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

THE MARTIN LAW GROUP, LLC

and **Case 10–CA–078395**

SHERI T. ROUSE, an Individual

Shelly C. Skinner, Esq., and Katherine Chahrouri, Esq.
for the General Counsel.
Brett Adair, Esq., and David P. Martin, Esq.
for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in Tuscaloosa, Alabama on September 10–12 and October 1, 2012. Sheri T. Rouse, an Individual, filed the charge on April 9, 2012, and amended it on May 4 and June 18, 2012.[1] The Acting General Counsel issued the complaint on June 27 alleging that the Respondent, the Martin Law Group, LLC, violated Section 8(a)(1) of the Act by, inter alia, terminating Rouse on March 14. The complaint alleges specifically that Respondent terminated Rouse for violating a rule that prohibited employees from discussing their wages and benefits with other employees and that the maintenance of this rule violated Section 8(a)(1) as well.

On July 10, the Respondent filed its answer to the complaint denying the alleged unfair labor practices and raising several affirmative defenses, including, inter alia, that Rouse's termination did not violate the Act because she was a statutory supervisor, and that even if Rouse was an employee, the termination was not unlawful because she engaged in no protected concerted activity and would have been discharged for a pattern of misconduct even if she had engaged in such activity.[2]

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[1] All dates are in 2012 unless otherwise indicated.

[2] On July 11, the Respondent filed with the Board a motion to dismiss, which it later asked to be converted to a motion for summary judgment. By order dated August 15, the Board denied the Respondent's motion.

On the entire record[3], 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

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a limited liability corporation, operates a law firm in Tuscaloosa, Alabama providing legal services to clients in and outside the State of Alabama. The Respondent annually receives gross revenues from its operations in excess of $250,000, and provides services valued in excess of $50,000 to clients located outside the State of Alabama. The 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.[4]

II. ALLEGED UNFAIR LABOR PRACTICES

The Respondent is a law firm in Tuscaloosa, Alabama specializing in ERISA law. David P. Martin, an attorney with more than 20 years experience, founded the firm in 2007. He is the firm's owner and an admitted supervisor and agent within the meaning of the Act. During the relevant period, the Respondent employed four attorneys in addition to Martin. Jason Burgett and Ariel Blocker were hired in 2007 and 2008, respectively, and held the title of senior associate. The Charging Party and Guy Martin (no relation to David Martin) were hired in 2011 as associates. Although David Martin, Burgett, Blocker and Guy Martin all testified that they were on a partnership track and identified a document setting forth the goals for achieving that status, Rouse claimed ignorance of such a procedure and of the document itself. In addition to the attorneys, the Respondent employed a support staff consisting of four case managers, who worked as paralegals, and a receptionist.[5]

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[3] At the hearing, I rejected Respondent's proffer of a tape recording of the meeting at which David Martin terminated Rouse and a transcript of that recording prepared by the Respondent. The Respondent, in its brief, requested that I reverse my ruling and admit the tape and transcript into evidence. Counsel for the Acting General Counsel, in her brief, opposes this request. After careful consideration, I have decided to adhere to my ruling and exclude this evidence based on issues related to the chain of custody of the recording and the circumstances surrounding the recoding itself and the preparation of the transcript. Counsel for the Acting General Counsel requested in her brief that I revisit my rulings with respect to the Respondent's compliance with her subpoena duces tecum. After careful consideration, I have decided to adhere to my rulings made at the hearing and find no basis for imposing any sanctions on the Respondent for noncompliance.

[4] In its answer, the Respondent denied that the Board had jurisdiction over this matter based on its assertion that Rouse was a statutory supervisor who was not protected by the Act.

[5] The case managers were Pamela Daniel, Amanda McDonald, Jennifer Saltzman, who also served as the firm's office manager, and Katherine Walton. Another case manager, Marlena Rice, was employed through most of the relevant period but resigned shortly before Rouse's termination. Melissa Saltzman was the firm's receptionist.

Rouse was first hired by David Martin on February 14, 2011, while still in law school. She worked as a law clerk until she passed the Mississippi bar on September 15, 2011. Rouse was the only attorney in the firm to be admitted in Mississippi. About the time she passed the bar, Rouse requested and was granted a part-time schedule based on the recommendation of her doctor that she not work full time. As a result, Rouse worked 4 days a week and was the only attorney in the firm with a part-time schedule. Rouse was also the only attorney to be paid on an hourly basis. Rouse worked for the Respondent on this schedule until her termination on April 14. Shortly before her termination, Rouse began working at home. The circumstances surrounding her termination are in much dispute but the threshold issue in this case is whether Rouse was a statutory supervisor or an employee covered by Section 7 of the Act. A great deal of evidence was proffered by both sides on this question, with much of the testimony in conflict. Before reaching this issue, I will address the complaint allegation that the Respondent maintained an unlawful rule prohibiting the discussion of wages and benefits among the employees. Resolution of this issue is not dependent on the status of Rouse inasmuch as the Respondent has admitted the rule applied to the attorneys and support staff.

