

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SODEXO AMERICA LLC

and

Case 21-CA-39086

PATRICIA ORTEGA, an Individual

SODEXO AMERICA LLC; AND
USC UNIVERSITY HOSPITAL

and

Case 21-CA-39109

SERVICE WORKERS UNITED

USC UNIVERSITY HOSPITAL

and

Cases 21-CA-39328
21-CA-39403

NATIONAL UNION OF HEALTHCARE
WORKERS

SODEXO AMERICA, LLC.'S REPLY MEMORANDUM
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Sodexo America LLC submits its reply memorandum in support of the motion for summary judgment that is currently pending before the Board. The General Counsel's opposition reveals that whether the off-duty access policy is lawful or is purely a question of law. The General Counsel states on page 2 of its opposition that the off-duty access policy is unlawful because it "does not prohibit access for any purpose as required by the

third prong of *Tri-County Medical Center*, 222 NLRB 1089 (1976). Sodexo maintains that the General Counsel is incorrect and that the off-duty access policy does not offend National Labor Relations Act § 8(a)(1), 29 U.S.C. § 158(a)(1).

Thus, as to both Respondents, it is clear that the General Counsel is making a facial challenge to the policy. This is particularly clear as to Sodexo.

There is no allegation against Sodexo that it attempted to enforce the policy against a union supporter, that the policy was not widely disseminated, or that the policy was promulgated in response to a union organizing campaign. In fact, in dismissing a portion of the charge filed by Service Workers United, the Regional Director and the General Counsel's Office of Appeals concluded the following: "In this regard, the investigation did not establish that Employers selectively enforced their access policy against employees engaged in union activity. Nor is there evidence that the access policy was recently implemented." Attachment "A." Indeed, the Regional Director found that the policy was implemented in 1991 and revised in 2008. Attachment "B." The sole allegation against Sodexo is that it maintained the policy by posting it on bulletin boards and making oral announcements concerning it. Complaint, ¶¶ 11 and 15.

Further, the General Counsel's opposition concedes that Sodexo operated the cafeteria. Opposition at 4. Therefore, for Sodexo employees, the cafeteria is a work area. Under *Tri-County Medical Center*, off-duty access can be prohibited in work areas.

The General Counsel argues that an off-duty access policy must prohibit access for any purpose. Such is not the rule established by *Tri-County Medical Center*. The third prong of the *Tri-County* test is that the policy "applies to off-duty employees seeking access to the plant for any purpose and not just for those employees engaging in

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union activity.” 222 NLRB at 1089. Thus, to violate section 8(a)(1), the off-duty access policy must be tethered in some fashion to restricting the exercise of protected concerted activities, which is only what section 8(a)(1) prohibits. Under the General Counsel’s theory, the off-duty access policy is unlawful even when employees are not engaged in either union or other protected concerted activity. When faced with the identical policy in *Tenet HealthSystem Hosp., Inc.*, 2002 WL 31402769 (Oct. 16, 2002), the administrative law judge stated that “the rules apply to all off-duty employees except those visiting a patient, receiving medical treatment, or conducting hospital-related business and are the not protected-activity exclusive.” 2002 WL 3142769, * 15.

The General Counsel’s reliance upon *Baptist Mem. Hosp.*, 229 NLRB 45, *enf’d*, 568 F.2d 1 (6th Cir. 1977), and *Intercommunity Hosp.*, 255 NLRB 468 (1982), is misplaced. In *Baptist Memorial Hospital*, the policy was deemed unlawful because it restricted off-duty access to the public sidewalks outside the Hospital building and had not been widely disseminated. 229 NLRB at 45 n. 4, 49-50. In 1981, the General Counsel examined the *Intercommunity Hospital* decision and concluded the following when addressing the argument that the policy to be lawful must prohibit off-duty access for any purpose: “However, it was concluded that the focus of the third criterion of *Tri-County Medical Center* is on whether an employer is discriminating among employees based on union considerations when they returned to the facility during non-working time.” *Perpetual American Savings & Loan*, 108 LRRM 1400 (1981) (footnote omitted).

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As to Sodexo, the question here is whether the policy must prohibit access for all purposes. Two administrative law judges have found that virtually identical policies pass muster under section 8(a)(1). There is no need for a third hearing on this issue, as the Board can decide the question on the undisputed facts before it. Therefore, the Board should issue an order to show cause why the motion for summary judgment should not be granted and cancel the pending hearing.

