

**No. 10-2101**

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**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

**NATIONAL LABOR RELATIONS BOARD**

**Petitioner**

**v.**

**JACKSON HOSPITAL CORPORATION D/B/A  
KENTUCKY RIVER MEDICAL CENTER**

**Respondent**

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**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
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**JURISDICTIONAL STATEMENT**

This case is before the Court on an application for enforcement, filed by the National Labor Relations Board (“the Board”), of a Supplemental Decision and Order issued against Jackson Hospital Corporation d/b/a Kentucky River Medical Center (“the Hospital”). The Board’s Decision and Order issued on August 24, 2010, and is reported at 355 NLRB No. 114 (2010). This case involves the

reinstatement and backpay for an X-ray technician, Melissa Turner, whom the Hospital unlawfully fired in 2000 for engaging in protected union activity.

The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (“the Act”). 29 U.S.C. §151, 160(a). This Court has jurisdiction over this proceeding pursuant to Section 10(e) of the Act (29 U.S.C. §160(e)) because the underlying unfair labor practices occurred in Jackson, Kentucky. The Board filed its application for enforcement on August 26, 2010. The application was timely; the Act places no time limit on the institution of proceedings to review or enforce Board orders. The Board’s Order is final under Section 10(e) of the Act.

### **STATEMENT OF THE ISSUE**

Whether the Board acted within its broad remedial discretion in determining the amount of backpay that the Hospital owes to discriminatee Melissa Turner as a result of her unlawful discharge.

### **STATEMENT REGARDING ORAL ARGUMENT**

The Board believes that this case involves the application of well-settled principles to straightforward facts and that argument would, therefore, not be of material assistance to the Court. However, if the Court believes that argument is necessary, the Board requests that the Court permit it to participate.

## STATEMENT OF THE CASE

This case is the latest effort in the now decade-long struggle to restore discriminatee Melissa Turner to her job at the Hospital, and to compensate her with the backpay she is due as a result of her unlawful discharge in August 2000. In *Kentucky River Medical Center*, 340 NLRB 536 (2003), *enforced sub nom. Jackson Hospital Corp. v. NLRB*, D.C. Cir. No. 04-1019 (June 3, 2005) (*per curiam*), the Board found that the Hospital discriminatorily discharged eight of its employees because of their union support and participation in a lawful strike, in violation of Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158 (a)(3) and (1)). In its Supplemental Decision and Order, which it now seeks to enforce, the Board ordered the Hospital to pay Turner \$79,577 in net backpay, plus interest.

## STATEMENT OF FACTS

### I. The Underlying Unfair Labor Practice Proceedings

In 1998, the Board certified the United Steelworkers of America, AFL–CIO–CLC (“the Union”) as the exclusive collective-bargaining representative of a unit of the Hospital’s employees, including registered nurses and technical employees. *Kentucky River Med. Ctr.*, 340 NLRB at 539. A year later, after 25 negotiating sessions but before the Union and the Hospital could reach a collective-bargaining agreement, an employee filed a decertification petition, and the Board held a second election. *Id.* The Union won the second election on March 30, 2000, and the Board recertified it on August 2. *Id.* In the meantime,

however, the employees engaged in a strike, which began on July 8 and ended August 15.

Acting on charges filed by the Union and one employee, the Board's General Counsel issued a complaint alleging that the Hospital had engaged in a variety of unfair labor practices, both before and after the strike. *Id.* at 538. After a hearing, an administrative law judge issued a decision, *id.* at 606-07, finding, among numerous other unfair labor practices, that the Hospital had discriminatorily discharged eight employees, including Melissa Turner, on the basis of their union support and participation in the strike in violation of Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)).

On September 30, 2003, the Board (Chairman Battista and Members Schaumber and Walsh) issued a decision affirming the judge's findings, and adopting his recommended order that, among other remedies, required the Hospital to offer reinstatement and pay backpay to the eight discriminatees whom it had unlawfully discharged. *Id.* at 536. On June 3, 2005, the Court of Appeals for the D.C. Circuit enforced that order. *Jackson Hosp. Corp. v. NLRB*, No. 04-1019.

## **II. Turner's Job Search and Interim Employment Following Her Unlawful Discharge**

### **A. After the Hospital Unlawfully Discharged Turner in August 2000 in Retaliation for Her Union Activity, She Immediately Found Interim Employment**

The Hospital employed Turner as an X-ray technician, and paid her \$16.63 an hour. (A 6; 129-33.)<sup>1</sup> She performed X-rays, CT scans, ultrasound, mammography, and general office duties. (A 6; 16-17, 140.) She lived about a mile from the Hospital in Jackson. Turner worked 40-hour weeks (7:00 a.m. to 3:30 p.m., Monday through Friday) with occasional overtime work and was on-call for nights and weekends. (A 6; 16, 18.)

During the strike in July to August 2000, Turner worked for St. Joseph's Hospital East ("St. Joseph's") in Lexington, Kentucky, approximately 86 miles from Jackson. (A 6; 138.) After the Hospital unlawfully discharged her on August 17, 2000, Turner continued her part-time position with St. Joseph's. (A 6; 134, 135-36.) In addition, while employed at St. Joseph's, Turner obtained part-time positions with a temporary-employment agency, Medical Staffing Network, Inc. ("MSN"). (A 6; 19.) She also attended orientation at Clark Regional Medical

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<sup>1</sup> "A" refers to the Appendix that accompanies the Hospital's brief, as supplemented by the Supplemental Appendix filed with the Board's brief. "Br." refers to the Hospital's opening brief before the Court. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

Center (“Clark”) in Winchester (approximately 67 miles from Jackson), but worked only a few days. (A 6; 156.)

**B. Although She Was a Single Mother Faced with Childcare Difficulties, Turner Worked Continually in 2001, Sometimes Driving More Than 85 Miles One-Way to Work Each Day**

Turner continued working for St. Joseph’s until January 2001. She left St. Joseph’s because the 86-mile commute made it difficult for Turner, a single parent, to pick up her child from school at 3:00 p.m. After attending orientation at Samaritan Medical Center, Turner declined the position because its 85-mile commute presented the same childcare difficulties as the equally-long commute to St. Joseph’s. (A 6-7; 138.)