A. The Allegedly Unlawful Rule

There is no dispute that David Martin prohibited the attorneys at the firm from discussing their compensation with one another and with the staff. Rouse testified that she was told when hired as a law clerk and when she became an attorney that she was not to tell anyone other than her husband what she was paid. David Martin reminded the attorneys of this rule at various Monday morning attorney meetings. The other attorneys who testified also acknowledged the existence of the rule. David Martin admitted the existence of this rule in his testimony.

There is also no dispute that a similar rule applied to the support staff. David Martin admitted telling the staff not to discuss their wages "on the job" because it causes disruption. Martin claimed that the rule did not prohibit the staff from discussing their wages on their own time or away from work, testifying that he could not control what they talk about outside work. David Martin's nuanced description of the rule contrasts with the blanket prohibition he laid out in the Respondent's written response to Rouse's claim for unemployment compensation. There he wrote that the rule had existed since the firm was established and that all "employees" are made aware that discussion of wages is grounds for termination. In this submission, Martin did not distinguish between attorneys and staff or between worktime and nonworktime discussions.

It is well established that employees have the right under Section 7 of the Act to discuss their wages, rates of pay and related topics because such matters are a "vital term and condition of employment." Such discussions often lead to protected concerted activity and are considered at the "core of Section 7 rights." *Taylor Made Transportation Services, Inc.* 358 NLRB No. 53 (June 7, 2012) and cases cited there. See also *Koronis Parts, Inc.,* 324 NLRB 675, 694 (1997). As a result, the Board has historically held that rules prohibiting employees from discussing their wages are unlawful, absent proof of a legitimate and substantial business justification for the rule. *Waco, Inc.,* 273 NLRB 746, 748 (1984). Here, the Respondent offered no proof of such a justification for the rule, merely stating its belief that employee wage discussions are "disruptive."

Based on the undisputed evidence of the existence of such a rule, and based on well-established precedent, I find that the Respondent violated Section 8(a)(1) of the Act, as alleged, by maintaining a rule prohibiting its employees from discussing their wages with other employees.

B. The Termination of Rouse

Rouse's supervisory status

A supervisor is defined in Section 2(11) of the Act as:

> An individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Because the statutory indicia of supervisory authority are stated in the disjunctive, an individual will be found to be a supervisor if he or she is found to possess or exercise at least one of the enumerated functions. *Oakwood Healthcare, Inc.,* 348 NLRB 686, 688 ((2006); *Albany Medical Center Hospital,* 273 NLRB 485, 486 (1984).

The issue of supervisory status, particularly when it involves professional employees, has generated a great deal of litigation over the years. In 2001, the Supreme Court addressed the issue in *NLRB v. Kentucky River Community Care, Inc.,* 532 U.S. 706, 712–713, reiterating the three part test established in *NLRB v. Health Care & Retirement Corp. of America,* 511 U.S. 571, 573–574 (1994). The Court held that a party asserting supervisory status has the burden of proving three factors necessary to determine whether an individual is a supervisor:

1. whether the individual has the authority to engage in any of the twelve functions listed in Section 2(11) of the Act;

2. whether their exercise of such authority requires the use of independent judgment; and

3. whether the individual holds the authority in the interest of the employer.

As counsel for the Acting General Counsel points out in her brief, the Board has historically exercised caution in construing the language of the Act so as not to apply the definition too broadly because an individual found to be a supervisor loses the protection of the Act. *Avante at Wilson, Inc.,* 348 NLRB 1056 (2006).

