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St. Joseph's Hospital *and* United Food and Commercial Workers International Union, Local 1625, AFL–CIO. Case 12–CA–20380

December 20, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On July 31, 2001, Administrative Law Judge Pargen Robertson issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations 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, and conclusions and to adopt the recommended Order as modified and set forth in full below.[1]

The judge found that the Respondent violated Section 8(a)(1) by discriminatorily prohibiting an employee from displaying a union-related computer screen saver message.[2] The judge also found that the Respondent violated Section 8(a)(3) and (1) by issuing a warning to the employee for displaying such a message. For the reasons stated below, we agree.

I. FACTS

Employee Patricia Elalem is a nurse in the Respondent's intensive care unit (ICU). The ICU contains a nurse's workstation for every two beds, and a computer is located at each workstation. At the time the events at issue took place, the Respondent allowed ICU nurses to display personalized screen saver messages on these computers, and a number of nurses did so.

The Union began an organizing campaign in August 1999.[3] At about 7 a.m. on the morning of September 17, Elalem programmed a screen saver message that said "Look for the U." Supervisor Lynn Kelly, who was aware that Elalem supported the Union, interpreted "U" to mean "Union," and Elalem testified that she intended "U" to mean "Union."

Later on the morning of September 17, Kelly called Elalem and told her to come to Kelly's office at 2:30 p.m. At the 2:30 meeting, Kelly showed Elalem a document Kelly had prepared entitled "Written Record of Verbal Warning." The document referred to the "union related" content of the screen saver message, and further stated: "Advised employee that bulletin boards and screen savers are hospital property and it is inappropriate to post pro union messages on hospital property or while on time clock." Kelly told Elalem she was being "written up for union activity, using hospital equipment for union activity."

II. ANALYSIS

A. The 8(a)(1) Violation

The judge found that the Respondent violated Section 8(a)(1) by discriminatorily prohibiting Elalem from displaying a union-related computer screen saver message. The judge's finding presents an issue of first impression for the Board; neither the parties' briefs nor our own research has identified any case directly on point.

In its exceptions, the Respondent argues that the principles applicable to company bulletin boards should govern this case. As the Respondent recognizes, under this line of case law, an employer "has the right to restrict the use of the company bulletin boards," but "this right may not be exercised discriminatorily."

In his answering brief, the General Counsel argues that the principles applicable to the wearing of union insignia should control. Under this line of case law, "employees have a protected right to wear union insignia at work in the absence of 'special circumstances.'" *Holladay Park Hospital*, 262 NLRB 278, 279 (1982).

We need not decide in this case whether a computer located at an employee's workstation is analogous to a company bulletin board or whether a computer screen saver message is similar to a union button. For, even applying the rules governing employee use of company bulletin boards, as the Respondent urges, we find, in agreement with the judge, that the Respondent's conduct was discriminatory and therefore in violation of Section 8(a)(1).

The legal principles applicable to employee postings on company bulletin boards are well established and have been summarized as follows:

> In general, there is no statutory right of employees or a union to use an employer's bulletin board. However, where an employer permits its employees to utilize its bulletin boards for the posting of notices relating to personal items such as social or religious affairs, sales of personal property, cards, thank you notes, articles, and cartoons, commercial notices and advertisements, or, in general, any nonwork-related matters, it may not validly discriminate against notices of union meetings which employees also

[1] We shall modify the judge's recommended Order to conform to the Board's standard remedial language.

[2] A screen saver message is a message that appears on the screen (or front surface) of a computer monitor after the computer has not been used for a specified period of time.

[3] All dates are in 1999 unless otherwise specified.

posted. Moreover, in cases such as these an employer's motivation, no matter how well meant, is irrelevant.