Turner accepted a job with Appalachian Regional Healthcare, Inc. (“Appalachian”) in January 2001, with a 27-mile commute. (A 7; 143, 196.) But, by the fall of 2001, a change in her schedule from the morning shift to the afternoon shift again caused childcare complications and motivated Turner to seek employment elsewhere. (A 7; 141-42.)

In October 2001, Turner accepted a position as a radiology technologist with Gram Resources, Inc. (“Gram”) in Hazard. (A 7; 143.) The commute to Gram was the same as that to Appalachian—27 miles. (A 7; 19.) The work schedule was consistent with Turner’s childcare situation, and Gram paid her an hourly wage of \$17.00. (A 7; 20, 144.) Yet, her schedule gradually expanded, and she was required to work late hours and weekends, making it difficult for Turner to

meet her childcare needs. At the same time, Turner's relationship with her supervisor deteriorated. (A 7; 20.)

**C. In 2002, Turner Pleads Guilty to a Felony, and, Shortly Thereafter, Resigns from Her Interim Employment; in 2003, Turner Finds Another Position; Despite Orders from Both the Board and the D.C. Circuit, the Hospital Refuses to Reinststate Turner and Pay Her Backpay**

In July 2002, Turner sought treatment for a toothache at the University of Kentucky Hospital. (A 7; 147, 149.) She received Percocet (a pain medication) with a prescription for more and scheduled an appointment for a tooth extraction the next day. (A 7; 147.) After leaving that hospital, Turner went to Central Baptist Hospital and attempted to obtain an injection of Demerol, another pain medication. (A 7; 147.) The treating physician learned that Turner had been given Percocet and a prescription for more pills earlier that day, and he asked her about it. (A 7; 147-49.) Turner denied receiving the earlier medication, and the doctor notified the police. (A 7; 148.) When questioned by the police, Turner denied visiting the University of Kentucky Hospital. (A 7; 148.) The police arrested Turner and charged her with attempting to obtain a controlled substance by fraud. (A 2-3, 7; 148, 150-51.) Shortly after her arrest, Turner resigned from Gram. (A 7; 47, 148.)

In August 2002, Turner married Jon Back. (A 7; 192-93.) She lived with Back in West Virginia for extended periods of time and did not make serious efforts to find employment for the next several months. (A 2, 7; 20, 145, 210.) In

December 2002, Turner pled guilty to fraud in connection to the July incident, and served three years' probation. (A 2-3, 7; 152.)

After returning from West Virginia, Turner started working full-time at Clark, a prior interim employer, on May 5, 2003. (A 7; 146, 153-54.) On September 30, 2003, while she was still employed by Clark, the Board decided the underlying unfair labor practice case in Turner's favor. (A 7.) At that time, the Hospital refused to reinstate Turner and instead filed an appeal with the D.C. Circuit. On June 3, 2005, the Court of Appeals affirmed the Board's 2003 Order, which required, in pertinent part, that the Hospital reinstate Turner to her former position. (A 7; 125 [Aug. 1, 2005 letter to Bryan Carmody].) Following the court's order, the Hospital did not contact Turner, and it did not reinstate her. (A 7; 171, 211.)

**D. The Hospital Learns of Turner's Arrest, but Does Not Investigate the Details of Her Conviction until 2007; the Hospital Maintains a Discretionary Discipline and Discharge Policy for Felony Convictions; the Hospital Retains the Only Other Employee Ever Convicted of a Felony**

In January 2005, Okey David Bevins, the Hospital's Chief Executive Officer, learned of Turner's conviction from Kenny Hicks, the Hospital's former Director of Radiology. (A 8 n.15, 213.) The Hospital did not speak to Turner or her probation officer—nor did it ascertain the facts surrounding the arrest. (A 8-9; 161-62, 168, 180, 181-82, 211-12.) The Hospital only obtained a copy of Turner's

criminal record shortly before the hearing in this case. (A 3 n.11; 117-24 [Jul. 10, 2007 transmittal of Turner's court records], 214-19.)

The Hospital maintained a "Discipline and Discharge" policy. (A 3 n.7; 167.) Policy B.7 listed a felony conviction as a dischargeable offense. (A 8; 78-79 [Discipline and discharge policy], 194-95.) However, a felony conviction did not automatically trigger a discharge, as the policy simply stated that such a violation "may" result in discharge. (A 8; 78-79 [Hospital discipline and discharge policy], 164-65.) The Hospital's treatment of employee Carol Hudson was consistent with the "Discipline and Discharge" policy's discretionary guidelines. Hudson was convicted of a drug-related felony in 1996. She had concealed her husband's home-based marijuana-growing and selling operation. (A 3, 9; 113-15 [Mar. 20, 1996 grand jury indictment of Hudson], 126, 128.) But the Hospital did not terminate her. (A 3, 9; 111 [May 31, 1996 letter to Hudson], 127.)

**E. After a Medical Leave for Pregnancy-Related Complications, Turner's Position at Clark is No Longer Available; Turner Actively Seeks Work for a Year; in July 2007, Turner Finds Work and Remains Employed**

On October 28, 2005, Turner went on medical leave from Clark due to pregnancy-related complications. (A 8; 139.) On May 9, 2006, she gave birth to her second child. (A 8; 139.) Although Turner was eligible for rehire, she did not receive medical clearance to return to work until June 25, 2006, at which point her position at Clark was no longer available. Clark had filled Turner's position a few

weeks earlier on May 22, 2006. (A 8; 116 [Jan. 11, 2006 Clark position posting], 155.)