While there are many cases in which the Board and the courts have addressed the supervisory status of nurses and other professional employees, the only cases cited by counsel

for the Acting General Counsel in which the attorneys were found to be employees involved staff attorneys at legal service agencies. See *North Carolina Prisoner Legal Services, Inc.,* 351 NLRB 464 (2007); *Louisville-Jefferson County Public Defender Corp.,* 330 NLRB No. 105 (2000); *Legal Aid Bureau, Inc.,* 319 NLRB 159 (1995); *Neighborhood Legal Services,* 236 NLRB 1269 (1978). No cases have been cited or found similar to this case involving the status of attorneys in a small law firm.[6]

In this case, the Respondent relies primarily on Rouse's interaction with and oversight of the case manager assigned to her to prove that she has the authority to assign work and responsibly direct employees. The Respondent also offered evidence to show that Rouse was involved in the hiring, firing and discipline of support staff. In addition, the Respondent presented evidence regarding the authority of its other attorneys in order to show that all the attorneys at the firm were similarly situated with respect to the possession and exercise of supervisory authority. Finally, both parties offered evidence regarding the "secondary indicia" of supervisory authority, such as supervisor to employee ratio, and differences in compensation and benefits. However, as noted, such secondary indicia, by itself, are not sufficient to establish supervisory status. *Ken-Crest Services,* 335 NLRB 777, 779 (2001).

The evidence shows that David Martin is the sole owner of the law firm and has ultimate responsibility for all decisions related to the employment of the attorneys and support staff. He is also the firm's chief financial officer. Although the firm's attorneys have the potential to become partners and share in the profits of the firm, at the time of the hearing and the events at issue, none had reached that level. The evidence also shows that David Martin does not act alone in exercising his authority to make decisions for the firm. It is undisputed that all the attorneys, including Rouse, met every Monday morning for a mandatory attorney meeting. At this meeting, in addition to discussing cases, the attorneys discussed issues regarding the hiring of staff, compensation for themselves and the staff and other matters affecting their and the other employees terms and conditions of employment. The discussions regarding the attorneys' bonuses, which Rouse admittedly participated in, is illustrative of the manner in which attorneys made recommendations which were then followed by Martin in crafting the bonus plan.

In addition to managing the firm, David Martin served as lead counsel on his own cases and was supported by one of the case managers. This was the same arrangement the other four attorneys had. Each attorney had one case manager assigned to work as a team on their cases. Under this arrangement, the attorney had full responsibility for the case manager in terms of complying with the rules of professional conduct and ethical obligations of the attorney. At the time of Rouse's discharge, Katherine Walton was the case manager assigned to her. Rouse was unique in the firm as the only attorney licensed to practice in Mississippi. She thus was responsible for all of the clients with cases in that state. At one point, there were as many as 300 Mississippi cases assigned to her. By the time of the discharge, that number had been culled to somewhere between100 and 150. Because of the sheer number of cases,

[6] Counsel for the Respondent, in his brief, did note the Board's initial reluctance to assert jurisdiction over law firms. See *Foley, Hoag, and Elliott,* 229 NLRB 456 (1977); *Kleinberg, Kaplan, Wolff, Cullen and Burrows, P.C.,* 253 NLRB 450 (1980). Those cases involved union representation of support staff, not attorneys.

David Martin had to rely on the attorneys to make decisions regarding how the cases assigned to them should be handled. As a result, the attorneys at the firm, including Rouse, had a great deal of responsibility, as attorneys, for ethically and effectively representing the firm's clients. How Rouse and the firm's attorneys interacted with the case managers to fulfill their case handling responsibilities is at the heart of the supervisory issue here.

The evidence shows that there was a well-established chain of command, with David Martin at the top, then Burgett, Blocker, Guy Martin and, finally, Rouse on the bottom. All employees had been advised that, in Martin's absence, Burgett would be in charge and, if he and Martin were both absent, Blocker would be in charge, and so on and so forth. Under this scheme, Rouse would only be "in charge" of the firm if she were the only attorney in the office. There is no evidence that this ever occurred. Of course, even in that event, David Martin or one of the more senior attorneys would be just a phone call away. The evidence also shows that because the firm was organized into teams of an attorney and case manager, case managers were expected to bring matters such as vacation requests or other time-off requests to the attorney to whom they were assigned first. Once clearing their request for time off with their attorney, it would go to Martin for final approval.

There is no dispute that David Martin hired all of the attorneys and support staff and determined their rate and method of compensation, their hours of work and made the assignment of case manger to attorney. The Respondent offered evidence to show that Rouse effectively recommended the hiring of case manger Katherine Walton and legal intern Ben Gaines.[7] The Respondent also offered the testimony of David Martin to show that Rouse directly hired an individual to accompany her on a trip to meet with a large number of clients in Mississippi, testimony which was directly contradicted by Rouse.