Honeywell, Inc., 262 NLRB 1402 (1982), enfd. 722 F.2d 405 (8th Cir. 1983) (internal quotations and citations omitted). Thus, if an employer allows employees to use its bulletin boards, it may not discriminate against union-related postings. See, e.g., *Fixtures Mfg. Corp.*, 332 NLRB No. 55, slip op. at 6–7 (2000) (manager's removal of union-related materials from bulletin board was discriminatory where employer otherwise allowed employees to post notices on the board without restriction); *J.C. Penney, Inc.*, 322 NLRB 238 (1996), enfd. in relevant part 123 F.3d 988 (7th Cir. 1997) (employer violated Sec. 8(a)(1) by discriminatorily enforcing a bulletin board policy prohibiting all nonwork-related postings; union postings were removed, but nonunion postings were regularly allowed to remain).

Here, the Respondent routinely permitted the ICU nurses to display a wide variety of personal, nonwork-related screen savers messages, such as, "Go Buccaneers," "Go FSU," "Be Positive," and "Have a Nice Day." The Respondent, however, barred Elalem's prounion "Look for the U" message. Under these circumstances, we agree with the judge that the Respondent violated Section 8(a)(1) by discriminatorily prohibiting Elalem from displaying a union-related screen saver message.

B. The 8(a)(3) Violation

The judge also found that the Respondent violated Section 8(a)(3) and (1) by issuing a warning to Elalem for displaying the screen saver message. Applying *Wright Line*,[4] the judge concluded that Elalem's union activity was a motivating factor in the warning and that the Respondent would not have warned Elalem in the absence of her union activity.

We agree that Kelly's warning to Elalem violated Section 8(a)(3) and (1), but we find it unnecessary to engage in a *Wright Line* analysis. *Wright Line* is appropriately used in cases "turning on employer motivation." 251 NLRB at 1089. A *Wright Line* analysis is not appropriate where the conduct for which the employer claims to have disciplined the employee was protected activity. See, e.g., *Saia Motor Freight Line, Inc.*, 333 NLRB No. 87, slip op. at 2 (2001) (written warning stated that employee was being disciplined for "distributing union literature"; Board found that warning violated Sec. 8(a)(3) and (1) without application of *Wright Line*).[5]

In this case, the Written Record of Verbal Warning itself shows that Elalem was warned solely for displaying a union-related screen saver message. Furthermore, Kelly told Elalem that she was being "written up for union activity, using hospital equipment for union activity." Section 7, however, protects an employee's right to engage in union activity. In addition, that Elalem displayed her union-related message on "hospital equipment" does not render her activity unprotected in this case. As we concluded above, the Respondent routinely allowed nurses to use the hospital's computers to display other personal, nonwork-related screen saver messages, and Section 7 protects Elalem's right to be free from discriminatory treatment. Accordingly, because the Respondent's stated reason for the warning was Elalem's protected activity, we agree with the judge that the warning violated Section 8(a)(3) and (1) of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, St. Joseph's Hospital, Tampa, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminatorily prohibiting its employees from displaying union-related screen saver messages on computers that are otherwise available for the display of personal screen saver messages by employees.

(b) Issuing warnings to its employees because of their union activities.

(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) Rescind the warning issued to Patricia Elalem on September 17, 1999.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warning to Patricia Elalem, and within 3 days thereafter notify her in writing that this has been done and that the warning will not be used against her in any way.

(c) Within 14 days after service by the Region, post at its facility in Tampa, Florida, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including

[4] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[5] In his *Saia Motor Freight* concurrence, Chairman Hurtgen agreed that a *Wright Line* analysis was not appropriate.

[6] 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."

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 September 17, 1999.

(d) 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 with this Order.

Dated, Washington, D.C. December 20, 2001

Peter J. Hurtgen, Chairman

Wilma B. Liebman, 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 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 discriminatorily prohibit employees from displaying union-related screen saver messages on computers that are otherwise available for the display of personal screen saver messages by employees.

WE WILL NOT issue warnings to employees because of their union activities.

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

WE WILL rescind the warning issued to Patricia Elalem on September 17, 1999.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful warning issued to Patricia Elalem, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the warning will not be used against her in any way.

