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

OAK TERRACE HEALTHCARE CENTER, INC.

and

Case 25-CA-089819

ROYDA HOUGHTON, AN INDIVIDUAL

Nathaniel E. Strickler, Esq., of Peoria, IL, for the Acting General Counsel.

Jeremy Woodle, Administrator, of Springfield IL, for the Respondent-Employer.

DECISION

Statement of the Case

Bruce D. Rosenstein, Administrative Law Judge. This case was tried before me on March 11, 2013, in Peoria, IL, pursuant to a Complaint and Notice of Hearing issued by the Regional Director for Region 25 of the National Labor Relations Board (the Board). The complaint, based upon a charge filed on September 24, 2012¹ and an amended charge filled on December 18, by Royda Houghton (the Charging Party or Houghton), alleges that Oak Terrace Healthcare Center, Inc. (the Respondent or Employer), has engaged in certain violations of Section 8(a)(1) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying that they had committed any violations of the Act.

Issues

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by orally promulgating and maintaining a rule instructing employees not to talk with other employees about their wages.

Additionally, the Acting General Counsel argues that the Charging Party's termination on September 12 resulted from her violation of the unlawful rule and by engaging in protected concerted activities under the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel and the Respondent, I make the following

¹ All dates are in 2012 unless otherwise indicated.

Findings of Fact

I. Jurisdiction

Respondent, a corporation with an office and place of business located in Springfield, Illinois, has operated a nursing home providing inpatient care. Respondent, in conducting its business operations, has derived gross revenues in excess of \$100,000, and has purchased and received at its facility products, goods, and materials, valued in excess of \$5,000 directly from points outside the State of Illinois. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has been a health care institution within the meaning of Section 2(14) of the Act.

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II. Alleged Unfair Labor Practices

A. Background and Facts

Houghton commenced employment with the Respondent on June 19, in the position of Human Resources Manager. Her assigned duties consisted of payroll, time keeping, new employee orientation, and accounts payable and receivables. Houghton was directly supervised by Respondent's Administrator Jeremy Woodle, and had no Section 2(11) supervisory responsibilities attached to her position.

On July 27, Denise Withers was hired as Respondent's Director of Nursing. Respondent, in its answer, admits that she is a supervisor and agent within the meaning of section 2(11) and 2(13) of the Act. As part of Withers duties and responsibilities, she is responsible for the hiring of the nursing staff including certified nursing assistants. During new employee orientation for each of these individuals, Withers instructed them not to discuss what they or other employees earn in compensation.

Withers testified that after the subject unfair labor practice charge was filed on September 24, Woodle instructed her not to inform newly hired employees that they could not discuss wage information with other employees. Withers admitted, however, that at no time since the filing of the unfair labor practice charge has she notified Respondent's employees either orally or in writing that they were permitted to discuss wage information with other employees.

On September 12, Houghton attended the regularly scheduled daily morning meeting for department heads In Woodle's office. At the conclusion of the meeting, Houghton took her regular scheduled break and proceeded outside to the designated smoking area. Houghton, along with Withers and co-workers Cathy Jewel and Prairie Eigenmann stood near each other while taking their break in the designated smoking area. Houghton was upset because her request to make up a day of work that she missed because of illness was denied by Woodle. Houghton stated to the group that it was not fair that everyone else got to work and earn overtime, yet she could not make up the time by working on a Saturday. Withers said, well don't be mad at us, none of us get overtime. Houghton said, that it was easier to miss a day when you make two or three times as much as I do. The conversation ended as it was time to end the break and return to work.

Shortly after the break ended, Withers and Jewel went to Woodle's office and told him that Houghton said that Withers made three times as much as she did and that Jewel and

Eigenmann made twice as much as she did. Woodle did not say anything and Withers and Jewel left his office.

A short time later, Woodle telephoned Withers and requested that she return to his office. When she arrived, Woodle informed Withers to remain in his office because he was going to have to terminate Houghton for breach of confidentiality in discussing employee wages with other employees.

