

the nursing facility in this case is Galion Pointe, LLC. The AGC offered virtually no evidence at trial regarding Galion Pointe, LLC.

RECORD/POINTS OF AUTHORITY: GC 11; ALJD footnote 8; See, *Capitol-EMI Music*, 311 NLRB 997.

2. ALJD page 4, line 4 through page 4, line 5.

The ALJ erred by finding that Respondent “acquir[es]” small nursing homes because there is no evidence that Respondent has any ownership interest in any nursing home relevant to this case.

RECORD/POINTS OF AUTHORITY: GC 11; GC 13; ALJD footnote 5; *Capitol-EMI Music*, 311 NLRB 997.

3. ALJD page 5, line 19 through page 5, line 21.

The ALJ erred by finding that Respondent signed a lease for the facility formerly operated as Village Care on June 29, 2010, or otherwise became legally bound by the referenced lease, because the uncontradicted evidence shows that the Lessee is Galion Pointe, LLC, a legal entity separate from Respondent.

RECORD/POINTS OF AUTHORITY: GC 12.

4. ALJD page 6, line 14 through page 6, line 21.

The ALJ erred by finding that James Griffiths made the final hiring decisions for staffing Galion Pointe on July 1, 2010 because all of the evidence showed that he did not include or exclude anyone from being hired and otherwise had no material role in the decision-making process.

RECORD/POINTS OF AUTHORITY: Tr. 1109, 1127, 1229, 1152, 1157-1159, 1536-1537.

5. ALJD page 6, line 25 through page 7, line 2; and page 30, line 36 through page 30, line 40.

The ALJ erred by finding that Ms. Walters requested that Ms. Knight provide her with a roster showing union membership, and that she used this roster for illegal purposes because the uncontradicted evidence shows that Ms. Knight made her notations without being requested, and Ms. Walters testified only that she used the roster to record her notes regarding the candidates for hire.

RECORD/POINTS OF AUTHORITY: Tr. 1112, 1115, 1116-1119; R. 18.

6. ALJD page 10, line 3 through page 10, line 11; and page 30, line 36 through page 30, line 40.

The ALJ erred by finding that Respondent kept track of the total number of former Village Care bargaining unit members that it was identifying for hire, and specifically for the purpose of depressing the number hired to avoid recognition of the union, because there is no testimony or other evidence to support the ALJ's reasoning, and all of the admitted testimony on the question is contrary to the ALJ's reasoning and finding.

RECORD/POINTS OF AUTHORITY: Tr. 1133, 1155-1156, 1545-1548, 1610.

7. ALJD page 11, line 1 through page 11, line 24; page 13, line 30, through page 13, line 37; and page 27, line 23 through page 27, line 33.

The ALJ erred by finding that Respondent communicated to Village Care employees attending the June 30, 2010 meeting that Respondent would not recognize the union as the representative of the employees at Galion Pointe because the uncontradicted evidence show that: when the union organizer, Dawn Courtright, spoke

to James Griffiths on June 30, 2010 there was no agreement between the union and Respondent; literally moments after this discussion, Mr. Griffiths made clear to meeting attendees that the workers alone would decide on union representation; and as of Ms. Courtright's July 6, 2010 letter, a majority of the workers at Galion Pointe were not members of the former Village Care bargaining unit.

RECORD/POINTS OF AUTHORITY: Tr. 1312, 1607-1610.

8. ALJD page 14, line 34 through page 15, line 17; and page 29, line 6 through page 29, line 14.

The ALJ erred by incorrectly counting the number of members from the former Village Care Bargaining Unit and incorrectly finding that the majority of the workforce at Galion Pointe was comprised of former Village Care Bargaining Unit members. The ALJ selected July 1, 2010 as the relevant date even though the uncontradicted evidence showed that operations at Galion Pointe were in a great state of flux for several weeks beyond July 1, 2010. The ALJ ignored what the evidence showed at trial in favor of notations made by a non-supervisor (Ms. Knight) on an impromptu, out of date roster, and did not require the AGC to meet his burden of proof to show which employees qualified under the Village Care Collective Bargaining Agreement as members represented by the Union.

RECORD/POINTS OF AUTHORITY: Tr. 618, 619, 766, 809, 846, 910, 1064, 1127, 1129, 1333, 1622, GC 2, Articles 4, 10; R. 18.

9. ALJD page 15, line 1 through page 15, line 6; page 29, line 9 through page 29, line 11.

The ALJ erred by incorrectly counting the number of workers at Galion Pointe who were not members of the former bargaining unit at Village Care based on his findings that several employees working at Galion Pointe were assigned on a “temporary basis” to work at Galion Pointe, and that several additional employees working at Galion Pointe should not be counted because they had supervisory responsibilities.