ST. JOSEPH'S HOSPITAL

Chris Zerby, Esq., for the General Counsel.
Thomas Gonzalez, Esq., of Tampa, Florida, for the Respondent.

DECISION

PARGEN ROBINSON, Administrative Law Judge. This hearing was held on May 10, 2001, in Tampa, Florida. All parties were represented and afforded full opportunity to be heard and to introduce evidence. Respondent and the General Counsel filed briefs. Upon consideration of the entire record and the briefs, I make the following findings. Respondent admitted the filling of charges and the jurisdictional allegations including allegations that it is a Florida corporation with an office and place of business located in Tampa, Florida, where it has been engaged the operation of an acute care hospital; it derived gross revenues in excess of $250,000 in the conduct of its Tampa business operations and it purchased and received goods valued in excess of $50,000 at its Tampa facility directly from points outside the State of Florida, during the 12 months before issuance of the complaint; and it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act at material times.

Union Business Agent William Barry testified to the effect that the Union is a labor organization. Employees participate in the Union during the organizing and negotiation processes as well as in enforcement of collective-bargaining contracts. The Union represents employees concerning wages, hours, grievances, and disputes between employees. I find that the Union is a labor organization.

The Unfair Labor Practice Allegations

The General Counsel alleged that Respondent discriminatorily prohibited employees from displaying computer screen saver messages about the Union and issued a verbal warning to employee Patricia Elalem because of her union activities.

The Union started an organizing campaign at Respondent with a first meeting on August 12, 1999. Patricia Elalem worked for Respondent in its intensive care unit (ICU).[1] Elalem engaged in prounion activities before September 17. Among

[1] The ICU includes 4 pods and a total of 26 beds. Three of the pods include six beds and the fourth includes eight beds. Every other bed has a computer work area. Additionally there are two computers at each of the four nurses' stations.

other things, she passed out handbills for the Union on September 12, 1999, at the garage entrance to the hospital.

Before August 1999 the ICU computers had permanent screen savers. The screen savers were visible to anyone passing the computer but they were not visible to patients. Beginning around August employees was permitted to personalize screen savers. That practice continued until around April 2000.[2] Several personal messages were included on screen savers. On September 17, 1999, at about 7 a.m., Elalem programmed her computer monitor screen saver[3] to include the message, "Look for the U." Elalem testified that U stood for Union.[4] Lynn Kelly phoned Elalem and told Elalem to be in her office at 2:30 p.m. Kelly, Gail Noland, and Elalem were present in Kelly's office. Kelly slid a paper over to Elalem and said that Elalem was being written up for "union activity, using hospital equipment for union activity." Elalem identified General Counsel's Exhibit 2 as the paper given her by Kelly. Elalem testified that even though the first paragraph of General Counsel's Exhibit 2, states this is not the first union-related message to be posted by this employee, she had not posted anything related to the Union before that date. Kelly told Elalem that she knew that Elalem was the one that was changing screen savers and posting propaganda about the Union in the unit, and that General Counsel's Exhibit 2 was becoming a permanent part of Elalem's record.

Lynn Kelly is Respondent's manager of the intensive care unit.[5] She testified that the nurses in ICU use computers in the performance of their jobs and that those computers have screen savers. The current policy is that only the hospital or company name can be displayed on those screen savers. However, in August and September 1999, the ICU nurses were able to change the screen saver messages. Kelly testified that some of the personal screen savers messages were "Maine Nurse," "Eat At Joe's," "Be Positive," and "Look for the U." She was told that Patricia Elalem had programmed "Look for the U". Lynn Kelly saw that message on an ICU screen saver on September 17, 1999, and she issued a verbal warning to Patricia Elalem because of that screen saver message. Kelly retained a personal record of that warning which was received in evidence as General Counsel's Exhibit 2.[6] That occasion was the first time Kelly had warned an employee about a screen saver. She did tell employee Joe Galluppo to take off a message, ("Out to Lunch"), but she did not issue a warning to Galluppo. After issuing the warning to Elalem, Kelly told the ICU nurses they were not permitted to put up personal screen saver messages. She told the nurses that it was inappropriate to put up comments that could be misinterpreted by families.[7] Kelly admitted that personal screen saver messages continued to be displayed after she told the employees that personal messages were not permitted. She permitted nurses to continue to show personal screen savers such as "Go Buccaneers," "Go FSU," "Be Positive," and "Have a Nice Day." Kelly did not issue any warnings regarding screen savers after she issued the one to Elalem.[8]