For the next year, Turner was unemployed. She was forced to move into her parents' home, and collected unemployment compensation from the state and child support from Back, whom she divorced in August 2006. (A 8; 23, 26.) To fulfill her responsibilities as a recipient of unemployment compensation benefits, Turner actively searched for work. She sought work with her former employers at Clark, Appalachian, and Gram; at the University of Kentucky Hospital in Lexington; Jupiter Health Clinic in Jackson; and medical offices in Winchester, Hazard, and Jackson. Turner also filed other job applications online. (A 8; 14-15, 22-25, 159-60, 197-209.) In July 2007, Turner found work as an ultrasound technologist with Ace Clinique in Hazard, Kentucky—where she remained employed at the time of the hearing. (A 8; 14-15, 190-91.)

### **III. The Instant Compliance Proceeding**

To resolve the amount of backpay that the Hospital must pay to discriminatee Turner, the Board's Regional Director issued a separate compliance specification detailing the amounts owed and a notice of hearing. (A 220-29 [Amended second compliance specification and notice of hearing].) The compliance specification calculated Turner's gross backpay from the time she was discharged until the specification was prepared in the first quarter of 2007, based on her hours and pay while still employed by the Hospital. (In the absence of a

valid offer of reinstatement by the Hospital, backpay continues to accrue for Turner. (A 2 n.4.) Pursuant to the Board's usual practice, the Region's Compliance Officer subtracted Turner's earnings from interim employment from the gross backpay amount. (A 75 [Compliance officer's worksheet].)

The Hospital filed an answer to the compliance specification. It did not dispute the formula used to calculate gross backpay, but did assert that additional offsets were warranted and that backpay should have been tolled or cut off at various times. (A 8; 91 [Hospital's amended answer to second amended compliance specification].) In 2007, an administrative law judge conducted a compliance hearing on the disputed issues. (A 6.) After rejecting most of the Hospital's defenses,<sup>2</sup> the administrative law judge issued a supplemental decision recommending that the Hospital pay Turner \$79,577, plus interest and minus required tax withholdings.

Both the General Counsel and the Hospital excepted to the administrative law judge's recommended order. After considering those exceptions, a two-member Board (Chairman Liebman and Member Schaumber) issued a Supplemental Decision and Order on July 9, 2009, which affirmed the judge's rulings, findings, and conclusions as modified. (A 2-10.)

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<sup>2</sup> The administrative law judge agreed with the Hospital that Turner removed herself from the job market and thereby incurred a willful loss of earnings in the last quarter of 2002 and the first quarter of 2003. He tolled backpay for those quarters and reduced the backpay figure accordingly. (A 9.)

#### **IV. The Board's Supplemental Decision and Order**

In July 2009, the Board, which then had only two members, issued a decision and order in this case. 354 NLRB No. 42 (2009) (A 1). In response, the Hospital filed a petition for review in the D.C. Circuit. On June 17, 2010, the Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), holding that Section 3(b) of the Act (28 U.S.C § 153(b)) requires a three-member delegee group for the Board. Based on *New Process*, the Board issued an order setting aside the two-member decision and order, and retained the case on its docket for further action. The D.C. Circuit dismissed the Hospital's 2009 petition for review. Thereafter, a properly-constituted three-member panel of the Board (Chairman Liebman and Members Schaumber and Pearce) affirmed the administrative law judge's rulings, findings, and conclusions and adopted his recommended order, as modified. (A 1.) That three-member decision, which incorporates by reference the two-member decision, is now before this Court.

#### **SUMMARY OF ARGUMENT**

The backpay and reinstatement remedies ordered by the Board in this case restore Turner to the position she would have been in but for the Hospital's unfair labor practice. It is undisputed that the General Counsel's gross backpay calculations were accurate, and the Board has already reduced Turner's backpay as appropriate to account for periods where she removed herself from the job market. Yet, the Hospital seeks to: (1) toll backpay upon Turner's 2002 resignation from

interim employer Gram, on the ground that she would have been fired for cause had she not resigned; (2) end both the reinstatement obligation and the backpay period based on Turner's 2002 felony conviction; and (3) end the reinstatement obligation and backpay period based on Turner's eight-month pregnancy-related medical leave in 2005-2006. None of these arguments have merit.

The Board found that Turner resigned from Gram due to conflicts with her childcare arrangements. Board law provides that resignation from interim employment due to conflicts with childcare arrangements does not constitute a willful loss of earnings. The Hospital errs in its contention that Turner's backpay should be reduced because she was forced to resign from Gram due to alleged misconduct; its argument rests on discredited testimony. The Board credited Turner's testimony that she resigned solely because of childcare responsibilities, and rejected contrary testimony from Gram's administrator.

Further, the Board properly rejected the Hospital's argument that its obligation to reinstate Turner, and the backpay period, ended when Turner was convicted of a felony in December 2002. The Hospital failed to show that it would have discharged Turner for that conviction. In the only documented instance of an employee with a felony conviction, the Hospital continued to employ her. Moreover, the Board properly discredited the Hospital's *post hoc* discipline and discharge policy-based rationalizations here. And, pursuant to established law, this Court should resolve any uncertainties regarding how events would have played

out if Turner had been convicted while employed by the Hospital against the Hospital, which committed the unlawful acts in the first place.

Finally, the Hospital contends that Turner's eight-month medical leave of absence tolled her backpay, or, alternatively, caused her to forfeit her right to reinstatement. In truth, no Hospital policy limits the length of medical leaves to 12 weeks or forbids a leave as long as 8 months. That no employee has ever been reinstated after an eight-month leave does not rule out the possibility that an employee could be so reinstated. The Hospital's written leave policy allows for both extended medical leaves and for personal leaves of absence, neither of which has any definitive time limit under Hospital policy. Because the Hospital failed to prove its defenses, this Court should enforce the Board's Order.

### **STANDARD OF REVIEW**

The Board's remedial power is "a broad, discretionary one, subject to limited judicial review." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964); *accord NLRB v. Joyce Western Corp.*, 873 F.2d 126, 128 (6th Cir. 1989). As the Supreme Court has explained, "[i]n fashioning its remedies . . . , the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts." *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 612 n.32 (1969); *accord NLRB v. Ryder Sys., Inc.*, 983 F.2d 705, 709 (6th Cir. 1993). The authority to fashion remedies under the Act "is for the Board to wield, not for the courts." *NLRB v. J.H.*

*Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969) (quoting *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953)).

