Provider Services Holdings, LLC *and* Patricia A. Johnson. Case 9–CA–46193

June 16, 2011

DECISION AND ORDER

BY MEMBERS BECKER, PEARCE, AND HAYES

The Acting General Counsel seeks a default judgment in this case on the ground that the Respondent has failed to file a timely answer to the complaint. Upon a charge filed by Patricia A. Johnson, an individual, herein the Charging Party, on January 10, 2011,[1] and an amended charge filed on January 14, the Acting General Counsel on March 23 issued a complaint and notice of hearing against Provider Services Holdings, LLC, the Respondent, alleging that it has violated Section 8(a)(1) and (3) of the National Labor Relations Act.

By letter dated April 7, the Acting General Counsel notified the Respondent that it had not filed an answer to the complaint by the April 6 deadline. The Acting General Counsel further advised the Respondent that, unless it filed an answer by April 13, the Acting General Counsel would file a motion for default judgment. The Respondent failed to file an answer.

On April 18, the Acting General Counsel filed with the Board a Motion for Default Judgment, with exhibits attached. Thereafter, on April 18, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On April 22, the Respondent filed a response to the motion, along with an answer. On April 26, the Acting General Counsel filed a brief in reply to the Respondent's response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively states that unless an answer is received by the Regional Office on or before April 6, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. Further, the Acting General Counsel's April 7 letter notified the Respondent that it had not filed an answer to the complaint, and provided the Respondent an additional opportunity to file an answer by April 13. The Respondent was further advised that if it failed to file an answer by that date, a motion for default judgment would be filed.

In its response to the motion for default judgment, the Respondent states that its failure to file a timely answer to the complaint was the result of "inadvertence" caused by "excessive demands" on the schedule of its human resources director Daniel Cobb and also "the fact that [Cobb] thought the matter had been resolved" because the Respondent had allegedly resolved an overtime issue with the Charging Party's union representative. Counsel for the Acting General Counsel in response asserts that the Respondent was timely served with all formal documents in this proceeding and that its claims that its human resources director had "excessive demands" on his time and thought this matter had been resolved do not constitute good cause for its delay in filing an answer. For the following reasons, we agree with counsel for the Acting General Counsel.

The Respondent does not deny that it was duly served with the complaint and counsel for the Acting General Counsel's April 7 letter. Though the Respondent argues that Cobb, who it claims handles its matters before the Board, was preoccupied with a large acquisition that caused "excessive demands" on his schedule, the Respondent did not make any attempt to contact the Regional Office to request an extension of time to file an answer.[2] Further, it is well settled that "preoccup[ation] with other aspects of [the] business" does not constitute good cause for a party's failure to file a timely answer. *Dong-A Daily North America*, 332 NLRB 15, 15 (2000), quoting *Lee & Sons Tree Service*, 282 NLRB 905 (1987). See also *Windward Roofing & Construction Co.*, 333 NLRB 658 (2001). Second, the Respondent argues that its failure to file a timely answer was inadvertent, resulting from its mistaken belief that the complaint allegations had been resolved when Cobb allegedly successfully resolved an overtime issue with the Charging Party's union representative after her termination from employment. This claim does not establish good cause. The Respondent was properly served with the complaint detailing specific allegations pending against it and explaining its obligation to file a timely answer. Further,

[1] All dates refer to 2011 unless otherwise indicated.

[2] A factor the Board considers in determining whether a respondent has good cause for not filing a timely answer is whether it requested an extension of time for filing. The Board has stated that a party's "failure to promptly request an extension of time to file an answer is a factor demonstrating lack of good cause." *Dong-A Daily North America*, 332 NLRB 15, 16 (2000), quoting *Day & Zimmerman Services*, 325 NLRB 1046, 1047 (1998).

the Respondent received a letter from counsel for the Acting General Counsel reminding it of its failure to file an answer to the complaint and extending the deadline for filing an answer to April 13. We find that these documents preclude any valid basis for believing that the instant matter before the Board had been resolved. See *A.C.E. Construction, Inc.*, 340 NLRB 609, 609–610 (2003), citing *Lee & Sons Tree Service*, supra ("Board found no merit in respondent's contention that its failure to file an answer was due to excusable neglect because of its mistaken belief that the matters addressed in the complaint had been resolved through the D.C. Office of Wage and Hour").