1. Findings

At issue is whether Respondent discriminatorily prohibited its employees from displaying computer screen saver messages about the Union and whether Respondent issued a verbal warning to Patricia Elalem, in violation of Section 8(a)(1) and (3).

Credibility

I credit Patricia Elalem's testimony regarding the warning she received on September 17, 1999. Although Gail Noland testified about the incident Noland testified to the effect that her memory was not good as to the incident and she did not deny that events happened as recalled by Elalem. In view of that evidence and the entire record including especially General Counsel's Exhibit 2, I credit Elalem's account of the September 17 meeting in Lynn Kelly's office. I also credit that Elalem was shown a copy of General Counsel's Exhibit 2. Lynn Kelly prepared that document and she wrote:

> Screen saver changed from "Be Positive" to "Watch for the U." This is not the first union related message to be posted by this employee on hospital property in violation of solicitation policy.
>
> Advised employee that bulletin boards and screen savers are hospital property and it is inappropriate to post pro union messages on hospital property or while on time clock.

2. Conclusions

The Board routinely applies a standard test in determining matters such as the questions before me. First, I must determine whether the General Counsel proved that Respondent was motivated to issue a verbal warning to Patricia Elalem on September 17 because of union animus. In that regard the record shows that Elalem participated in union activity by, among other things, passing out union handbills at the garage entrance to the hospital and creating a screen saver stating, "Look for the U" Elalem's credited testimony and the contents of General Counsel's Exhibit 2, which admitted Supervisor and Agent Lynn Kelly, prepared, show that Elalem was warned because of her union activity. (*Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996); *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 393 (1983); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).)

[2] The policy since April 2000 does not permit employees to change screen savers on the monitors.

[3] The computer programmed by Elalem was ICU Area 1, between beds 3 and 4.

[4] However, when called into her supervisor's office Elalem argued that "U" could stand for unicorn.

[5] Patricia Elalem testified there are between 55 and 70 nurses that work in the ICU.

[6] Although Lynn Kelley testified that issuance of the record of verbal warning did not constitute discipline the evidence showed otherwise. Kelly admitted that GC Exh. 2 was a record she maintained in her own office even though that record was not otherwise maintained by Respondent. Human Resources Director Pat Teeuwen admitted that GC Exh. 2 could be used in considering further discipline under Respondent's progressive discipline system (GC Exh. 3).

[7] Kelly was referring to families of patients. She told the nurses that some examples of inappropriate comments were "byte me," "admit to nothing," and all union-related messages.

[8] Kelly testified that she did "speak to people" but she did not use a document similar to GC Exh. 2.

Even though Kelly testified that she issued the September 17, 1999 warning because it may cause patient's families to believe the nurses' minds were on something other than patient care, the wording of General Counsel's Exhibit 2 shows that Elalem was warned because of the Union. I must now examine whether Respondent proved that it would have warned Elalem in the absence of her union activity. Respondent, in its brief, argued that it would have warned Elalem on showing that the standard it applied related not to the Union but to whether screen saver messages were inappropriate and violated the hospital's no-solicitation policy. That argument is not supported by record evidence. Although Lynn Kelly testified that she did tell one other employee, Joe Galluppo, to remove a personal screen saver message, Galluppo was not warned. Therefore, rather than showing that Respondent did not treat Elalem with disparity, the matter regarding Galluppo illustrates just the opposite. Even though Galluppo allegedly posted an inappropriate screen saver he was not warned. However, Elalem who also allegedly posted an inappropriate screen saver was warned. The obvious difference in the two cases was illustrated by the warning issued to Elalem (GC Exh. 2). Kelly wrote on the warning "it is inappropriate to post pro union messages on hospital property or while on time clock." According to Kelly, Elalem's screen saver was inappropriate because it involved the Union.