Katherine Walton began work at the firm in about mid-October 2011 as a temporary employee. Respondent had retained Walton through an agency called Key Staff Source. Walton had never worked in a law firm before. On her first day of employment, she was met by Rouse and David Martin. Martin told her she would be working for Rouse on the Mississippi cases. Martin's decision to hire a temporary employee came after a request from Rouse for help with these cases, which, as previously noted, numbered in the hundreds. Walton worked as a temporary for 12 weeks. During that time, she worked exclusively for Rouse on these cases. Rouse was the only attorney in the firm to sign her weekly timesheets. Martin did not review the timesheets which were the basis for determining her pay by the temporary agency.

Walton was converted to an employee of the firm in early January 2012. According to David Martin, this was after several requests by Rouse that he hire Walton because Walton was getting other job offers and Rouse did not want to lose her. Although Rouse denied such conversations, she acknowledged a desire to retain Walton because of the time it would take

[7] Although testimony was offered at the hearing regarding the hiring of case manager Pamela Daniel, Respondent, in its brief, does not rely on this as proof of supervisory status. In fact, there is no evidence that Rouse did any more than introduce Daniel, a woman she had met at church, to Martin after he told the attorneys at a Monday attorney meeting in spring 2011 that he wanted to hire another case manager. Rouse was only a law clerk at the time.

to train a new case manager on the Mississippi cases. Martin testified that he hired Walton in January based on Rouse's recommendation because he had very little opportunity to review Walton's work during the time she worked as a temporary employee. Martin also claims that he hired Walton because of Rouse's strong recommendation that he hire her even though the firm was experiencing a "financial crunch" at the time. There is no dispute that he did meet with Walton privately before making the decision to hire her. During this meeting, Martin and Walton discussed her compensation and Martin inquired about her experience as an LPN and whether she could do nurse reviews for the firm when the work on the Mississippi cases slowed. This meeting occurred on January 6, 2 days before she started as an employee. Martin testified, without contradiction, that he had already announced, at the firm's Christmas party, that Walton would be joining the firm as an employee.

While admitting that David Martin asked her on several occasions whether Walton should be hired, Rouse claims that he also asked all the other attorneys at a weekly attorney meeting what they thought of Walton. However, none of the other attorneys had any opportunity to work with Walton during her time as a temporary employee.

Having considered the evidence as to Walton's hiring, I find that Rouse did make an effective recommendation to hire her. I found Rouse's attempt to minimize her input into the decision disingenuous. Based on her own testimony regarding the volume of work on the Mississippi cases and her desire to retain Walton rather than have to train someone new, I find that David Martin's version of events is the more likely scenario. There is no dispute that Walton had been working exclusively for Rouse for 12 weeks and that Rouse was the only attorney in the firm in any position to evaluate Walton's work performance. The fact that Martin also interviewed Walton before she was hired is not dispositive as that interview explored compensation issues and what other skills Walton could bring to the firm. I credit Martin that he had already made the decision to hire Walton based on Rouse's recommendation. *Legal Aid Society of Alameda County,* 324 NLRB 796 (1997).

There is no dispute that Martin hired a law student, Ben Gaines, to work as a law clerk and that he too was assigned to assist Rouse on the Mississippi cases. Gaines was hired in November 2011. The testimony regarding the circumstances of his hiring is in direct conflict. According to David Martin, he hired Gaines after Rouse requested, during a weekly attorney meeting, that the firm hire a law clerk to help her with the Mississippi cases. Martin claims that Rouse brought him Gaines' resume and that the two of them interviewed him before hiring him. Rouse did not specifically deny requesting the assistance of a law clerk but she did deny bringing Gaines' resume to Martin. According to Rouse, she recommended someone else for the position, a law school classmate, "John", with whom she had worked previously. Further contradicting Martin, Rouse testified that she actually recommended against hiring Gaines, after reviewing his resume, based on potential political and religious conflicts with David Martin and others in the firm.

I found the testimony of Rouse in this regard suspicious. She did not mention the other individual, "John", until rebuttal and never disclosed his full name or other identifying information. Moreover, she backtracked with regard to whether she solicited Gaines' resume or whether Martin obtained it on his own. And her testimony whether she made a "primary" or "secondary" recommendation to hire "John" is contradictory. In any event, it is clear that

Martin would not even be considering hiring a law clerk if Rouse had not requested that one be hired to work with her on her cases. Even assuming Rouse did not recommend that Gaines be hired, her recommendation that a law clerk be hired was effective and is enough to establish the existence of supervisory authority.[8]

The testimony with respect to the hiring of an individual to accompany Rouse on a trip to Mississippi is also in direct conflict. David Martin testified that Rouse approached him in December about a meeting she had scheduled in Mississippi with a large number of ERISA clients. She was concerned that she might need "security" if the meeting got out of hand. She also wanted someone who could assist with heavy lifting. David Martin testified it was Rouse who selected the individual for this one-time job, a man named Perry Harbin, and that she made all the arrangements. The firm merely paid him with a check for $100.