RECORD/POINTS OF AUTHORITY: Tr. 1202-1224, 1317, 1544, 1546, 1611-1613.

10. ALJD page 15, line 30 through page 15, line 32; page 16, line 1 through page 16, line 2.

The ALJ erred by finding that Ms. Ronk, Ms. Fortney and/or Ms. Shuster noted which former Village Care employees attended the Union’s press conference because: the person alleged as the sole source for that finding (Mr. Claypool) did not testify to that alleged fact, even though he testified in the trial of this case; the actual source for the information (Ms. Siegenthal) was biased against Mr. Claypool based on the personal relationship Ms. Siegenthal formerly had with Mr. Claypool; and no evidence was adduced showing any record or communication of the alleged monitoring.

RECORD/POINTS OF AUTHORITY: Tr. 407-447, 852.

11. ALDJ page 17, line 1 through page 17, line 17.

The ALJ erred by finding that Ms. Atkins intended to quit her then full-time job at McDonalds in order to allow her to work full-time at Galion Pointe in July 2010 because the uncontradicted, non-hearsay, testimony showed that Ms. Atkins’ actual plan was to

continue to work at McDonalds full-time, while working at Galion Pointe, and that she quit her job at Galion Pointe because the Galion Pointe schedule interfered with Ms. Atkins' work at McDonalds.

RECORD/POINTS OF AUTHORITY: 748, 1186-1188, 1323-1324, 1350.

12. ALDJ page 18, line 1 through page 18, line 20.

The ALJ erred by finding that Ms. Archer did not abandon her job on or about July 2, 2010 because Ms. Ronk's uncontradicted testimony showed that Ms. Archer left work before the end of her shift and that this abandonment materially influenced the decision to terminate Ms. Archer's employment.

RECORD/POINTS OF AUTHORITY: Tr. 1161, 1347, 1714-1715, 1717, 1719-1720.

13. ALDJ page 19, line 21 through page 19, line 29.

The ALJ erred by finding that Ms. Nolen's termination was for an illegal reason, not related to her documented mistreatment of a patient at Galion Pointe, because the finding conflicts with the uncontradicted testimony regarding the patient's mistreatment and related documentary evidence created at the time of the patient's mistreatment.

RECORD/POINTS OF AUTHORITY: Tr. 1029, 1162-1163, 1722-1723; R. 21K.

14. ALDJ page 22, line 6 through page 22, line 10.

The ALJ erred by finding that additional employees were hired at Galion Pointe between July-September 2010 as a result of "many" JAG Healthcare employees being ready to return to their original facilities because there was no evidence admitted at trial that supports this finding. The uncontradicted evidence showed that many former Village Care employees quit soon after being hired to work at Galion Pointe, and that

many former Village Care workers continued to be interviewed and offered work at Galion Pointe throughout July and the following months in 2010.

RECORD/POINTS OF AUTHORITY: Tr. 1137, 1186, 1126, 1129-1130, 1137, 1186, 1226, 1228,-1229, 1282, 1323, 1331, 1332, 1337, 1354, 1655-1657.

15. ALDJ page 22, line 17 through page 23, line 5; and page 31, line 11 through page 31, line 33.

The ALJ erred in finding that former Village Care bargaining unit members not hired in the initial period of July 1, 2010 were not offered work thereafter for reasons other than their qualifications based on personal knowledge and personnel records because the uncontradicted evidence shows that such decisions were generally made by Ms. Ronk, not Ms. Walters, and at a time that afforded Ms. Ronk much greater opportunity to review personnel records. The evidence was also uncontradicted that Ms. Ronk's duties as Director of Nursing made her familiar with the qualifications of STNAs who had worked at Village Care.

RECORD/POINTS OF AUTHORITY: Tr. 273, 707, 809, 1054, 1062, 1109-1111, 1225, 1354, 1328, 1336, 1338, 1380-1381; R. 22; GC 29; *compare* ALJD p. 6, footnote 11 to ALJD, p. 22, line 17. *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.* (1974), 417 U.S. 249 (Douglas, dissenting), citing *Crotona Service Corp.*, 200 N.L.R.B. 738.

16. ALDJ page 23, line 10 through page 23, line 20, and page 30, line 47 through page 31, line 3.

The ALJ erred by finding that Ms. Walters' August 27, 2010 notes evidence union animus because they simply record what the applicant said and there is no evidence

correlating a notation of “good” with any remark about the union. For example, two “good” remarks are attributed to applicants who made no remark about the union.

RECORD/POINTS OF AUTHORITY: Tr. 298-301; GC 20.

