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Family Healthcare, Inc. *and* Kristine McCallum. Case 9–CA–44539

June 4, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On February 5, 2009, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief; the General Counsel and the Charging Party filed answering briefs. The General Counsel also filed a limited cross-exception and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board[1] has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Family Healthcare, Inc., Chillicothe, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. June 4, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Eric V. Oliver, Esq., for the General Counsel.

Russell E. Carnahan and *Catherine J. Harshman, Esqs. (Hunter, Carnahan, Shoub & Byard),* of Columbus, Ohio, for the Respondent.

Spencer M. Youell, Esq. (Mowery, Youell & Galeano, Ltd.), of Dublin, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Chillicothe, Ohio, on December 15–16, 2008. The charge was filed August 11, 2008, and the complaint was issued on October 28, 2008.

The issues in this case are: (1) whether Respondent, Family Healthcare, Inc. (FHI) violated Section 8(a)(1) in discharging the Charging Party, Dr. Kristine McCallum, on July 28, 2008 in retaliation for protected concerted activity; (2) whether Respondent is an statutory employer; and (3) whether Dr. McCallum is a statutory employee, pursuant to Section 2(3) of the Act or, on the other hand, a "supervisor" under Section 2(11), who is excluded from the protections afforded employees by the Act.

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

FINDINGS OF FACT

I. JURISDICTION

Respondent, Family Healthcare, Inc., a corporation, operates medical clinics at several sites in southern Ohio, including its main office in Chillicothe, where the Charging Party worked as a physician. Respondent derived gross revenues in excess of $250,000 in the 12 months prior to the issuance of the Complaint and during that period purchased and received at its Chillicothe facility goods valued in excess of $5000 from outside the State of Ohio. For reasons set forth below, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent contends that it is not an employer within the

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), petition for cert. filed __ U.S.L.W. __ (U.S. May 27, 2009) (No. 08–1457); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), rehearing denied No. 08–1878 (May 20, 2009). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petition for rehearing filed Nos. 08–1162, 08–1214 (May 27, 2009)

[2] The Respondent has excepted to the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In agreeing with the judge's finding that Dr. Kristine McCallum is not a supervisor within the meaning of Sec. 2(11) of the Act, Member Schaumber disavows, as inconsistent with Board precedent, the comments in fn. 10 of the judge's decision. Further, in adopting the judge's finding that Dr. McCallum did not have the authority to reward other employees for purposes of Sec. 2(11), Member Schaumber disavows any implication by the judge that Dr. McCallum's failure to recommend a specific pay increase amount would preclude a finding of supervisory status.

[3] The General Counsel seeks compound interest computed on a quarterly basis for any backpay awarded. Having duly considered the matter, we are not prepared at this time to deviate from our current practice of assessing simple interest. See, e.g., *Glen Rock Ham*, 352 NLRB 516, 516 fn. 1 (2008), citing *Rogers Corp*., 344 NLRB 504 (2005).

meaning of Section 2(2) on the grounds that it is an exempt political subdivision, but failed to cite a single case in support of this contention in its brief. FHI makes this argument based on three factors, none of which satisfy any of the criteria for an exempt political subdivision under existing case law: that most of its funding (over 80 percent) comes from Federal and State grants *and* Medicare and Medicaid reimbursement; that the Federal Government requires that 51 percent of its directors have used FHI facilities in the past year; and that its physicians are covered by the Federal Tort Claims Act.

In *NLRB v. Natural Gas Utility District of Hawkins County,* 402 U.S. 600 (1971), the Supreme Court held that an exempt political subdivision under the Act is an entity that is either (1) created directly by the State, so as to constitute an administrative arm of the Government or (2) administered by individuals who are responsible to public officials or to the general electorate.[1] Even if an employer is an entity that is created directly by a State or county, an issue remains as to whether it was created "so as to constitute an administrative arm of government." *Hinds County Human Resource Agency,* 331 NLRB 1404 (2000).

Respondent meets none of the criteria for an exempt political subdivision, see, e.g., *Regional Medical Center at Memphis,* 343 NLRB 346, 358–360 (2004). Respondent was not created by the State of Ohio; it is a nonprofit corporation. FHI is not an administrative arm of a state or county government.