In contrast, Rouse testified that it was Martin who instructed her to "find a man" to take with her to the client meeting in Mississippi to assist with carrying heavy equipment and crowd control. According to Rouse, Martin is the one who told her what to pay the man and where to find him, i.e. by calling their Sunday School teacher.[9] Rouse testified that the Sunday School teacher recommended Harbin, who was a church missionary. After discussing the job and the terms with Harbin, Rouse went back to Martin and got his okay before advising Harbin that he was hired for the job. According to Rouse, Martin even specified the time and place where she should meet Harbin on the day of the trip. The only point of agreement in the testimony is that Rouse and Martin both testified that Martin signed the $100 check.

I find it unnecessary to resolve this conflict in testimony. Even assuming that Rouse directly hired Harbin for this one-time job, this would not be sufficient by itself to establish her supervisory authority because Harbin was never an "employee" of the firm. At most he was an independent contractor or temporary employee with no expectation of continued employment.

The Respondent offered evidence that Rouse fired, or effectively recommended the firing of, the law clerk, Gaines.[10] As noted above, Gaines was hired specifically to work as a law clerk on Rouse's Mississippi cases after Rouse had requested such help. There is no dispute that Gaines did not last long, working only 1–2 weeks before being let go and that he only worked for Rouse during this brief tenure. The basis for his termination is also without dispute, i.e. Rouse had complained that Gaines was often tardy, that he came into work one day hung over, and that he had been overheard on the phone promising money to potential clients, who would be Rouse's clients. It is clear that David Martin had no firsthand knowledge of these facts. According to Rouse, when she reported her dissatisfaction with Gaines, Martin told her to fire him. She testified that Martin wanted her to fire Gaines because

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[8] Although Rouse may claim that it was Martin's idea to hire a law clerk, she slipped in her testimony when she testified that she made the recommendation to hire John "upon the first time that David [Martin] **agreed** that a law clerk could be hired…" (Emphasis added).

[9] There is no dispute that Martin and Rouse and their respective families at one point attended the same church.

[10] This appears to be the only instance of employee termination before Rouse was discharged in April.

he had never fired anyone in his life and didn't want to have to do it. Rouse testified that she then told Gaines that Martin told her that it "was not working out." According to Rouse, Gaines expressed concern about how a termination might look on his record and how it might affect his admission to the bar and future career. She testified that he asked if he could be classified as a volunteer and be allowed to resign. Rouse told Gaines she would have to check with Martin. Rouse claims she reported Gaines' request to Martin and that Martin agreed to let him resign as a volunteer, which he did. It is undisputed that Gaines never completed any employment paperwork, such as a W-4 or I-9 form, and received no pay for the time he worked at the firm.

Martin disputed Rouse's characterization of these events. According to Martin, when Rouse reported the problems she was having with Gaines, he merely told her to do what she thought best. Martin testified that Rouse returned later that day and told him she had fired Gaines but that he had expressed concern about how a termination would look on his bar application. She reported that he wanted to resign and not be paid for his time at the firm. He denied instructing her to have Gaines resign as a volunteer.

Again, I find that the more credible version of events is that described by Martin. As noted above, Martin had no independent basis for firing Gaines. He only knew what Rouse reported to him. There is no evidence that he even investigated her claims as to Gaines' misconduct. He simply relied on her judgment to do what was best. Since Gaines had been hired at Rouse's request to work on her cases, it is reasonable that she would be the one to decide whether it was "working out." Even assuming, as Rouse claims, that Martin told her to fire Gaines when she reported her concerns, her report was effective in recommending Gaines' termination because Martin relied upon it without any independent investigation.

Counsel for the Acting General Counsel attempts to avoid the consequences of an adverse finding with respect to Gaines' termination by arguing that Gaines was not an employee and that an individual is not a supervisor unless he or she exerts authority over "employees" of their employer. See *Crenulated Co.,* 308 NLRB 1216 (1992). While it is true that unpaid volunteers are not employees within the meaning of the Act,[11] and that Gaines ultimately ended up becoming an unpaid volunteer, he was hired as an employee to be paid $9 per hour, as documented in the notes of the interview at which Rouse was present. It is not disputed that Gaines was given the forms to fill out to become an employee. Only after his termination did Gaines request a change to volunteer status to protect his professional reputation, a fact conceded by Rouse. Thus, at the time he was terminated, Gaines was still an employee of the firm even though he had not yet been paid for his time worked.