DATED: February 7, 2011

Respectfully submitted,

MARKS, GOLIA & FINCH, LLP

By: 
MARK T. BENNETT
Attorneys for Respondent Sodexo America,
LLC

860.080/3001394/bdp

ATTACHMENT “A”

ATTACHMENT “A”



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

RECEIVED
JUL 27 2010
BY: *[Signature]*

July 23, 2010

Re: Sodexo Healthcare Services/
USC University Hospital
Case No. 21-CA-39109

Bruce A. Harland, Attorney at Law
Weinberg, Roger & Rosenfeld
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501

Dear Mr. Harland:

Your appeal has been carefully considered. The appeal is denied substantially for the reasons set forth in the Regional Director's partial dismissal letter of May 26, 2010 letter. Contrary to the assertions in the charge, the investigation did not disclose that the Employers violated Section 8(a)(3) or (5) of the National Labor Relations Act, as alleged.

In this regard, the investigation did not establish that the Employers selectively enforced their access policy against employees engaged in union activity. Nor is there evidence that the access policy was recently implemented. Consequently, the burden could not be met that the Employers violated Section 8(a)(3) and (5) of the Act as alleged. Accordingly, further proceedings were not deemed warranted.

Sincerely,

Lafe E. Solomon
Acting General Counsel

By *[Signature: Yvonne T. Dixon]*
Yvonne T. Dixon, Director
Office of Appeals

cc: James F. Small, Regional Director
National Labor Relations Board
888 South Figueroa Street, 9th Floor
Los Angeles, CA 90017

Sodexo Healthcare Services
1500 San Pablo Street
Los Angeles, CA 90033

Mark T. Bennett, Attorney at Law
Marks, Golia & Finch, LLP
8620 Spectrum Center Blvd., Suite 900
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Linda Van Winkle Deacon
Attorney at Law
Bate, Peterson, Deacon, Zinn & Young
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Los Angeles, CA 90017

SODEXO000002

ATTACHMENT “B”

ATTACHMENT “B”



75th Anniversary
1935 - 2010

United States Government
NATIONAL LABOR RELATIONS BOARD
Region 21
888 South Figueroa Street, Ninth Floor
Los Angeles, CA 90017-5449
Telephone: (213) 894-5204
Facsimile: (213) 894-2778
E-mail: NLRBRegion21@nlrb.gov

RECEIVED
MAY 27 2010

BY: _____

Resident Office:
555 W Beech Street - Suite 418
San Diego, CA 92101-2939
Telephone: (619) 557-6184
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May 26, 2010

Bruce A. Harland, Attorney at Law
Weinberg, Roger & Rosenfeld
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501-1091

Re: Sodexo Healthcare Services/
USC University Hospital
Case 21-CA-39109

Dear Mr. Harland:

The Region has carefully investigated and considered your charge against Sodexo Healthcare Services/USC University Hospital (the Employers), alleging violations of Section 8 of the National Labor Relations Act ("The Act").

Decision to Partially Dismiss: Based on that investigation, I have concluded that further proceedings are not warranted and I am dismissing portions of your charge for the following reasons:

Your charge alleges, inter alia, that the Employers violated Section 8(a)(1), (3) and (5) of the Act by: (1) implementing, maintaining and enforcing an illegal policy restricting employee access to public areas during their nonwork time; (2) discriminating against employees on account of their union and other protected concerted activity; and (3) unilaterally changing the employee access policy without bargaining with the Union.

With regard to the allegation that the Employers violated Section 8(a)(3) of the Act, the Region concluded that there was no evidence presented or revealed that the Employers selectively enforced their access policy against employees engaged in union activity. With regard to the claim that the Employers violated Section 8(a)(5) of the Act by unilaterally changing the employee access policy without bargaining with the Union, the Region concluded that there was no evidence presented that the policy was recently implemented. Rather, the investigation revealed that the policy was implemented in 1991 and revised in 2008.

This action does not in any way affect the remaining portion of the charge, which alleges that the Employers violated Section 8(a)(1) of the Act by implementing, maintaining and enforcing a policy restricting employee access to the public areas during their nonwork time, which remains in full force and effect.

Your Right to Appeal: The National Labor Relations Board Rules and Regulations permit you to obtain a review of this action by filing an appeal with the GENERAL COUNSEL of the National Labor Relations Board. Use of the Appeal Form (Form NLRB-4767) will satisfy this requirement. However, you are encouraged to submit a complete statement setting forth the facts and reasons why you believe that the decision to dismiss your charge was incorrect.

Means of Filing: An appeal may be filed electronically, by mail, or by delivery service. Filing an appeal electronically is preferred but not required. The appeal MAY NOT be filed by fax. To file an appeal electronically, go to the Agency's website at www.nlr.gov, click on **E-GOV**, select **E-Filing**, and follow the detailed instructions. To file an appeal by mail or delivery service, address the appeal to the General Counsel at the National Labor Relations Board, Attn: Office of Appeals, 1099 14th Street, N.W., Washington D.C. 20570-0001. Unless filed electronically, a copy of the appeal should also be sent to me.

