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Southside Medical Center, Inc. and American Federation of State, County and Municipal Employees, Local 1644. Case 10–CA–37919

December 23, 2010

DECISION AND ORDER

BY MEMBERS BECKER, PEARCE, AND HAYES

On April 22, 2010, Administrative Law Judge Keltner W. Locke issued the attached decision. The Respondent filed exceptions and a supporting brief, the Acting General Counsel filed an answering brief, and the Respondent filed a reply brief.

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, and conclusions,¹ to modify his remedy,² and to adopt the recommended Order as modified and set forth in full below.³

¹ In addition to contending on exceptions that Amelia Kemp was a supervisor while employed as “Clinical Manager (Floater),” the Respondent excepted to the judge’s further conclusion that Kemp was not a managerial employee. As the Respondent did not proffer any argument or articulate any grounds for reversing the judge’s conclusion, however, we find that it has effectively waived this exception. See Board’s Rules and Regulations Sec. 102.46(b)(1)-(2); *Gaetano & Associates*, 344 NLRB 531, 531 fn. 6 (2005), enf. mem. 183 Fed. Appx. 17 (2d Cir. 2006). In any event, we agree with the judge that the Respondent has presented no evidence that Kemp ever “formulate[d] and effectuate[d] management policies by expressing and making operative the decisions of [her] employer.” See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974).

In the absence of exceptions, we adopt, pro forma, the judge’s finding that, because he concluded that Kemp’s protected attendance at a union meeting was the sole reason for her discharge, the mixed-motive analysis in *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), “would be neither helpful nor appropriate” in determining the legality of the discharge. In any event, even if Kemp’s alleged “lack of candor” when subsequently questioned about the meeting were considered as a separate motivational factor under *Wright Line*, it would not be legitimate grounds for her discharge in the circumstances of this case.

² Backpay shall be computed in accordance with *F. W. Woolworth*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

³ We shall modify the judge’s recommended Order and substitute a new notice in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996) and *Ferguson Electric Co.*, 335 NLRB 142 (2001), and to conform to the Board’s standard remedial language. In addition, we shall modify the judge’s recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified and set forth in full below, and orders that the Respondent, Southside Medical Center, Inc., Atlanta, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating any employee about union support or protected activities, including attendance at union meetings and discussions concerning salaries or other compensation.

(b) Discharging or otherwise discriminating against any employee for supporting the American Federation of State, County and Municipal Employees, Local 1644 or any other labor organization by, inter alia, attending union meetings.

(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 from the date of this Order, offer Amelia Kemp full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Amelia Kemp whole for any loss of earnings and other benefits suffered as a result of the discrimination against her. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

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

J. Picini Flooring, Member Hayes would not require electronic distribution of the notice.

(e) Within 14 days after service by the Region, post at its Atlanta, Georgia facilities copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 10, 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 all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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 May 4, 2009.

(f) 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 Regional Director attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 23, 2010

Craig Becker, Member

Mark Gaston Pearce, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX
NOTICE TO EMPLOYEES

⁴ 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."

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 coercively question you about your union support or protected activities, including your attendance at union meetings and discussions concerning salaries or other compensation.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the American Federation of State, County and Municipal Employees, Local 1644 or any other labor organization by attending union meetings or otherwise engaging in activity protected by the Act.

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, within 14 days from the date of the Board's Order, offer Amelia Kemp full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Amelia Kemp whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, less any net interim earnings, plus interest.

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

SOUTHSIDE MEDICAL CENTER, INC.