The Respondent, in support of its assertion that Rouse was a supervisor, also relies on evidence that she had the authority to assign work. The Board, in *Oakwood Healthcare, Inc.,* 348 NLRB 686 (2006), clarified the statutory definition of "assign" as follows:

> The ordinary meaning of the term "assign" is "to appoint to a post or duty." *Webster's Third New International Dictionary* 132 (1981). Because this function shares with other 2(11) functions–i.e., hire, transfer, suspension, layoff, recall,

[11] WBAI Pacifica Foundation, 328 NLRB 1273 (1999).

> promotion, discharge, reward, or discipline–the common trait of affecting a term or condition of employment, we construe the term "assign" to refer to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee. That is, the place, time, and work of an employee are part of his/her terms and conditions of employment.

Id. at 689.

There is no dispute that Rouse did not designate the place any employee worked. Only Martin made such assignments, i.e., determining which case manager would work for each attorney, and selecting the particular office for each attorney or support staff. Nor did Rouse appoint any employee to a particular time of work. Again, it was Martin who established the employees' work schedules, including whether they would work full or, as in Rouse's case, part time. The only basis in the record here for a finding that Rouse had statutory authority to "assign" employees is if she had the authority to give "significant overall duties . . . to an employee." Id. As the Board noted in *Oakwood Healthcare, Inc.,* assigning "significant overall duties" requires more than choosing the order in which an employee performs a discreet task.[12] It is more in the nature of deciding whether an employee will get a "plum" or a "bum" assignment. *Oakwood Healthcare, Inc.,* 348 NLRB supra, at 690.

The Respondent utilizes a case management software called "Needles". This software generates a list each day that shows what tasks need to be performed on each case that day and identifies the attorney or staff person who is responsible for completing that task. This software works seamlessly for most of the cases handled by the law firm. However, it was not designed for a mass plaintiff case such as the Mississippi pension cases assigned to Rouse. As previously noted, at one point there had been as many as 300 such cases. It became necessary to modify the Needles software to accommodate the Mississippi cases. There is no dispute that Rouse was responsible for making suggestions for these modifications that were then applied by Amanda McDonald, the case manager who also handled information technology duties. However, Martin ultimately made any decision with respect to modifying the Needles software. It is undisputed that the Respondent was still working on adapting Needles to handle the Mississippi cases when Rouse was terminated.

The evidence also shows that Rouse, as the lead attorney on cases assigned to her, could alter the priority of tasks on Walton's Needles list during the course of the day. In addition, pursuant to a firm policy established by Martin, that prioritized dictation over other tasks performed by the case managers, it was not unusual for Rouse to redirect Walton when she needed to dictate a letter or other document. I agree with counsel for the Acting General Counsel that, for the most part, the tasks assigned by Rouse to Walton during the course of the day that deviated from the Needles checklist, were routine clerical duties that do not fit the *Oakwood Healthcare* definition of "assigning significant overall duties."

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[12] As with all of the statutory indicia of supervisory status, the assignment of work must be done with the exercise of independent judgment in the interest of the employer. *NLRB v. Kentucky River Community Care, Inc.,* supra.

The Respondent also offered evidence that, toward the end of her tenure at the firm, Rouse was involved in a project to divide the Mississippi cases among other attorneys at the firm. This project started as a result of difficulty Rouse and Walton were having keeping up with the volume of cases being generated in Mississippi. As the only attorney at the firm admitted in Mississippi, Rouse was ultimately responsible for these cases. The other attorneys in the firm who took on some of the cases would have to report to Rouse on these cases. Such a reassignment of cases would meet the definition of "assign" as the "giving of significant overall duties" to an employee that is set forth in *Oakwood Healthcare.* The Respondent introduced a document in evidence purporting to show Rouse's plan for reassigning the cases and sharing the workload. However, it is unclear how much of the document was the work of Rouse and how much was done by Martin. There is no dispute that Rouse's initial draft was reviewed by Martin and that it went through several revisions. Neither Martin nor Rouse testified clearly or consistently as to how much of this document was the product of each. While it is clear that Rouse had significant input into the creation of the document and the decisions regarding how the cases would be reassigned, it is also clear that Martin, as the firm's principal who was most familiar with the skills, experience and current workload of the firm's attorneys, did not need to follow Rouse's recommendations. In addition, the reassignment of cases had not been completed by the time Rouse was terminated. Under these circumstances, and due to the lack of clarity in the testimony and evidence, I must conclude that the Respondent did not prove that Rouse, in her work on this project, exercised independent judgment in making or recommending case assignments to other attorneys and case managers in the office.