In the absence of good cause being shown for the failure to file a timely answer, we grant the Acting General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation, with a place of business in Fairfield, Ohio (the Respondent's facility), has been engaged in the operation of residential care facilities providing services for persons with mental retardation/development disabilities in the State of Ohio. During the 12 months prior to the issuance of the complaint, the Respondent, in conducting its operations described above, received gross revenues in excess of $250,000. During the same period, the Respondent, in conducting its operations described above, purchased and received goods and materials valued in excess of $5000, which were shipped to its Ohio facilities directly from points outside the State of Ohio.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that United Food and Commercial Workers Union Local No. 75 (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the position set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

Joe Vetter	-Qualified Mental Retardation Professional
Tonya Vance	-Residential Supervisor/MUI Investigator
Rachel Mitchell	-Home Manager

The following employees of the Respondent (the unit), constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time, non-professional employees, employed by [the Respondent] at its 350 Kolb Drive, Fairfield, Ohio and 958 West Northbend Road, Cincinnati, Ohio facilities, including: RS-1s, Transportation Aides, Housekeeping Aids, Pool Aides, Operator Receptionists, Life Guards, Housekeeping Assistant, Maintenance Department Assistant, Volunteer Coordinator, Food Service Assistants, Cook, Dietary Technician, Recreation Aides, Therapeutic Recreation Coordinators, Laundry/Supply Employees, Assistant Laundry/Supply Supervisor, Maintenance Technicians and Medical Records Coordinator, but excluding all confidential employees, office clericals, LPNs, RNs, Building Managers, Qualified Mental Retardation Professionals, Social Workers, Behavior Management Specialists, Day Program Instructor, QA (Quality Assurance) employee, all professional employees, guards and supervisors as defined in the Act.

At all material times, the Union has been the designated exclusive collective-bargaining representative of the unit and has been recognized as the collective-bargaining representative by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from January 1, 2009 through December 31, 2010. This contract has been in effect and extended by mutual agreement of the Respondent and the Union. At all material times, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

About September 22, 2010, the Respondent, by Joe Vetter, at its Fairfield, Ohio location, denied the written request of the Charging Party to be represented by the Union while completing a witness statement form. The Charging Party had reasonable cause to believe that completing the witness statement would result in disciplinary action being taken against her, and she refused to complete the witness statement. About September 24, 2010, the Respondent discharged her because of her refusal to complete the witness statement without union representation.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a)(1)[3] of the Act by:

(a) Refusing to allow Patricia A. Johnson to be represented by a union representative of her choosing while completing a Witness Statement form where she had reasonable cause to believe that discipline might be taken against her, in violation of her rights under Section 7 of the Act.

(b) Discharging Johnson because she refused to complete the Witness Statement under the circumstances described above in violation of her rights under Section 7 of the Act.

4. The above unfair labor practices of the Respondent affect 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, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(1) by discharging Charging Party Patricia A. Johnson, we shall order the Respondent to offer Johnson 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 and privileges previously enjoyed, and to make her 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), with interest as 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).[4]

The Respondent shall also be required to remove from its files all references to the unlawful discharge of Johnson, and to notify her in writing that this has been done and that the discharge will not be used against her in any way.

ORDER

The National Labor Relations Board orders that the Respondent, Provider Services Holdings, LLC, Fairfield, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Denying employees' requests to be represented by a union representative of their choosing while completing a witness statement form, where employees have reasonable cause to believe disciplinary action will be taken against them, thereby interfering with, restraining, and coercing employees in the exercise of the rights guaranteed to them under Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

(b) Discharging employees for refusing to complete witness statement forms where employees have reasonable cause to believe disciplinary action will be taken against them, and where the employees' request to be represented by a union representative of their choosing has been denied, thereby interfering with, restraining and coercing employees in the exercise of the rights guaranteed to them under Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to 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 Patricia A. Johnson 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 and privileges previously enjoyed.

(b) Make Patricia A. Johnson whole for any loss of earnings and other benefits suffered as a result of her unlawful discharge, with interest, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files all references to the unlawful discharge of Patricia A. Johnson, and within 3 days thereafter, notify her in writing that this has been done and that the unlawful discharge will not be used against her in any way.

(d) 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.

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[3] The Acting General Counsel alleged in the complaint that the Respondent violated Sec. 8(a)(1) and (3) by "discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization." The Board has traditionally treated denials of an employee's rights under *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), and discipline for exercising those rights, as violations of Sec.8(a)(1). See, e.g., *Washoe Medical Center*, 348 NLRB 361 (2006); *Salt River Valley Water Users' Assn.*, 262 NLRB 970 (1982). Accordingly, we find that by its actions the Respondent violated Sec. 8(a)(1). We find it unnecessary to decide whether the Respondent also violated Sec. 8(a)(3) because that finding would not materially affect the remedy.

[4] The Acting General Counsel's request for additional remedies is denied.

(e) Within 14 days after service by the Region, post at its facility in Fairfield, Ohio, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 9, 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.[6] 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 24, 2010.

(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 Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 16, 2011

Craig Becker, Member

Mark Gaston Pearce, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[5] 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."

[6] For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB No. 9 (2010), Member Hayes would not require electronic distribution of the notice.

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 deny your request to be represented by a union representative of your choice while completing a witness statement form which you have reasonable cause to believe will result in disciplinary action being taken against you.

WE WILL NOT discharge you for refusing to complete a witness statement form which you have reasonable cause to believe will result in disciplinary action being taken against you where the discharge was because of your refusal to complete the form without union representation.

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 Patricia A. Johnson 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 and privileges previously enjoyed.

WE WILL make Patricia A. Johnson whole for any loss of earnings and other benefits suffered as a result of her unlawful discharge, with interest.

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

PROVIDER SERVICES HOLDINGS, LLC