Specifically, as this Court has recognized, the Board “has wide latitude in computing the amount of backpay to award to a discriminatee.” *NLRB v. Akron Paint & Varnish Co.*, 985 F.2d 852, 854 (6th Cir. 1992) (citing *Rutter-Rex Mfg. Co.*, 396 U.S. at 263). “When the Board, ‘in the exercise of its informed discretion,’ makes an order of restoration by way of backpay, the order ‘should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.’” *Seven-Up Bottling*, 344 U.S. at 346-47 (quoting *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943)); accord *NLRB v. Overseas Motors, Inc.*, 818 F.2d 517, 520 (6th Cir. 1987) (citations omitted). Accordingly, judicial review “is limited to a determination whether the Board has abused its discretion in fashioning its remedial order.” *Joyce Western Corp.*, 873 F.2d at 128.

With respect to credibility, “this Court will not normally substitute its judgment for that of the Board or administrative law judge who has observed the demeanor of the witnesses.” *NLRB v. Lakepark Indus., Inc.*, 919 F.2d 42, 44 (6th Cir. 1990). When the Board adopts the credibility determinations of the administrative law judge, those determinations are entitled to great weight. *Taylor Warehouse Corp. v. NLRB*, 98 F.3d 892, 901 (6th Cir. 1996). The Court will overturn such determinations only if they ““overstep the bounds of reason[,]”” *id.*

(quoting *Kusan Mfg. Co. v. NLRB*, 749 F.2d 362, 366 (6th Cir. 1984)), and are “inherently unreasonable,” *Kusan Mfg. Co.*, 749 F.2d at 366. *Accord Tel Data Corp. v. NLRB*, 90 F.3d 1195, 1199 (6th Cir. 1996).

The findings of fact underlying the Board’s decision are conclusive if they are supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *NLRB v. S.E. Nichols of Ohio, Inc.*, 704 F.2d 921, 923-24 (6th Cir. 1983). A reviewing court may not displace the Board’s choice between two fairly conflicting views, even if the court “would justifiably have made a different choice had the matter been before it de novo.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951); *accord NLRB v. V&S Schuler Eng’g*, 309 F.3d 362, 367 (6th Cir. 2002) (quoting *NLRB v. St. Francis Healthcare Centre*, 212 F.3d 945, 952 (6th Cir. 2000)). “The Board’s conclusion as to whether an employer’s asserted defenses against [backpay] liability have been successfully established will be overturned on appeal only if the record, considered in its entirety, does not disclose substantial evidence to support the Board’s findings.” *NLRB v. Westin Hotel*, 758 F.2d 1126, 1130 (6th Cir. 1985) (citations omitted); *accord Ryder Sys. Inc.*, 983 F.2d at 712.

**ARGUMENT****THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION IN DETERMINING THE AMOUNT OF BACKPAY THAT THE HOSPITAL OWES TO DISCRIMINATEE MELISSA TURNER AS A RESULT OF HER UNLAWFUL DISCHARGE****A. The Board’s Backpay and Reinstatement Remedies Restore Turner to the State She Would Have Been in Had the Unfair Labor Practice Not Occurred**

As the Supreme Court has explained, Section 10(c) of the Act (29 U.S.C. § 160(c)) provides that the Board, upon finding that an unfair labor practice has been committed, “shall order the violator ‘to take such affirmative action including reinstatement with or without backpay, as will effectuate the policies’ of the Act.” *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262 (1969). Accordingly, Section 10(c) authorizes the Board to fashion appropriate orders to prevent and remedy the effects of unfair labor practices. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984). Under the Act, an award of reinstatement with backpay is the conventional remedy in cases of unlawful discharge. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187 (1941).

“A finding by the Board that an unfair labor practice was committed is presumptive proof that some backpay is owed.” *The Lorge School*, 355 NLRB No. 94, slip op. at 3, 2010 WL 3291935, at \*4 (Aug. 19, 2010) (citing cases); *see NLRB v. Overseas Motors, Inc.*, 818 F.2d 517, 520 (6th Cir. 1987) (a backpay award is necessitated by the employer’s wrongful conduct). A backpay award is a make-

whole remedy designed to restore “the economic status quo that [the discriminatee] would have obtained but for the [employer’s] wrongful [act].” *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 188 (1973) (quoting *J.H. Rutter-Rex*, 396 U.S. at 263); see also *Phelps Dodge*, 313 U.S. at 198; *NLRB v. Robert Haws Co.*, 403 F.2d 979, 980 (6th Cir. 1968). A backpay award also serves to deter future unfair labor practices by preventing wrongdoers from gaining any advantage from their unlawful conduct. See *J.H. Rutter-Rex*, 396 U.S. at 265; 354 F.2d 170, 178 (2d Cir. 1965); *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 175 (2d Cir. 1965).

To restore the economic status quo, the discriminatee is ordinarily entitled to the difference between her gross backpay—the amount that she would have earned but for the wrongful conduct—and her actual interim earnings. See *Ryder Sys., Inc.*, 983 F.2d at 712 n.2. The backpay period normally runs from the date of the unlawful discharge to the date that the employer offers the discriminatee valid, unconditional reinstatement. See, e.g., *Westin Hotel*, 758 F.2d at 1128-29.

**B. The Hospital, Which Does Not Dispute That the General Counsel’s Gross Backpay Calculations Were Correct, Has the Burden To Prove Its Affirmative Defenses in Support of the Offsets It Seeks**

The burdens of proof in a backpay proceeding are matters of settled law. The General Counsel’s burden in a backpay proceeding is to establish only that the gross backpay amounts contained in a compliance specification are reasonable.