In *Oakwood Healthcare,* supra, the Board also sought to clarify the definition of the authority "responsibly to direct" employees that is listed in Section 2(11) of the Act. The Board referred to the legislative history showing that this phrase was added to "encompass those individuals who exercised basic supervision, but lacked the authority or opportunity to carry out any of the other statutory functions (e.g., where promotional, disciplinary and similar functions are handled by a centralized Human Resources Department)." 348 NLRB supra, at 690–691. The Board held that, "for direction to be 'responsible', the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly." Id. at 691. The Board further explained that, "to establish accountability…, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps." Id. at 692.

As noted previously, the Respondent's firm is organized into teams of an attorney and case manager with each team responsible for the cases assigned. The Respondent's attorneys, as are all attorneys, have ethical and professional responsibilities to their clients and are subject to sanctions for noncompliance with these obligations. An attorney's delegation of client-related tasks to a paralegal or clerical does not absolve the attorney from responsibility if a mistake is made and a client's interests are jeopardized. Thus, all of the Respondent's attorneys are subject to adverse consequences if the case manager on their team does not properly perform a task assigned.

In addition, because Rouse was the only attorney in the firm with a Mississippi license, she was solely responsible for ensuring that the Mississippi cases were handled properly, whether she performed a given task herself or delegated it to Walton, Rouse's case manager for the bulk of her time at the firm. In addition to Walton, Rouse briefly utilized the service of law clerk Gaines, who was hired solely because Rouse recommended that Martin hire a law clerk to assist her on these cases. Thus, unlike the other attorneys in the firm, Rouse had two employees working under her direction, even if this was for a brief time.[13] Although Rouse may not have "assigned" these employees as that term has been defined by the Board, she certainly was responsible for directing their work. The only question is whether this direction met the Board's definition of responsible direction.

When Walton first came to the firm as a temporary employee and was assigned to work as Rouse's case manager, she had no experience working in a law office, nor any knowledge or experience regarding ERISA law. There is no evidence or contention that David Martin trained Walton or directed her work on Rouse's cases. Whatever training Walton required to perform the tasks assigned had to come from Rouse. In fact, Rouse testified that she had expressed concern over the loss of Walton, shortly before Walton became a regular employee, because of how long it had taken Rouse to get Walton up to speed on the Mississippi cases and she did not want to have to train someone else. There is no question that, as an attorney, Rouse was accountable for Walton performing her job on these cases properly.

The Respondent cites one instance which is particularly telling as to Rouse's accountability for employees' performance of their duties. The evidence shows that many of Rouse's clients in the Mississippi cases had their retirement checks deposited into the Respondent's trust accounts pursuant to a power of attorney signed by the client. At one point, a check was received for an individual who was no longer represented by the firm and who had revoked the power of attorney. When Rouse became aware of this, she reported it to Martin. Martin testified that he reprimanded Rouse for failing to properly supervise the handling of clients' money and reminded Rouse that she was responsible for the actions of the staff on her cases. Although Rouse denied being reprimanded for this mistake, she admitted that Martin spoke to her about it. Whether this conversation amounted to a formal reprimand or not, clearly it demonstrates that the Respondent held Rouse accountable for the actions of staff assigned to work on her cases.

There is no dispute, as noted above, that the Needles software and the list of daily tasks it generated did not work for the Mississippi cases. Rouse had to modify the list and reorganize Walton's tasks on a daily basis to ensure that the Mississippi cases were handled properly. Although these actions did not amount to the statutory definition of "assigning employees", it did amount to responsible direction. In determining each day what Walton should do on her cases, Rouse had to use her judgment as an attorney to make sure that all of

[13] When Gaines was initially hired to work as a law clerk for $9 per hour, assisting Rouse with the Mississippi cases, it was with the expectation that he would continue to be employed in that capacity. The short duration of his employment was the result of his actions and does not negate the fact that Rouse was expected to oversee the work of two people.

the Mississippi clients were properly represented. If not, and a deadline were missed, for example, Rouse as the lead attorney, would suffer the consequences, whether it be potential malpractice or sanctions from the Bar. In the context of a law firm, I find that such consequences meet the Board's definition of accountability in determining whether Rouse had the authority to "responsibly direct" employees.