17. ALDJ page 23, line 23 through page 23, line 28, and page 31, line 23 through page 31, line 29.

The ALJ erred by finding that the reason for Ms. Haney not receiving a job offer to work at Galion Pointe following her interview in early October 2010 was illegal, or was based on anything other than Ms. Walters’ concern about Ms. Haney’s personal hygiene, and Haney’s demand for hours and wages other than what were being offered, because it conflicts with Ms. Walter’s uncontradicted testimony (which even Ms. Haney corroborated as to the wage demand).

RECORD/POINTS OF AUTHORITY: Tr. 872-874, 1057, 1137-1142, 1144.

18. ALJD page 25, line 19 through page 26, line 10; and page 29, line 9 through page 29, line 18.

The ALJ erred in concluding that Respondent was the successor to Village Care because the evidence did not show that a majority of Respondent’s workforce was comprised of former members of the Village Care bargaining unit.

RECORD/POINTS OF AUTHORITY: Tr. 137, 809, 1064, 1202-1224, 1544, 1546, 1611-1612; *Kessel Food Mkts., Inc. v. NLRB* (6th Cir. 1989), 868 F.2d 881.

19. ALJD page 26, line 27 through page 27, line 10.

The ALJ erred in holding, generally, that an 8(a)(1) violation and, specifically, that a successor employer that informs applicants that there will be no union causes the employer to forfeit its “Burns rights” to unilaterally set the initial terms and conditions of

employment. The principal error lies in a basic misconstruction of the Supreme Court's holding in *NLRB v. Burns International Security Services* (1972), 406 U.S. 272.

RECORD/POINTS OF AUTHORITY: See, Comment, 2 National Labor Relations Act: Law and Practice, Section 14.01[3] [iv].

20. ALJD page 27, line 12 through page 28, line 2.

The ALJ erred by finding that Respondent informed applicants for jobs at Galion Pointe that there would be no union at Galion Pointe because the evidence shows without contradiction that Mr. Griffiths statements on June 30, 2010 were nothing more than declarations of fact (as of that date: no other JAG Healthcare-managed nursing facility employed workers represented by a union; and there was no contract between the union and Respondent) without threat of reprisal or promise of benefit, and Mr. Griffiths made abundantly clear that the decision of union representation was up to the workers (a decision with which he said he would not interfere).

RECORD/POINTS OF AUTHORITY: Tr. 627-628, 659, 692, 709, 801, 885, 1172, 1617, 1619; 29 U.S.C. Section 158(c).

21. ALJD page 27, line 4 through page 27, line 19; and page 30, line 33 through page 30, line 36.

The ALJ misconstrues the holding of *Kessel Food Mkts., Inc. v. NLRB* (6th Cir. 1989), 868 F.2d 881.

22. ALJD page 30, line 27 through page 31, line 10.

The ALJ incorrectly found “substantial evidence of union animus” because, as discussed above, Mr. Griffiths’ June 30, 2010 remarks concerning union representation were not illegal; Ms. Walters’ use of the employee roster on June 30, 2010 was not

illegal; Ms. Walters did not attempt to depress the number of employees hired from the former Village Care bargaining unit; Ms. Ronk did not record who attended the union press conference; Ms. Walters' August 2010 notes were not illegal; and the only evidence regarding hiring decisions made for Galion Pointe between July 2 and October 31, 2010 is that those decisions were based on legitimate, non-discriminatory bases.

23. ALJD page 31, line 12 through page 31, line 29.

The ALJ incorrectly found that, assuming evidence that Respondent attempted to depress the number of Galion Pointe workers hired from the former Village Care Bargaining unit (which Respondent denies), that Respondent did not meet its burden of proof showing that it would not have hired the former Village Care bargaining unit members not previously offered work for legitimate, non-discriminatory bases because the finding conflicts with the uncontradicted evidence adduced regarding Respondent's staffing model and practices, and the business-judgment rationally exercised by Respondent as how to best meet its staffing needs.

RECORD/POINTS OF AUTHORITY: 1078-1080, 1087, 1088, 1095, 1097-1098, 1098, 1124-1134, 1150, 1159, 1343-1379, 1506-1508, 1593, 1595; R. 21. *Crotone Service Corp.*, 200 N.L.R.B. 738.

24. ALJD page 31, line 31 through page 32, line 8; and page 39, line 9 through page 39, line 11.

The ALJ erred by holding that, as a result of the antecedent finding that Respondent attempted to avoid recognizing the union by depressing the hiring of former members of the Village Care bargaining unit (which Respondent denies), Respondent discriminated against all 21 of the "discriminatees" alleged by the AGC at trial, including

the seven persons laid off by Village Care (Jolene Dennis; Ceilata Dotson; Vicky Ely; Brandi Riley; Bobbie Stephens; Cassandra Storer; and Judy Watts), because this is not a correct statement of the law, particularly under the present circumstances in which the ALJ determined that the AGC had not proved that Respondent had promised to hire all Village Care employees to work at Galion Pointe.