*Overseas Motors, Inc.*, 818 F.2d at 520. Any formula that approximates what a discriminatee would have earned had she not been discriminated against is acceptable if not unreasonable or arbitrary under the circumstances. *La Favorita, Inc.*, 313 NLRB 902, 902 (1994), *enforced*, 48 F.3d 1232 (10th Cir. 1995); *see Overseas Motors, Inc.*, 818 F.2d at 521 (the Board is “required only to adopt a formula which will give a close approximation of the amount due”). The burden then shifts to the employer to establish affirmative defenses mitigating liability.<sup>3</sup> *NLRB v. Akron Paint & Varnish Co.*, 985 F.2d 852, 854 (6th Cir. 1992) (citing *NLRB v. Ohio Hoist Mfg. Co.*, 496 F.2d 14, 15 (6th Cir. 1974)).

The backpay and reinstatement remedies ordered by the Board in this case restore Turner to the position she would have been in but for her unlawful discharge. The Hospital does not dispute (A 8) that the General Counsel’s gross backpay calculations were accurate. Although the Hospital sought more offsets before the Board, it failed to prove any of those defenses.

### **C. The Hospital Failed to Prove Any of Its Affirmative Defenses**

In urging the Court to reduce its backpay liability and eliminate its reinstatement obligation, the Hospital contends that: (1) backpay should have been

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<sup>3</sup> The General Counsel ordinarily will also include in the backpay specification any mitigating amounts that he has discovered during his backpay investigation. *See* Section 102.53 of the Board’s Rules and Regulations (29 C.F.R. § 102.53). By doing so, however, the General Counsel does not “assume[] the burden of establishing the truth of all of the information supplied or of negating matters of defense or mitigation.” *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 454 (8th Cir. 1963).

tolled upon Turner’s 2002 resignation from interim employer Gram because she would have been fired for cause had she not resigned; (2) Turner’s 2002 felony conviction ended both the reinstatement obligation and the backpay period; and (3) Turner’s eight-month pregnancy-related medical leave in 2005-2006 also ended the reinstatement obligation and backpay period. What this Court stated more than 40 years ago remains true today—under “[t]he basic substantive and procedural [] principles applicable to backpay [,]...the employer has the burden of proving facts that show no liability or that mitigate the extent of the damage.” *NLRB v. Rogers Mfg. Co.*, 406 F.2d 1106, 1109 (6th Cir. 1969). As the Board reasonably found, here the Hospital failed to meet its burden of proof on those asserted defenses to its reinstatement and backpay liability.

**1. The Hospital failed to prove that Turner’s resignation from Gram tolled her backpay**

The Hospital contends (Br. 22) that Turner’s backpay should be reduced because she was forced to resign from Gram due to alleged misconduct. Yet, backpay will only be reduced if the discriminatee was discharged from an interim employer for “gross” or “egregious” misconduct such that it constitutes a willful loss of earnings. *NLRB v. Ryder Sys., Inc.*, 983 F.2d 705, 713 (6th Cir. 1993); *Pepsi-Cola Bottling Co. of Fayetteville, N.C.*, 330 NLRB 1043, 1044 (2000), *remanded on other grounds*, 258 F.3d 305, 315 (4th Cir. 2001). Here, the Board rejected (A 4, 7) the Hospital’s attempt to reduce Turner’s backpay because it is

undisputed that Gram never discharged Turner—she resigned solely because of childcare concerns, and thus did not cause a willful loss of earnings. To the contrary, the Hospital’s allegation that Turner committed misconduct is irrelevant and rests on discredited testimony.

The record amply supports the Board’s finding (A 4, 7) that Turner resigned her position with Gram due to scheduling conflicts and did so without any knowledge that she might be fired for misconduct. When she began working at Gram, Turner worked the day shift. Over time, Gram changed her schedule to include 10:00 a.m. to 10:00 p.m. shifts and weekends. Turner was unable to work those schedules because of her responsibilities as a single parent. As a result, she resigned the position at Gram in July 2002, and again sought temporary work through MSN. (A 7; 136-37.) Turner’s decision comports with Board law that resignation from interim employment due to conflicts with childcare arrangements does not constitute a willful loss of earnings, so backpay is not reduced under those circumstances.<sup>4</sup> *Be-Lo Stores*, 336 NLRB 950, 954-55 (2001); *Twistex, Inc.*, 291 NLRB 46, 49 (1988).

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<sup>4</sup> Because Turner resigned only due to scheduling complications and it is undisputed that Gram never discharged Turner, the Company’s reliance (Br. 22-23) on two cases involving discharges for alleged gross or egregious misconduct is misplaced. *See NLRB v. Ryder System, Inc.*, 983 F.2d 705, 712-13 (6th Cir. 1993) (affirming the Board’s finding that employee who forcefully, yet mistakenly, asserted a right to representation during an investigatory interview had not committed gross misconduct, and enforcing order requiring reinstatement); *Brady v. Thurston Motor Lines, Inc.*, 753 F.2d 1269, 1279 (4th Cir. 1985) (reducing

The only support for the Hospital's view (Br. 22) that Turner's backpay should be reduced because she was about to be fired for misconduct is the discredited testimony of Gram Administrator Ken Holbrook, who testified that Turner realized that she was going to be fired and preemptively quit instead. (A 47) The Hospital has not met the stringent standard of review for overturning the Board's credibility determinations. When a case turns on witness credibility, "this Court will not normally substitute its judgment for that of the Board or administrative law judge who has observed the demeanor of the witnesses." *NLRB v. Lakepark Indus., Inc.*, 919 F.2d 42, 44 (6th Cir. 1990). Although Turner testified that she resigned her employment at Gram to remedy her childcare difficulties, the Hospital contends that her resignation is a mere "semantic nicety" (Br. 22). It does not, however, offer any effective arguments to demonstrate that the Board erred in crediting Turner and discrediting Holbrook. Moreover, it is "long past the time" for credibility challenges in this case. *Vico Prods. Co., Inc. v. NLRB*, 333 F.3d 198, 209 (D.C. Cir. 2003). This Court will not retry the evidence unless the Board's credibility decisions were without a rational basis. *See Glenn's Trucking Co. v. NLRB*, 298 F.3d 502, 505 (6th Cir. 2002) (citing *NLRB v. Valley Plaza, Inc.*, 715 F.2d 237, 242 (6th Cir. 1983)). The Hospital has not carried this heavy burden here.