Counsel for the General Counsel seeks to minimize Rouse's authority to direct Walton by arguing that most of Walton's tasks were routine or clerical in nature, such as typing dictation and mailing letters. This argument ignores the fact that Walton also handled client's funds, kept track of deadlines to avoid the statue of limitations, reviewed case files for completeness and communicated with clients on Rouse's behalf regarding case matters. These tasks, delegated from an attorney to support staff are not routine or merely clerical because failure to perform such tasks properly can have severe consequences for the attorney and the client. Accordingly, I find that the Respondent has satisfied its burden of proving that Rouse had the authority to responsibly direct employees of the Respondent and that she used independent judgment in exercising this authority in the Respondent's interest.

Counsel for the Acting General Counsel, in her brief, addressed other claims which the Respondent appeared to raise at the hearing to suggest that Rouse had the authority to discipline or effectively recommend discipline, to evaluate employees, or to schedule employees. The Respondent, in its brief, does not cite any of this evidence in support of its assertion that Rouse was a supervisor.[14] Having already found sufficient evidence that Rouse had the authority to effectively recommend hiring of employees, to fire or effectively recommend that an employee be fired, and to responsibly direct employees, it is not necessary for me to address these other potential bases for finding supervisory status.

Counsel for the Acting General Counsel also cites secondary indicia as tending to show that Rouse was not a supervisor, i.e., the ratio of supervisors to employees if Rouse and the other attorneys were found to be supervisors and the fact that Rouse was paid on an hourly basis. These secondary indicia are not determinative and cannot outweigh evidence showing that in fact Rouse possessed and exercised several of the statutory indicia of supervisory authority. In any event, I note that Rouse requested to be paid on an hourly basis and that her pay was equivalent to what the other attorneys received as a salary. Moreover, just prior to her termination, she had discussed with Martin changing her method of compensation to a contingent fee basis and had informed him that she preferred to remain an hourly employee on some cases and contingent on others. Although the ratio of supervisor to employee would be 1:1 if all of the Respondent's attorneys were found to be supervisor, this does not require a different result. The nature of the attorneys' work and the importance of supervision of support staff to effective representation of clients make for the unusual ratio. I note that the Respondent here operates a small law firm where each attorney is lead counsel on his or her cases with independent authority to make decisions regarding how those cases are to be handled. This is quite different from the context of a legal services agency employing a large number of staff attorneys who work under multiple layers of supervision. See *Legal Aid*

[14] Some of this evidence was cited in support of the Respondent's asserted lawful basis for terminating Rouse.

Society of Alameda County, supra. The Board has never addressed the question of supervisory status of attorneys in the context of a law firm like the Respondent.

Having found that Rouse exercised sufficient statutory authority to meet the Board's definition of a supervisor, it follows that she was not covered by Section 7 of the Act when she allegedly violated the Respondent's unlawful rule. It is therefore not necessary to determine whether she was terminated for violation of the rule or for any of the myriad other reasons asserted by the Respondent. Because she was a statutory supervisor when terminated, her termination did not violate the Act. Accordingly, I shall recommend that the complaint be dismissed as it relates to Rouse's termination.

CONCLUSIONS OF LAW

1. By maintaining a rule that prohibited employees from discussing their wages and benefits with other employees, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a) (1) and Section 2(6) and (7) of the Act.

2. The Respondent did not violate Section 8(a) (1) or any other provision of the Act by terminating attorney Sheri T. Rouse on March 14, 2012.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, the Respondent shall be ordered to rescind the unlawful rule and notify its employees that this has been done.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The Respondent, The Martin Law Group, LLC, Tuscaloosa, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a rule that prohibits employees from discussing their wages and benefits with one another.

[15] 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.

(b) 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 the rule that prohibits employees from discussing their wages and benefits with one another.

(b) Within 14 days after service by the Region, post at its facility in Tuscaloosa, Alabama copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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 has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 14, 2012.

(c) 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. May 6, 2013

Michael A. Marcionese
Administrative Law Judge

16 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT maintain a rule that prohibits you from discussing your wages with other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

THE MARTIN LAW GROUP, LLC
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

233 Peachtree Street N.E., Harris Tower, Suite 1000, Atlanta, GA 30303-1531
(404) 331-2896, Hours: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (404) 331-2870.