Appeal Due Date and Time: The appeal is due on June 9, 2010. If you file the appeal electronically, it will be considered timely filed if the transmission of the entire document through the Agency's website is accomplished no later than 11:59 p.m. Eastern Time on the due date. If you mail the appeal or send it by a delivery service, it must be received by the General Counsel in Washington, D.C. by the close of business at 5:00 p.m. Eastern Time or be postmarked or given to the delivery service no later than June 8, 2010.

Extension of Time to File Appeal: Upon good cause shown, the General Counsel may grant you an extension of time to file the appeal. A request for an extension of time may be filed electronically, by fax, by mail, or by delivery service. To file electronically, go to www.nlr.gov, click on E-Gov, select E-Filing, and follow the detailed instructions. The fax number is (202) 273-4283. A request for an extension of time to file an appeal must be received on or before the original appeal due date. A request for an extension of time that is mailed or given to the delivery service and is postmarked or delivered to the service before the appeal due date but received after the appeal due date will be rejected as untimely. Unless filed electronically, a copy of any request for extension of time should be sent to me.

Confidentiality/Privilege: Please be advised that we cannot accept any limitations on the use of any appeal statement or evidence in support thereof provided to the Agency. Thus, any claim of confidentiality or privilege cannot be honored, except as provided by the FOIA, 5 U.S.C. 552, and any appeal statement may be subject to discretionary disclosure to a party upon request during the processing of the appeal. In the event the appeal is sustained, any statement or material submitted may be subject to introduction as evidence at any hearing that may be held before an administrative law judge. Because we are required by the Federal Records Act to keep copies of documents used in our case handling for some period of years after a case closes, we may be required by the FOIA to disclose such records upon request, absent some applicable exemption such as those that protect confidential source, commercial/financial information or personal privacy interests (e.g., FOIA Exemptions 4, 6,

May 26, 2010

7(C) and 7(d), 5 U.S.C. § 552(b)(4), (6), (7)(C), and (7)(D)). Accordingly, we will not honor any requests to place limitations on our use of appeal statements or supporting evidence beyond those prescribed by the foregoing laws, regulations, and policies.

Notice to Other Parties of Appeal: You should notify the other party(ies) to the case that an appeal has been filed. Therefore, at the time the appeal is sent to the General Counsel, please complete the enclosed Appeal Form (NLRB-4767) and send one copy of the form to all parties whose names and addresses are set forth in this letter.

Very truly yours,


James F. Small
Regional Director

Enclosures

cc: Andrew G. Gaitan, Business Representative
Service Workers United
275 Seventh Avenue
New York, NY 10001

Sodexo Healthcare Services
1500 San Pablo Street -
Los Angeles, CA 90033

Mark T. Bennett, Attorney at Law
Marks, Golia & Finch, LLP
8620 Spectrum Center Boulevard, Suite 900
San Diego, CA 92123

USC University Hospital
1500 San Pablo Street
Los Angeles, CA 90033

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888 South Figueroa Street, Suite 1500
Los Angeles, CA 90017

General Counsel
Office of Appeals
National Labor Relations Board
Washington, D.C. 20570

JFS/pc

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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Cases 21-CA-39328
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NATIONAL UNION OF HEALTHCARE
WORKERS

PROOF OF SERVICE VIA OVERNIGHT MAIL

I, Brandi D. Paape declare that:

I am over the age of eighteen years and not a party to the action; I am employed in the County of San Diego, California; where the mailing occurs; and my business address is 8620 Spectrum Center Boulevard, Suite 900, San Diego, California 92123-1489. I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for mailing with Federal Express/Norco Overnight pursuant to which practice the correspondence will be deposited with Federal Express/Norco Overnight this same day in the ordinary course of business. I caused to be

served the following document(s): SODEXO AMERICA, LLC.'S REPLY
MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT by
placing a copy thereof in a separate envelope for each addressee listed as follows:

VIA OVERNIGHT EXPRESS/NORCO

Linda Van Winkle Deacon, Esq.
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New York, NY 10001

VIA OVERNIGHT EXPRESS/NORCO

James F. Small, Regional Director
Alice Garfield
Region 21
National Labor Relations Board
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Los Angeles, CA 90017-5449

/ / / / /

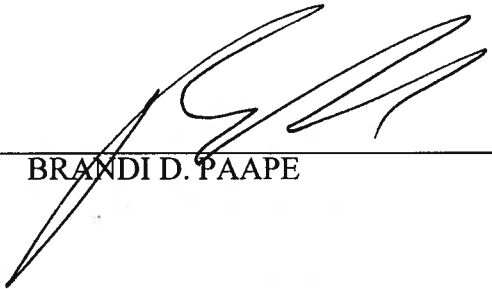
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I then sealed the envelope(s) and, either deposited it/each with Federal Express/Norco Overnight or placed it/each for collection and mailing on February 7, 2011, at San Diego, California, following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 7, 2011.



BRANDI D. PAAPE