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backpay for Title VII plaintiffs discharged from their interim employment for knowingly violating work rules).

The Hospital makes the meritless argument (Br. 22 n.7) that Board erred by stating that the judge implicitly discredited Holbrook. In fact, the Board found (A 4) that the judge discredited Holbrook when he expressly found, directly contrary to Holbrook's testimony (A 5 n.10; 47-48), that the Hospital failed to establish that Turner knew she was about to be fired. Therefore, because the Hospital offers no other basis on which to overturn the discrediting of Holbrook, it has fallen far short of the stringent standard of review here.

**2. The Hospital failed to prove that Turner's felony conviction tolled her backpay, or caused Turner to forfeit her right to reinstatement**

The Hospital also contends (Br. 14) that its obligation to reinstate Turner and the backpay period both ended when Turner was convicted of a felony in December 2002. The Board, however, properly rejected (A 2-3, 9) this argument because the Hospital failed to show that it would have discharged Turner for that conviction. The Hospital bears the burden of proving its affirmative defense that Turner is not entitled to reinstatement or backpay after her conviction because the Hospital would have terminated her on that basis. *NLRB v. Jackson Hosp. Corp.*, 557 F.3d 301, 307 (6th Cir. 2009). Yet, the Hospital offers no persuasive evidence that this is true—only speculation (Br. 15, 18) that had the Hospital not unlawfully fired Turner for her protected union activity, she still would have found herself in the same circumstances. Strong judicial precedent requires that any uncertainties regarding how events would have unfolded if the incident occurred while Turner

was employed by the Hospital must be resolved against the Hospital, the wrongdoer. *E.g., Kawasaki Motors Mfg. Corp., U.S.A. v. NLRB*, 850 F.2d 524, 527 (9th Cir. 1988) (because “doubts must be resolved against the employer who committed the unfair labor practice,” it bears a “difficult” burden in seeking to reduce backpay). *See generally Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946) (“[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.”), *quoted in NLRB v. The Staten Island Hotel P’ship*, 101 F.3d 858, 862 (2d Cir. 1996). As the D.C. Circuit has observed, the Board can “hardly be said to be effectuating policies beyond the purposes of the Act by resolving . . . doubts” about events that would mitigate the employer’s backpay liability “against the party who violated the Act.” *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1321 (D.C. Cir. 1972) (citation omitted).

The Board reasonably found that the Hospital failed to prove that it would have discharged Turner following her conviction because its policies and past practice demonstrate that the Hospital does not automatically require termination when an employee is convicted of a crime. First, the Hospital’s written policy allows termination but does not demand it. Specifically, the Hospital’s discipline policy (A 79 [Discipline and discharge policy]) states only that a felony conviction “may” result in an employee’s discharge. Next, the Hospital’s past practice in handling employee crimes shows that a felony conviction does not necessarily end

employment. *See Beverly Calif. Corp.*, 339 NLRB 776, 777 (2003) (employer failed to establish that its practice was to discharge employees based solely upon receipt of a patient abuse citation). Here, the Board found that in the only documented incident where an employee was convicted of a felony, the Hospital continued to employ her. The Hospital retained Carol Hudson, a registered nurse, after she was convicted of a felony for concealing her husband's home-based marijuana-growing and -selling operation. (A 3, 9; 13 [1996 judgment against Hudson], 85, 113-15 [Mar. 20, 1996 grand jury indictment of Hudson], 126, 128.) Additionally, the Hospital continued to employ a dozen or more admitted substance-abuser employees who received treatment under the Hospital's employee assistance program. (A 3, 9 n.23; 183-86, 187, 188-89; Br. 18.) It was such evidence of the Hospital's handling of comparable situations in the past that prompted the Board to reject the Hospital's defenses regarding the import of Turner's drug-related conviction.

The Hospital tries to rationalize its disparate treatment of Hudson and Turner by unconvincingly distinguishing (Br. 15-16) the two felony convictions based on the nature of Hudson's offense and Hudson's voluntary disclosure of her felony conviction. The Hospital contends that Hudson was worthy of continued employment but Turner was not because, first, Hudson's offense was less serious because it amounted to only guilt by association (Br. 15); second, Hudson's offense was not a "deliberate" act (Br. 15-16); third, Hudson voluntarily came to

the Hospital to discuss and explain her conviction (Br. 17); and, fourth, Hudson's offense did not suggest that she would misuse medication (Br. 16). As we show, the Board reasonably found those distinctions unpersuasive.

First, the documentary evidence, including the Hospital's own records (A 111 [May 31, 1996 letter to Hudson]), demonstrates that Hudson was convicted of a felony and negates any attempts (Br. 15-16) by the Hospital to downplay the seriousness of her offense. The judgment against Hudson (A 85 [1996 judgment against Hudson]) makes it clear that Hudson's offense was a felony involving specific intent to conceal an illegal drug operation. Likewise, the Hospital's own May 31, 1996 letter to Hudson setting forth the conditions for her continued employment states that Hudson was convicted of a felony; she certainly was not convicted of "being in the wrong place at the wrong time." (Br. 16, A 85 [1996 judgment against Hudson].)

Second, the Hospital's claim (Br. 15) that it chose not to reinstate Turner because, unlike Hudson, she deliberately violated the law also falls flat because, at the time the Hospital decided not to reinstate Turner, it did not know what her specific conduct was. (A 2 n.11) In fact, the Hospital only acquired the details of Turner's conduct in July 2007 shortly before the hearing—two years after its asserted March 2005 decision not to reinstate her. (A 8-9; 117-24 [Jul. 10, 2007 transmittal of Turner's court records], 161-62, 168, 180, 181-82, 204-09.) In March 2005, the Hospital knew only that Turner had been convicted of a felony—

nothing more. In any event, although Hudson apparently did not grow or sell marijuana, she was convicted of deliberately concealing that conduct by her husband—a felony in itself. (A 85 [1996 judgment against Hudson]) The Hospital’s attempt to split hairs to prove that Hudson was a seemingly better felon than Turner is an exercise in absurdity.