Mark Bridenbaugh, the executive director, is in charge of Respondent's day to day operations. Dr. Dawn Murray, the medical director, Melissa Walls, the chief operating officer, and Wanda Justice, the Chillicothe site manager, report to Bridenbaugh. Bridenbaugh reports to a board of directors, which is not responsible to public officials or the general electorate. The Board consists of 9–15 individuals, who are selected by existing board members.

II. ALLEGED UNFAIR LABOR PRACTICES

Protected Concerted Activity

Section 8(a)(1) of the National Labor Relations Act provides that it is an unfair labor practice to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. Section 7 provides that "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and *to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.*" (Emphasis added.)

In *Myers Industries,* 268 NLRB 493 (1984) *(Myers I)*, and in *Myers Industries,* 281 NLRB 882 (1986) *(Myers II)*, the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, the activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity. Individual action is concerted so long as it is engaged in with the object of initiating or inducing group action. *Whittaker Corp.,* 289 NLRB 933 (1988); *Mushroom Transportation Co.,* 330 F.2d 683, 685 (3d Cir. 1964).

Additionally, the Board held in *Amelio's,* 301 NLRB 182 (1991), that in order to present a prima facie case that an employer has discharged an employee in violation of Section 8(a)(1), the General Counsel must establish that the employer knew of the concerted nature of the activity.

Dr. Kristine McCallum, a board-certified family physician, was one of seven physicians working at FHI's Chillicothe, Ohio clinic when she was terminated on July 28, 2008. FHI physicians worked pursuant to contracts with Respondent, generally of 2-year duration. Dr. McCallum had worked at FHI since 1999.

Respondent began plans for a new contract with its physicians sometime in the fall of 2007, or earlier. Respondent formed a contract committee in 2007 which consisted of physicians, including Dr. McCallum, and Mark Bridenbaugh, Respondent's executive director.

On April 17, 2008, Respondent held a meeting with physicians from several of its sites. Prior to that meeting, it had provided its physicians with a draft of a new employment contract. Several of the doctors at the Chillicothe site were unhappy with the new draft contract and with the fact, in their view, that they had not been sufficiently consulted about it.

The primary issue between Respondent and several of the Chillicothe physicians was how their time was to be calculated for purposes of their compensation.[2] A physician's compensation depends on whether the doctor was a full-time employee or a part-time employee. Part-time employees' compensation depends on their percentage of full time (par. 7) (70 percent) for example, as opposed to (par. 8). Under the new draft contract, only patient contact hours spent at the Chillicothe facility would be considered in this calculation, not hours spent treating patients at the Adena Hospital in Chillicothe. This was a change in the terms and conditions of the employment of FHI physicians. Under prior contracts a physician's time spent at Adena was included in the determination of the percentage of their full-time employment.

Several doctors believed this change would either force them to accept less compensation or work longer hours. Respondent was aware that the new contract terms would likely force its doctors to make such a choice (Tr. 550), and was not opposed to at least some of its physicians terminating their hospital work. At the April 17 meeting, Dr. McCallum and others complained to Respondent's management that they were not consulted adequately about this change in policy.

[1] In order to meet the standard of being administered by individuals who are responsible to the general electorate, these individuals must be responsible to the same electorate as those running for office in general political elections. *Enrichment Services Program,* 325 NLRB 818, 820 fn. 13 (1998).

[2] The GC Exh. at 40 of its brief makes the curious statement that Dr. McCallum's conduct was protected even though she may not have been personally affected by the issues she raised with Respondent. To the contrary, the record establishes that several, if not all, the Chillicothe physicians, including Dr. McCallum, were affected and concerned with the issue of "how time is accounted, especially outside of the office," e.g., GC Exh. 14, Dr. Crawford's June 7, 2008 e-mail to Dr. Murray.

Respondent held a second meeting on May 9, in Logan, Ohio. The Chillicothe doctors carpooled to Logan and on the way discussed strategy for the meeting with management. Pursuant to this strategy, Dr. McCallum asked management to leave the room at the start of the session so that the Chillicothe doctors could discuss the proposed contract with providers from other FHI facilities. Respondent's management begrudging agreed to leave for 10 minutes. Respondent's medical director, Dr. Dawn Murray, was very unhappy with Dr. McCallum's request.