Woodle then telephoned Houghton and instructed her to come to his office. Upon arriving in Woodle's office, and in the presence of Withers, Woodle told Houghton that he was going to terminate her for discussing employee wages because it was confidential information. Houghton was provided an employee discharge memorandum on September 12 that stated, "Breach of Confidentiality by sharing salary information with employees about other employees" (GC Exh. 2).

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B. The Unlawful Rule

The Acting General Counsel alleges that wage discussions among employees are considered to be the core of Section 7 rights. *Parexel International, LLC,* 356 NLRB No. 82, slip op. at 3 (2011). An employer's rule which prohibits employees from discussing their compensation is unlawful on its face. *Danite Sign Co.,* 356 NLRB No. 124, slip op. at 1 fn 1 and slip op. at 7 (2011) quoting Freund Baking Co., 336 NLRB 847 (2001); *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004).

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Based on the forgoing I find that the Respondent, by Withers, has violated Section 8(a)(1) of the Act when since about July 27 she orally promulgated and maintained a rule that explicitly prohibits employees from discussing their compensation. Since the Respondent's rule explicitly restricts employees from discussing their compensation including pay rates it restricts Section 7 activity and would likely have a chilling effect on those rights such that the mere maintenance of those provisions violates Section 8(a)(1) of the Act even in the absence of enforcement.

C. The 8(a)(1) Termination Allegations

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The Acting General Counsel alleges in paragraph 4 of the complaint that the Respondent terminated the Charging Party because she violated the unlawful rule, and by engaging in protected concerted activities. The Employer defends its conduct by asserting that the rule regarding employee wages was not relied upon for its termination of Houghton. Rather, they argue that Houghton was terminated for breaching confidentiality.

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Discussion

The Board has held in *Double Eagle Hotel & Casino*, 341 NLRB 112, fn. 3 (2004), enfd. 414 F. 3d 1249 (10th Cir. 2005), cert, denied 546 U.S. 1170 (2006), that discipline imposed pursuant to an unlawfully overbroad rule violates the Act in those situations in which an employee violated the rule by (1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act. Nevertheless, an employer will avoid liability for discipline imposed pursuant to an overbroad rule if it can establish that the employee's conduct actually interfered with the employee's own work or that of other employees or otherwise actually interfered with the employer's operations and that the interference rather than the violation of the rules, was the reason for the discipline. It is the employer's burden, not only to assert this affirmative defense as was done in the subject case, but also to establish that

the employee's interference with production or operations was the actual reason for the discipline. *The Continental Group, Inc.* 357 NLRB No. 39 (2011). ²

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The Board has also held in *Automatic Screw Products Co.* 306 NLRB 1072 (1992) that an employer violates Section 8(a)(1) of the Act by promulgating and maintaining a rule prohibiting employees from discussing their salaries and also by disciplining an employee for violating that rule.

The protected nature of Houghton's and other employee's efforts to protest Respondent's actions concerning the confidential nature of compensation and pay rates has long been recognized by the Board who has held that similar conduct comes within the guarantees of Section 7 of the Act. See *Joseph DeRairo*, *DMD*, *P.A.* 283 NLRB 592 (1987). The Board has also held in *Mike Yurosek & Sons*, *Inc.*, 306 NLRB 1037, 1038 (1992), that "individual action is concerted where the evidence supports a finding that the concerns expressed by the individual are [sic] logical outgrowth of the concerns expressed by the group." In this case, I find that Houghton's discussions, on her own and with other employees' about their compensation, fall within the ambit of protected concerted activity. However, it must be determined whether Houghton was terminated based on such activity.

In *Wright Line*, 251 NLRB 1083 (1980), enfd, 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer decision. On such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1993). In *Manno Electric*, 321 NLRB 278 fn. 12 (1996), the Board restated the test as follows. The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity.

I find that the Acting General Counsel sustained his initial burden of showing that Houghton's protected activity was a motivating factor in the decision to terminate her. In this regard, Houghton engaged in protected activity by disclosing and discussing with fellow employees her compensation and pay rate, the Employer was aware of this activity, and animus against such activity was exhibited by the Employer. Moreover, the timing of the termination demonstrates animus as the action took place on the same day that Houghton discussed wage information with her fellow employees. Likewise, Houghton's discharge memorandum specifically states that her termination was based on sharing salary information with employees about other employees.