Third, unlike Hudson, Turner did not have the chance to come to the Hospital to discuss the circumstances of her conviction because she had been unlawfully discharged two years earlier. Likewise, her unlawful discharge meant that she could not (Br. 18) avail herself of the Hospital’s employee assistance program, the way a dozen or more other employees, who had substance abuse problems yet were retained by the Hospital, were able to do. (A 3, 9 n.23; 183–86, 187, 188-89; Br. 18.)

Nor is there any merit to the Hospital’s oblique fourth contention—that Hudson was less likely than Turner to misuse drugs available at the hospital. (Br. 16.) Unlike Hudson, who was a registered nurse, Turner was only an X-ray technician. Therefore, she had no work-related access to the kind of drugs that would be of interest to a substance abuser, while Hudson did. (A 3; 173-79.) Even if the Hospital had a valid concern that Turner might misuse her position to access drugs illicitly, employees in a variety of positions—and with much greater access to controlled substances than Turner would have had, including a physician—remained employed by the Hospital despite their substance abuse problems. (A 3,

7 n.5; 183-86, 187, 188-89.) This demonstrates that the Hospital's markedly different treatment of Hudson and admitted substance abuser-employees, compared with Turner, had no sound basis. (A 3.) Thus, all of the Hospital's efforts to distinguish Hudson's felony from that of Turner fail.

The administrative law judge discredited (A 3 n.7) CEO Bevins' testimony on why he chose not to reinstate Turner, a determination adopted by the Board and therefore entitled to great weight. *Taylor Warehouse Corp. v. NLRB*, 98 F.3d 892, 901 (6th Cir. 1996). The Hospital has not shown that the Board's determination was hopelessly incredible, as is required to overturn the Board's credibility determinations. *Kusan Mfg. Co. v. NLRB*, 749 F.2d 362, 366 (6th Cir. 1984). Rather, the Board reasonably determined that the lack of corroborating record evidence undermined the credibility of Bevins' testimony (A 3 n.7) that he based his decision not to reinstate Turner on the circumstances of her arrest and conviction. Bevins admitted that the Hospital's "Disciplinary and Discharge" policy was discretionary, not mandatory: the decision to discipline or discharge Turner was to be based on Bevins' investigation, as the CEO, of the circumstances surrounding the felony conviction. (A 74.) Yet, as the Board found, the Hospital conducted no such investigation before deciding not to reinstate Turner, as shown above (p. 26). (A 3 n.11.) The Hospital only investigated the circumstances of Turner's conviction two years *after* it decided not to reinstate Turner. (A 3 n.11;

117-24 [Jul. 10, 2007 transmittal of Turner's court records], 161-62, 168, 180, 181-82, 204-09.)

At the time that the Hospital ostensibly decided not to reinstate Turner, it actually had no information about the details of Turner's crime with which to determine whether her circumstances would warrant termination under its policy.<sup>5</sup> Indeed, even as described in the Hospital's opening brief (Br. 17), in 2005 when Bevins decided not to reinstate Turner, all that he bothered to investigate was whether Turner's crime was a felony or not; the Hospital did not know the particulars until 2007, right before the administrative hearing. (A 8 n.15; 117-24 [Jul. 10, 2007 transmittal of Turner's court records], 162-63, 171-72.) There is no reason here to conclude that the Hospital would have necessarily discharged Turner, as evidenced by the decision not to discharge Hudson despite her felony conviction. In sum, none of the Hospital's *post hoc* reasons legitimate its refusal to reinstate Turner, and the Court should disregard them.

The Hospital also incorrectly argues (Br. 16) that the Board misconstrued Bevins' testimony as offering additional disqualifying reasons for not reinstating Turner while Bevins actually only testified as to the circumstances of Turner's

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<sup>5</sup> See *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966) (if Board finds stated motive for the employer's action is false, it can infer that the actual motive is one that the employer wishes to conceal and is unlawful); *E.C. Waste, Inc. v. NLRB*, 359 F.3d 36, 43 (1st Cir. 2004) (same). *Accord Lancaster Fairfield Cmty. Hosp.*, 303 NLRB 238, 238 (1991), *enforced*, 968 F.2d 1215, 1992 WL 146659, at \*5 (6th Cir. Jun. 26, 1992) (*per curiam*) (unpublished table decision).

offense that he considered when he decided not to reinstate her. In fact, Bevins specifically testified (A 3; 73-74, 165-66) that he took into account the dischargeable offenses listed in Section B.7 of the disciplinary policy; namely, a felony conviction, the solicitation of drugs, fraud, and falsifying medical information. This testimony shows that Bevins was actually referencing the Hospital's written "Discipline and Discharge" policy—not the "circumstances" of Turner's offense. (A 3; 73-74, 78-79 [Discipline and discharge policy].) Bevins' testimony clearly shows that the Board did not misconstrue Bevins' testimony before ultimately discrediting it.

Finally, the Hospital's cited cases are distinguishable and do not undermine the Board's remedy here. The Hospital's reliance (Br. 19) on *Jacob E. Decker & Sons v. NLRB*, 636 F.2d 129, 130-31 (5th Cir. 1981), is misguided. In that case, the employer, although it lacked any "firm" and "automatic" policy of discharging convicted felons, refused to reinstate and make whole two employees with post-discharge felony convictions. The Fifth Circuit deferred to the Board's remedial discretion and agreed that one employee (Orosco) remained entitled to reinstatement and backpay, while the other (Dominguez) was only entitled to backpay from his discharge to his conviction in view of his history as a probationary employee and other factors. *Id.* at 130-32. Unlike Dominguez's situation in *Decker*, in this case there has been no assertion, no evidence, and no

finding that Turner's employment history at the Hospital or any other factors make reinstatement an inappropriate remedy.