When management left, Dr. McCallum discussed the manner in which Respondent proposed to define "patient care hours" for purposes of determining full-time employment and the percentage of part-time employment. Providers from other sites were less concerned with this issue than were the Chillicothe doctors.

After the May 19, meeting, Respondent made a number of changes in the proposed new contract in response to requests from its providers. For example, the number of patient contact hours needed to constitute full-time employment was reduced from 35 to 32 hours. Attendance at certain staff meetings was no longer deemed mandatory and changes were made to provisions regarding vacation time.

A third meeting was held regarding the new proposed contract on June 9. Dr. McCallum and Dr. Ellis Frazier told management, including Dr. Murray, that the contract required them to give up treating patients at Adena Hospital in Chillicothe. Murray disputed this contention and said whether the physicians gave up their hospital hours was a matter of personal choice.

On June 13, Dr. Murray e-mailed the providers with a final draft of the new contract which was to be implemented in September or October 2008. In late June or early July, Dr. McCallum informed Respondent's executive director, Mark Bridenbaugh, that she and other doctors would withdraw their hospital privileges at Adena on account of the terms of the new contract. This meant that they would effectively stop treating new patients at the Hospital. Several doctors apparently agreed among themselves to continue treating their patients who had already been admitted to Adena.

Bridenbaugh asked McCallum in late June if the doctors would postpone their withdrawal of privileges[3] McCallum responded by telling Bridenbaugh that she would talk to the other doctors about such a postponement.

On June 26, Respondent's board of directors approved the new contract. A meeting between the physicians and management scheduled for July 14 was postponed in late June or early July.

On July 2, Wanda Justice, Respondent's site director, informed McCallum and other physicians that the July 14 meeting was being postponed. Justice testified that she told Dr. McCallum that the reason for the postponement was that Dr. Murray had to take her son to a medical appointment on July 14. Dr. McCallum testified Justice did not give her a reason for the postponement. I credit Dr. McCallum in part because neither Dr. Frazier nor Dr. Crawford, both current employees of FHI, failed to corroborate Justice's testimony that FHI explained to the physicians why the July 14 meeting was being postponed.[4]

Justice said the meeting would be rescheduled but did not tell the physicians when it would be rescheduled. The postponement prompted Dr. McCallum and others to withdaw their Adena hospital privileges the same day. (Tr. 398–400, 404–407.)

Dr. McCallum submitted her withdrawal of her hospital privileges to Adena on July 2. She also submitted the withdrawal papers of another Chillicothe physician to Adena. At 2:35 p.m. that day, Ty McBee, an employee of Adena, emailed Mark Bridenbaugh, stating that an Adena staff physician had informed him that McCallum stated that Respondent would cease treating hospital patients effective September 2.[5] McBee stated the Hospital would not be sufficiently staffed by September 2, to replace the FHI physicians. He asked Bridenbaugh "what discussions we may need to have." (R Exh. 22.) A half-hour later, Bridenbaugh forwarded this e-mail to FHI Medical Director Dr. Dawn Murray, Site Director Wanda Justice, and Chief Operations Officer Melissa Walls.

Dr. Murray e-mailed McBee late that afternoon. She wrote,

[3] R. Br. at 6 states that Mark Bridenbaugh "told" Dr. McCallum to hold off on withdrawing her privileges. I credit Dr. McCallum's testimony (Tr. 100) that Bridenbaugh "asked" if the Doctors could wait to withdraw their privileges. Bridenbaugh (Tr. 562–565) also testified that he "asked" Dr. McCallum to hold off. Bridenbaugh also testified to what he "believed" he discussed with McCallum and for that reason I discredit his testimony where it contradicts McCallum's testimony.

[4] I regard Dr. Crawford, in particular, to be a neutral witness. He testified that the physicians were told on July 2, that the July 14 meeting was being postponed. When asked if the reason was Dr. Murray's appointment, Dr. Crawford testified that "I don't remember the issue, I remember it was postponed." Tr. 236. The fact several physicians reacted to the news of the postponement by withdrawing their hospital privileges indicates to me that they were not provided with a reasonable explanation for the postponement.

