

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SMALL FREYS CHILDREN CENTER, INC.

Cases 4-CA-37248

4-CA-37249

and

4-CA-37251

HEATHER HARNISH, An Individual
ABBY SMITH, An Individual
BRITTANY DITZLER, An Individual

Margarita Navarro-Rivera, Esq.
for the General Counsel.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This is a compliance specification (backpay case) which was tried in Philadelphia, Pennsylvania on March 21, 2011. The Respondent, although aware of the hearing, did not appear. The General Counsel put on his case in her absence and filed a post-hearing brief, which I have read and considered.¹

The General Counsel filed his complaint on the merits of the alleged violation on March 5, 2010. Respondent failed to file an answer. The General Counsel then filed a Motion for Default Judgment with the Board on March 31, 2010. The Board issued a Notice to Show Cause why the motion should not be granted on April 2, 2010. Respondent filed no response. As a result, the Board granted the General Counsel's motion for default judgment, 355 NLRB No. 36 (2010).

In granting the motion for default judgment, the Board found that Respondent discharged Abby Smith and Brittany Ditzler on October 14, 2009 in violation of Section 8(a)(1) of the Act and that it discharged Heather Harnish on October 16, 2009, also in violation of Section 8(a)(1). The Board ordered that Respondent reinstate the three charging parties to their former positions, or to substantially equivalent positions if those jobs no longer exist and to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

Respondent has not complied with the Board's order with regard to reinstatement of the Charging Parties. NLRB Region 4 issued a Compliance Specification and Notice of Hearing on August 25, 2010. Initially, Respondent did not reply to the compliance specification and the

¹ I grant the General Counsel's motion to correct the transcript, which is attached to his post-hearing brief.

5 General Counsel filed a motion for default judgment with regard to it. However, Respondent retained counsel who filed an answer and the motion for default judgment was withdrawn. When represented by counsel, Respondent supplied time cards for the discriminatees covering the period January 1, to October 16, 2009.

10 Respondent's counsel later withdrew his representation of Respondent. The Region issued an amended compliance specification on February 4, 2011, to which Respondent did not reply.

15 At the hearing on March 21, 2011, Region 4 Compliance Officer Shane Thurman testified as to how he computed the backpay due to the charging parties. He computed the gross backpay from the time cards submitted by Respondent. Thurman took the total number of hours that the charging parties worked, and then divided that number by the number of weeks the discriminatees worked and multiplied that by their wage rate.² He then subtracted the discriminatees' net interim earnings (interim earnings minus lost holiday and vacation pay³ and additional travel expenses to their interim employment) to calculate their net backpay.⁴

20 From October 14 (October 16 in Harnish's case) through the end of 2010, the net backpay owed to the discriminatees was as follows: Harnish \$19,750.85; Smith \$17,635.39;⁵ and Ditzler \$2,881.61. Thurman also determined that Ditzler is due reimbursement for \$1,485 in additional child care expenses through the end of 2010 that she incurred during her employment by her interim employer as compared with Respondent.

25 Respondent gave Ditzler a \$10 reduction in her child care costs, which resulted in Ditzler paying \$5 per week for child care. With her interim employer, Ditzler paid \$30 per week for child care. Thurman thus computed the amount due Ditzler for additional child care expenses by multiplying the number of weeks in each calendar quarter of the backpay period during which Ditzler incurred child care expenses by \$25, see Amended Compliance Specification Paragraph 3, Tr. 24.

35 The discriminatees are also due interest on the net backpay amounts as well as the additional child care expense in the case of Ditzler. Additionally, since Respondent has not

² He excluded weeks in which there were only a few workdays, such as the week following New Year's Day 2009. Thurman also excluded the weeks during which Abby Smith was on maternity leave in the calculation of her gross backpay.

³ Thurman subtracted lost holiday and vacation pay in the calculation of net interim backpay for Harnish and Smith, but only subtracted lost holiday pay for Ditzler. In January 2011, Thurman emailed Respondent's counsel requesting records regarding paid vacation and holiday hours. He received no response from counsel or from Respondent after counsel withdrew his representation. Thus Thurman used the information provided by the charging parties regarding the number of paid vacation and holiday days they would have received during the backpay period in computing the backpay due in the amended compliance specification.

⁴ If a discriminatee worked more hours per quarter for an interim employer than she worked for Respondent, these earnings were not included in the calculation of interim earnings.

⁵ The calculation for Smith takes into account the fact that she went on a part-time schedule in August 2009, but, prior to her termination, had reached an agreement with Respondent that she would return to full-time employment on November 2, 2009.

5 offered the discriminatees reinstatement they are entitled to be made whole until such an offer is made or until the backpay period ends for some other reason.

10 In compliance proceedings, the General Counsel bears the burden of proving the amount of gross backpay. He has discretion in selecting a formula closely approximating the amount due. The Board has found that any formula that approximates what the discriminatees would have earned had they not been discriminated against is acceptable if not unreasonable or arbitrary, *La Favorita, Inc.*, 313 NLRB 902 (1994). I find that the General Counsel has met his burden of proving the amount of gross backpay in this case.

15 The burden is on the Respondents to establish facts that reduce the gross backpay, *Minette Mills, Inc.*, 316 NLRB 1009, 1010-11 (1995). If a Respondent contends that a discriminatee failed to mitigate his or her damages by failing to make a reasonable effort to find work, it bears the burden of proof on this issue.

20 In this regard, the Respondent must show that were substantially equivalent jobs within the relevant geographic area during the backpay period. Only if Respondent makes such a showing, must the General Counsel show that the discriminatee took reasonable steps to seek those jobs, *St. George Warehouse*, 351 NLRB 961 (2007).

25 Due to the fact that it did not appear at the hearing, Respondent did not establish that there were substantially equivalent jobs in the relevant geographic area during the backpay period. Thus, the charging parties are entitled to payment of the amount of backpay computed by the General Counsel.

30 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

ORDER

35 Respondent, Small Frey Childrens Center, its officers, agents, successors and assigns, shall, consistent with the compliance specification as amended, satisfy its obligation through the end of the fourth quarter of calendar year 2010 to make the charging parties whole by paying them the following amounts: Heather Harnish \$19,750.85; Abby Smith \$17,635.39; and Brittany Ditzler \$2,881.61 in net backpay and \$1,485 to Ditzler for reimbursed child care expenses, together with interest thereon upon accrued to the date of payment computed in the manner described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State laws.⁷ Since Respondent has not complied with the Board's reinstatement order, Respondent shall also satisfy its obligation to pay the three discriminatees

⁶ 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.

⁷ The Board has declined to apply its new policy, announced in *Kentucky River Medical Center*, 356 NLRB No. 8 (October 22, 2010) of daily compounding of interest on backpay awards, in cases such as this, that were already in the compliance stage on the date that decision issued. *Three Rivers Electrical, Inc.*, 356 NLRB No. 38, slip op. at 1 fn. 2 (2010).

5 named above all backpay and other reimbursable expenses which they are due for periods after
January 1, 2011.

Dated, Washington, D.C., April 22, 2011.

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Arthur J. Amchan
Administrative Law Judge

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