Nor do its citations (Br. 19) to *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 256 (1939), *Nebraska Bulk Transport, Inc. v. NLRB*, 608 F.2d 311, 316 (8th Cir. 1979), and *NLRB v. Big Three Welding Equipment Co.*, 359 F.2d 77, 83 (5th Cir. 1966) advance the Hospital's cause here. Although it is true that there are limits on the Board's remedial power, each of these cases is factually distinguishable: *Fansteel* involved the Board's power to order reinstatement of employees who participated in an illegal strike and destroyed the employer's property; *Big Three Welding* involved an employee who stole property from the employer; and *Nebraska Bulk Transport* involved reinstatement of an employee whose driving record was so bad that the employer would not have been able to insure him. In contrast, here Turner's drug-related offense had no effect on the Hospital. There has been no assertion, no evidence, and no finding that Turner stole or destroyed the Hospital's property or that her reinstatement would affect the Hospital's insurance.

**3. The Hospital failed to prove that Turner's 8-month medical leave of absence tolled her backpay, or caused her to forfeit her right to reinstatement**

The Hospital's contention (Br. 23) that Turner's eight-month medical leave of absence tolled her backpay, and caused her to forfeit her right to reinstatement is

likewise meritless. No Hospital policy forbids a leave of eight months.<sup>6</sup> Instead, the Hospital largely relies (Br. 23-24) on CEO Bevins' testimony to establish that it would not have allowed Turner to return to work after an eight-month leave.

The Hospital's written Family Medical Leave Act ("FMLA") policy, however, allows for both extended medical leaves and for personal leaves of absence. (A 93-108 [Leaves of absence policy].) The Hospital's written leave policy provides that employees are entitled to 12 weeks' leave pursuant to the FMLA, after which, according to CEO Bevins, employees who exhaust their FMLA leave are placed on PRN or, "as needed," status for 2 more months. Bevins stated that, under the apparently unwritten PRN policy, if an employee is unable to work at least three shifts while on PRN status, the Hospital would discharge him or her. (A 4-5, 5 n.17; 169-70.) Yet, beyond the FMLA-based leave, personal leaves of absence have no definitive time limit under Hospital policy:

Requests for personal leave of absence (for individuals not eligible for FMLA or for reasons not FMLA eligible) will be considered for a reasonable period of time up to 90 days if the facility is able to obtain a satisfactory replacement during the time the employee would be away from work. The leave may be extended for a reasonable period of time due to special circumstances, as determined on an individual basis and approved by the supervisor and Human Resources Department.

(A 5; 105 [Leaves of absence policy].)

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<sup>6</sup> The Board adopted the administrative law judge's suspension of the backpay period for the eight months that Turner was unable to work. Thus, Turner was only eligible for backpay and reinstatement after her medical leave—by which time her position at Clark had been filled and was no longer available. (A 4 n.16.)

Here, the Board looked to the plain text of the Hospital's own leave policy and reasonably concluded that the Hospital could have granted Turner, upon request, a personal leave of absence of 90 days or more following the standard 12-week FMLA leave. Further, the policy allows for an extension of leave with no stated limit, which would be considered on a case-by-case basis. (A 4.) This possibility negates the Hospital's contention that Turner would definitely have been fired had she not returned to work after 12 weeks.<sup>7</sup>

Likewise, although the Hospital erroneously states (Br. 23) that the Board determined that Turner "would have" been re-employed by the Hospital once medically released to return to work, the Board actually merely reasoned that Turner *could have* been re-employed. (A 5.) Because the Hospital cannot carry its burden to show that the record eliminates the possibility that Turner could have returned to her job, the Board again reasonably resolved (A 5) this ambiguity against the wrongdoer, *Kawasaki Motors Mfg. Corp., U.S.A. v. NLRB*, 850 F.2d 524, 527 (9th Cir. 1988), and rejected the Hospital's arguments that Turner's eight-month medical leave of absence necessarily disqualified her from reinstatement and further backpay.

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<sup>7</sup> The Hospital's argument (Br. 25) and citation to *Edgar v. JAC Products*, 443 F.3d 501 (6th Cir. 2006), regarding the lawfulness of its "neutral leave of absence policy" of discharging any employee who does not return to work after 12 weeks of leave pursuant to the FMLA is a red herring. Whether any such policy would be lawful, if it existed, is not at issue in this case. Also, the FMLA sets a floor, not a ceiling, on leave; here, the Hospital's policy did not provide a definite cap on leave.

Finally, failing to show any written limit on leave, the Hospital relies on Bevins' hearing testimony that he could not identify any employee who had been reinstated after an eight-month medical leave. The Hospital argues (Br. 24) that because no employee had ever been reinstated after an eight-month medical leave, no employee could ever be. Yet, as the Board explained (A 5), Bevins' testimony did not rule out the possibility that an employee could be so reinstated; he testified only that no employee had been. Although the Board did not "require[] the Hospital to prove a negative," (Br. 25) the Hospital did have to prove that it enforced a definite limit on leave, but it failed to establish such a limit with either its written policies or testimony. Accordingly, the Board again reasonably resolved any uncertainty against the Hospital and rejected the Hospital's argument because it was not supported by the record. (A 5.) *See NLRB v. Superior Roofing Co.*, 460 F.2d 1240, 1241 (9th Cir. 1972) ("The Board has wide discretion in selecting criteria for reconstructing what would have happened in a given case but for the discrimination").

## CONCLUSION

The backpay and reinstatement remedies ordered by the Board in this case restore Turner to the position she would have been in but for the Hospital's unfair labor practice. And, as shown above, where the Hospital's arguments lack record and legal support, it has failed to meet its burden of overcoming its backpay and reinstatement obligations. Therefore, this Court should enforce the Board's Order in full.

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 NATIONAL LABOR RELATIONS BOARD  
 April 2010

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD )  
)  
Petitioner ) No. 10-2101  
)  
)  
v. ) Board Case No.  
) 9-CA-37734  
JACKSON HOSPITAL CORPORATION )  
D/B/A KENTUCKY RIVER MEDICAL )  
CENTER )  
)  
Respondent )  
)

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 8,414 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, DC  
this 29th day of April 2011

UNITED STATES COURT OF APPEALS  
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	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on April 29, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth by using the appellate CM/ECF system.

I certify foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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