[5] I decline to find that Dr. McCallum made such a statement to anyone. This evidence is the purest form of hearsay. Neither the unnamed staff physician to whom the comment was allegedly made, nor McBee testified in this proceeding. In June, Dr. McCallum told Dr. John Fortney, the medical director at Adena Hospital, that the *FHI physicians* were likely to withdraw their hospital privileges. Thus, the record shows that she was speaking for the FHI physicians, acting in concert. There is no credible evidence that Dr. McCallum suggested that she was speaking for FHI. Thus, there is no evidence that Dr. McCallum "misrepresented the intentions of her employer" as stated at p. 23 of Respondent's brief. Mark Bridenbaugh conceded that hospital privileges belong to the individual physicians, not to FHI. (Tr. 602–604.)

Moreover, employees engaged in protected activity may communicate with third parties to advance legitimate interests when the communication is not so disloyal, reckless or maliciously untrue to lose the Act's protection, see *Emarco, Inc.,* 284 NLRB 832, 834 (1987); *Arlington Electric,* 332 NLRB 845 (2000), *Five Star Transportation, Inc.,* 349 NLRB 42 (2007). Thus, regardless of whether Dr. McCallum communicated with Adena to prepare Adena for loss of the FHI physicians' services, and/or, as Mark Bridenbaugh believed, to put pressure on FHI through Adena to alter the terms of the new contract (Tr. 459) she did not lose the protection of the Act. Dr. McCallum's communication with Adena in this regard was clearly related to the physicians' concerted protest of the terms of their new contract.

"First, I want to apologize for any confusion that has been caused by Dr. K. McCallum's remarks. She is not authorized to act as hospital liaison for FHI, she speaks only for herself." Dr. Murray noted that FHI's Chillicothe physicians recently said they planned to give up inpatient responsibilities in light of the new contract, but that FHI did not have anything in writing to this effect. Murray promised to talk to the Chillicothe physicians about maintaining their current level of inpatient work through October 1, 2008.

On July 2, McCallum met with Bridenbaugh and informed him that six of the seven Chillicothe doctors were withdrawing their privileges at Adena and that she had done so that day. Also, on July 2 or 3, Dr. McCallum had a conversation with Bridenbaugh in which she told him that he was a figurehead and that Dr. Murray and Melissa Walls were running FHI and "really messing things up." (Tr. 567.) There is no evidence as to whether or not Bridenbaugh relayed this to Murray or Walls.

On July 21, Murray and Bridenbaugh met with the Chillicothe doctors. Murray expressed anger at the fact that McCallum and other doctors had communicated with Adena about withdrawing their privileges directly, rather than doing so through FHI.

On July 28, Dr. Murray and Bridenbaugh summoned Dr. McCallum to a meeting and handed her a short letter terminating her employment contract. The letter provided no reason for the termination. When McCallum asked why she was being terminated, Murray replied that things just weren't working out.[6]

At a meeting in early August, after Respondent terminated Dr. McCallum, Adena asked the other Chillicothe physicians to temporarily restore their hospital privileges until October 2. They did so. Neither Respondent nor Adena made such a request to Dr. McCallum before terminating her employment. Adena Hospital retained Dr. McCallum as an independent contractor in early August 2008 and then hired her as a staff physician effective January 1, 2009. Dr. McCallum's hospital privileges at Adena have been restored.

At hearing, Respondent attempted to suggest that the reasons for Dr. McCallum's termination were broader than her conduct related to the new employment contract. This is completely incredible. In the only written evaluation Respondent gave to Dr. McCallum, in July 2004, she was rated as outstanding in 9 of 10 categories. (R. Exh. 3.)

The initiative for Dr. McCallum's termination came from Medical Director Murray. When I pressed Dr. Murray on the reasons for the termination, she testified:

> I terminated her because there's been a pattern of behavior over time that basically when we started talking about the contract, it didn't have anything to do with the contract.
>
> But the behavior during the time that we were talking about the contract just got to be to the point that it was the last straw.
>
> And the thing about the Adena privileges, she took—she withdraws her privileges, but they were all in the process of whether they were going to withdraw privileges or not. We were still in the process of talking about that.