RECORD/POINTS OF AUTHORITY: See, *Capital Cleaning Contractors v. NLRB* (D.C. Cir. 1998), 147 F.3d 999; *Kessel Food Mkts., Inc. v. NLRB* (6th Cir. 1989), 868 F.2d 881.

25. ALJD page 33, line 43 through page 34, line 34.

The ALJ erred in finding that Mr. Griffiths' one stray remark allegedly made on June 30, 2010 (regarding an instruction to telephone the police) and Ms. Ronk's write up of Ms. Archer on July 2, 2010 for expressing her desire to subordinate her duty to care for her patients in favor of joining her friends gathered across the street transformed Respondent's otherwise legal policy regarding solicitation and distribution to an illegal policy because no evidence was adduced showing that either action was prompted by the intent to interfere with Section 7 Rights, or resulted in that outcome.

RECORD/POINTS OF AUTHORITY: 29 U.S.C. Section 158(c); *Albertson's v. NLRB* (6th Cir. 2000), 301 F.3d 441.

26. ALJD page 35, line 40 through page 37, line 4.

The ALJ erred in concluding that the AGC met his burden proof, and that Respondent did not prove its affirmative defense, as to the allegations made by the AGC regarding Ms. Archer, particularly since the AGC made no effort to produce her as a witness (unlike Ms. Atkins, Ms. Nolen and Ms. Haney); Ms. Archer disobeyed the subpoena issued by Respondent for her appearance at trial; and no evidence was

adduced that linked Ms. Archer's termination to an intent to dissuade other employees from engaging in activity protected by the Act.

RECORD/POINTS OF AUTHORITY: Tr. 1161, 1347, 1714 -1715, 1719-1720; R. 9.

27. ALJD page 37, line 8 through page 37, line 47.

The ALJ erred in concluding that the AGC met his burden of proof, and that Respondent did not prove its affirmative defense, as to the allegations made by the AGC regarding Ms. Nolen, particularly since the uncontradicted evidence showed that: Ms. Nolen mistreated her patient, precipitating her termination; she had already been hired for a full-time job that began the same date as her termination from Galion Pointe; and no evidence was adduced that linked Ms. Nolen's termination to an intent to dissuade other employees from engaging in activity protected by the Act.

RECORD/POINTS OF AUTHORITY: Tr. 1029-1030, 1162-1164, 1364, 1722-1725; R. 21K.

28. ALJD page 38, line 4 through page 38, line 39.

The ALJ erred in concluding that the AGC met his burden of proof, and that Respondent did not prove its affirmative defense, as to the allegations made by the AGC regarding Ms. Atkins, particularly since the uncontradicted evidence was that Ms. Atkins terminated her employment at Galion Pointe after working there for one shift because that job conflicted with her full-time job at McDonalds (where she remained employed as of the trial in this case), and no evidence was adduced that linked Ms. Nolen's termination to an intent to dissuade other employees from engaging in activity protected by the Act.

RECORD/POINTS OF AUTHORITY: Tr. 748, 1324, 1350.

29. ALJD page 40, line 1 through page 41, line 6 (excluding footnote 58); and page 42, line 21 through page 42, line 36.

The ALJ misapplies the law as to his recommended “make whole” remedies for the alleged 21 discriminatees, particularly under the circumstances of this case. The uncontradicted evidence showed that:

- Four discriminatees were laid off by Village Care (Dotson, Stephens, Storer and Watts);
- Three discriminatees testified they were retired (Bishop, Sandra Nolen and Sedmak), and two of them did not apply for work at Galion Pointe (Nolen and Sedmak).
- One discriminatee (Zetts) never applied for a position at Galion Pointe.
- One discriminatee (Riley) was terminated from Galion Pointe for absenteeism.

The AGC presented only eleven discriminatees to testify at trial:

- Two had been hired to work at Galion Point (Atkins, Nolen);
- One had rejected an offer of employment (Dennis);
- One had been interviewed for employment (Haney);
- One had refused to provide any method to contact her for work (Brady);
- One had volunteered for and accepted a layoff from Village Care (Ely); and
- One admitted she submitted her application outside the timeframe applicable to the Unfair Labor Practice charges at issue in this case (Teeter).

RECORD/POINTS OF AUTHORITY: Tr. 755, 770, 809, 1044, 1054, 1059-1060, 1062-1064, 1327-1328, 1330, 1331-1333, 1336-1339, 1354, 1357-1359, 1373, 1376, 1380-1381; R. 22. See, *NLRB v. Fluor Daniel* (6th Cir. 1998), 161 F.3d 953.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the following, by e-mail, this 5th day of September 2012:

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