Respondent also argued that not all union-related screen savers were removed.[9] However, that evidence does not show that Elalem would have been warned in the absence of her union activity. As shown above, Elalem engaged in union activity before September 17 and Lynn Kelly noted as much on Elalem's warning. Kelly wrote, "This is not the first union related message to be posted by this employee on hospital property in violation of solicitation policy." Elalem disputes that she posted anything on hospital property before September 17, but she does admit that she engaged in open union activity before that date.

Respondent argued that Elalem's screen saver was inappropriate in the hospital where an "atmosphere of serenity" is a desirable goal. However, Lynn Kelly admittedly permitted screen savers including "Go Buccaneers," "Go FSU," "Be Positive," and "Have a Nice Day." Respondent failed to show how those screen savers did not interfere with its goal of establishing an "atmosphere of serenity," while "Look for the U" did.

Respondent argued that Elalem's screen saver violated its no-solicitation rule. As Respondent's attorney argued during the hearing, the complaint does not allege that Respondent maintained an illegal no-solicitation rule. Lynn Kelly wrote on Elalem's warning that her screen saver violated Respondent's solicitation rule. However, there was no evidence that Elalem actually engaged in solicitation while at work. The screen saver itself included nothing along the lines of solicitation that would distinguish it from other messages permitted by Respondent. I find Patricia Elalem was not actually warned for violating a no-solicitation rule. The record shows that Respondent unlawfully prohibited Patricia Elalem from displaying a screen saver and issued a verbal warning to Elalem because the screen saver message referred to the Union. I also find Respondent failed to show that Elalem would have been warned in the absence of her union activity.

[9] Patricia Elalem testified that an AFL–CIO screen saver was not removed.

CONCLUSIONS OF LAW

1. Respondent St. Joseph's Hospital is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Food and Commercial Workers International Union, Local 1625, AFL–CIO, CLC, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by discriminatorily prohibiting it employees from displaying computer screen saver messages about the Union.

4. The Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act by warning Patricia Elalem on September 17, 1999, because of her union activity.

5. The unfair labor practices found above are unfair labor practices having an effect on commerce within the meaning of 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.

The Respondent having discriminatorily warned Patricia Elalem because of her union activities must remove any reference to the warning from its files and notify Elalem of that action in writing.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Tampa, Florida, St. Joseph's Hospital, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminatorily prohibiting its employees from displaying screen saver messages about the Union.

(b) Warning its employees because of their union activities.

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

(a) Within 14 days from the date of this Order rescind the warning issued to Patricia Elalem on September 17, 1999.

(b) Within 14 days from the date of this Order remove from its files any reference to the warning to employee Patricia Elalem and notify Elalem in writing that this has been done and that evidence of the warning will not be used against her.

(c) Within 14 days after service by the Region, post at its facility in Tampa, Florida, copies of the attached notice marked

[10] 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.

"Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 12, 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.

Dated, Washington, D.C. July 31, 2001

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 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 discriminatorily prohibit our employees from displaying computer screen savers about United Food and Commercial Workers International Union, Local 1625, AFL–CIO, CLC or any other labor organization.

WE WILL NOT warn our employees because of their union activities.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of rights protected by Section 7 of the National Labor Relations Act.

WE WILL rescind the unlawful warning issued to Patricia Elalem and WE WILL notify Patricia Elalem on that action in writing.

ST. JOSEPH'S HOSPITAL

[11] 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."