I further find that the Respondent has not met its rebuttal burden under *Wright Line*, of showing that it would have discharged Houghton even in the absence of her protected activity. Notably, the test applies regardless of whether the case involves pretextual reasons or dual

² The facts clearly show that Houghton was engaged in conduct that otherwise implicates the concerns underlying Section 7 of the Act under the second prong of the test set forth in *Continental Group.* See also, the Board's holding in *Taylor Made Transportation Services, Inc.,* 358 NLRB No. 53 (2012), a case strikingly similar to the subject case.

motivation. Frank Black Mechanical Services, 271 NLRB 1302 fn. 2 (1984). The Board has held that a finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not, in fact relied upon, thereby leaving intact the inference of wrongful motive. Limestone Apparel Corp. 255 NLRB 722 (1981), enfd. 705 F. 2d 799 (6th Cir. 1982). In short, a finding of pretext defeats any attempt by the employer to show that it would have discharged the discriminatee absent his or her protected conduct. Golden State Foods Corp. 340 NLRB 382 (2003).

I conclude that Houghton did not breach any rule of confidentiality and only raised a general comparison of her wages with those of other individuals without mentioning any specifics of what those employees earned. In summary, I find that Houghton was terminated for engaging in protected concerted activity based on Respondent's unlawful rule that instructed employees not to talk with other employees about their wages. Accordingly, such action violates Section 8(a)(1) of the Act.

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With respect to paragraphs 4(f) and (g) of the complaint, I do not find that the Act has been violated. In this regard, while the evidence establishes that Withers informed both Eigenmann and nurse Joanne Neathery in a meeting that occurred after the termination that we had to let Houghton go for talking about what people are making, such evidence is cumulative to my above finding that Houghton was terminated for engaging in protected activities and violating the rule against discussing wages with other employees. Additionally, I find that the Acting General Counsel did not present any evidence that Woodle informed other employees, either orally or in writing, that an employee was terminated for discussing employees' wages with other employees. Rather, the record shows that on September 12 Woodle informed Houghton in the presence of supervisor Withers, that she was being terminated for discussing employee wages that was confidential information (GC Exh. 2).

Conclusions of Law

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- 1. Respondent is an employer engaged in commerce within the meaning of Section 2(2) (6), and (7) of the Act, and has been a health care institution within the meaning of Section 2(14) of the Act.
- 2. By maintaining a rule instructing employees not to talk with other employees about their wages, the Respondent violated Section 8(a)(1) of the Act.

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3. By discharging employee Royda Houghton because she violated the above rule and engaged in concerted activity, the Respondent has been interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

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4. Respondent did not violate Section 8(a)(1) of the Act by informing employees, orally or in writing, that an employee was terminated for discussing employees' wages with other employees.

Remedy

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Having found that the Respondent engaged in certain unfair labor practices, I shall order them 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) of the Act by maintaining an unlawful rule instructing employees not to talk with other employees about their wages, I shall order the Respondent to rescind those provisions and to notify its employees in writing, that it has done so. *Hyundai America Shipping Agency*, 357 NLRB No. 80 (2011).

