (1972) (bright yellow union buttons approximately 2 inches square were lawfully prohibited by the nursing home which had long maintained strict rule limiting all-white uniform adornment to name tag and professional affiliation only).

#### CONCLUSION OF LAW

By promulgating, maintaining and enforcing a policy prohibiting employees from wearing a union button “in any area on our campus where they may encounter patients or family members,” the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusion of law and on the entire record, I issue the following recommended<sup>5</sup>

#### ORDER

The Respondent, Sacred Heart Medical Center, Spokane, Washington, its officers, agents, successors, and assigns, shall cease and desist from promulgating, maintaining, and enforcing a policy prohibiting employees from wearing a union button “in any area on our campus where they may encounter patients or family members” and 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.

Take the following affirmative action necessary to effectuate the policies of the Act: Rescind the February 27, 2004 memorandum and, within 14 days after service by the Region, post at its facility in Spokane, Washington copies of the attached notice marked “Appendix.”<sup>6</sup> Copies of the notice, on forms pro-

<sup>5</sup> 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.

<sup>6</sup> If this Order is enforced by a judgment of a 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.”

vided by the Regional Director for Region 19, 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 February 27, 2004.

Dated: March 24, 2005

#### APPENDIX

NOTICE TO EMPLOYEES  
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#### SACRED HEART MEDICAL CENTER

ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”