Additionally, having found that the Respondent further violated Section 8(a)(1) of the Act by discharging Royda Houghton, I shall order the Respondent to offer her full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to her seniority or any other rights or privileges previously enjoyed. Further, the Respondent shall make the aforementioned employee 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 at the rate prescribed in New Horizons for the Retarded, 283 NLRB 1173 (1987), compounded daily as prescribed in Kentucky River Medical Center, 356 NLRB No. 8 (2010), enf. denied on other grounds sub. nom., Jackson Hospital Corp. v. NLRB, 647 F. 3d 1137 (D.C. Cir. 2011). The Respondent shall also be required to expunge from its files any and all references to the unlawful discharge of Royda Houghton and to notify her in writing that this has been done and that the unlawful discharge will not be used against her in any way. The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate Royda Houghton for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. Latino Express, Inc., 359 NLRB No. 44 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondent, Oak Terrace Healthcare Center, Inc., Springfield, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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- (a) Maintaining a rule instructing employees not to talk with other employees about their wages.
- (b) Discharging employees who engage in concerted activities, or to discourage employees from engaging in these activities.
- (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Rescind its July 2012 rule instructing employees not to talk with other employees about their wages, and notify employees in writing that it has done so.
- (b) Within 14 days from the date of this Order, offer Royda Houghton reinstatement to her former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.
- (c) Within 14 days from the date of this Order, make Royda Houghton 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.
- (d) Within 14 days from the date of this Order, remove from its files all references to the unlawful discharge of Royda Houghton, and within 3 days thereafter, notify her in writing that this has been done and that the unlawful discharge will not be used

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

against her in any way.

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- (e) 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 decision.
- (f) Reimburse Royda Houghton in an amount equal to the difference in taxes owed upon receipt of a lump-sum backpay payment and taxes that would have been owed had there been no discrimination against her.
- (g) Submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Royda Houghton, it will be allocated to the appropriate periods and reimburse her an amount equal to the difference in taxes owed upon receipt of a lump sum backpay payment and taxes that would have been owed had there been no discrimination against her.
- (h) Within 14 days after service by the Region, post at its facilities in Springfield, Illinois copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted immediately upon receipt 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 e-mail, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with their employees by such means. Picini Flooring, 356 NLRB No. 9 (2010). Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent have 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 July 27, 2012.
- (i) 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.

⁴ If this Order is enforced by a Judgment of the 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."

5	IT IS FURTHER ORDERED that the complaint is dismissed insofar as it allege violations of the Act not specifically found.					
10	Dated, Washington, D.C.	April 30, 2013				
15			Bruce D. Rosenstein Administrative Law Judge			
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APPENDIX

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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 the National Labor Relations Act and has ordered us to post, mail, 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 maintain a rule instructing employees not to talk with other employees about their wages.

WE WILL NOT discourage you from talking to each other about wages, hours, and working conditions.

WE WILL NOT discharge employees because they engage in concerted activities, or to discourage employees from engaging in these activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

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WE WILL rescind our July 27, 2012 rule that instructs employees not to talk with other employees about their wages, and notify employees in writing that we have done so.

WE WILL offer Royda Houghton 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 Royda Houghton whole for any loss of earnings and other benefits suffered as a result of our unlawful conduct, plus interest compounded daily.

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WE WILL, within 14 days, from the date of this Order, remove from our files all references to the unlawful discharge of Royda Houghton, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the unlawful discharge will not be use against her in any way.

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WE WILL submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Royda Houghton, it will be allocated to the appropriate periods.

WE WILL reimburse Royda Houghton an amount equal to the difference in taxes owed upon receipt of a lump-sum backpay payment and taxes that would have been owed had there been no discrimination against her.

			Oak Terrace Healthcare Center, Inc. (Employer)			
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	Dated	Ву				
		-	(Representative)	(Title)		
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15	National Labor Relatior representation and it in about your rights under	ns Act. It conducts secre vestigates and remedie the Act and how to file	s an independent Federal agency of et-ballot elections to determine whe es unfair labor practices by employed a charge or election petition, you n h below. You may also obtain inform	ether employees want union ers and unions. To find out more nay speak confidentially to any		
	www.mib.gov.	300 I	Hamilton Boulevard, Suite 200			
			Peoria, Illinois, 61602-1246			
20		H	ours: 8:30 a.m. to 5:00 p.m. 309-671-7080.			
	THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE					
25	THIS NOTICE MUST BE ALTERED, DEFA	REMAIN POSTED FOR ACED, OR COVERED BY	60 CONSECUTIVE DAYS FROM THE ANY OTHER MATERIAL. ANY QUES	EDATE OF POSTING AND MUST NOT STIONS CONCERNING THIS NOTICE REGIONAL OFFICE'S COMPLIANCE		
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