(Tr. 493.)

Thus, it is crystal clear that Respondent would not have terminated Dr. McCallum in the absence of her challenge to the new contract and her concerted activity with other Chillicothe physicians to withdraw their hospital privileges in light of FHI's new contract. Furthermore, where there is no reason given for a discharge, it is indicative of unlawful motivation, *Hurst Performance, Inc.,* 242 NLRB 121, 128 (1979). Respondent knew that Dr. McCallum was acting in concert with other physicians. For example, in General Counsel's Exhibit 14, Dr. Eric Crawford, in a June 7, 2008 e-mail to Dr. Murray, noted that his specific concerns about the new contract had been addressed by Doctors Frazier and McCallum.

Mark Bridenbaugh testified that a decision was made to terminate Dr. McCallum after the July 21 meeting because Dr. McCallum had "in affect challenged Dr. Murray's leadership." (Tr. 583.) Since this challenge related primarily, if not exclusively, to the terms and conditions of employment of the Chillicothe physicians, the conduct for which Respondent terminated Dr. McCallum was clearly protected by Section 7 of the Act.[7]

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[6] I do not credit the testimony of Mark Bridenbaugh that he decided to terminate Dr. McCallum on July 2. His testimony (Tr. 461) and Dr. Murray's testimony (Tr. 504) establishes that no such decision was made prior to the July 21 meeting and that this decision was initiated by Dr. Murray; not Bridenbaugh. Dr. Murray initiated the termination of Dr. McCallum on the grounds that McCallum had been disrespectful and had undermined her authority. Bridenbaugh concurred in Dr. Murray's recommendation/decision.

Bridenbaugh's testimony that he decided to terminate Dr. McCallum on July 2 is also inconsistent with the fact that on July 2 he agreed with Dr. McCallum that she should be a 70-percent part-time employee, as opposed to a 60-percent part-time employee.

At pp 27–28 of its brief, Respondent argues that Dr. McCallum's conduct was unprotected due to the comments she made about Mark Bridenbaugh being a figurehead and Dr. Murray and Melissa Walls running FHI and "messing things up." There is absolutely no evidence that Respondent terminated Dr. McCallum for these remarks or even that they played any role in termination. Respondent's brief mentions other alleged "misbehavior" by Dr. McCallum, such as her refusal to see patients who arrived more than 15 minutes late for an appointment. There is no evidence that any of this alleged misconduct (assuming it is misconduct) were factors in her termination.

Furthermore, Respondent's statement at p. 28 of its brief that, "Dr. McCallum in particular had a history of rude and sometimes outwardly disrespectful behavior toward other staff, the management of FHI, and sometimes even patients," is not supported by the record. Indeed, the record evidence is to the contrary. For example, Respondent, introduced Dr. McCallum's 2003–2004 performance evaluation, which mentions some patient complaints and one written grievance. (R. Exh. 3.) However, this evaluation is overwhelmingly positive. Dr. McCallum's testimony is that the grievance was filed in 2002 and was occasioned by her refusal to prescribe diet pills to a patient that she believed should not have received the prescription.

[7] Contrary to Respondent's brief, FHI terminated Dr. McCallum for her conduct related to the new contract, not simply the withdrawal of her privileges. Moreover, the withdrawal of her privileges was in essence part of a concerted protest of her employer's decision not to

FHI violated Section 8(a)(1) of the Act in terminating Dr. McCallum in retaliation for engaging in protected concerted activity.

Dr. McCallum did not Lose the Protection of the Act by Raising her Voice to Dr. Murray or any Other Conduct.

Pursuant to *Atlantic Steel Co.,* 245 NLRB 814, 816–817 (1979), an employer violates the Act by discharging an employee engaged in the protected concerted activity of voicing a complaint about his or her employment terms unless, in the course of that protest, the employee engages in opprobrious conduct, costing him the Act's protection. In assessing the conduct, the Board assesses four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practices.

Consideration of these factors leads me to conclude that Dr. McCallum's conduct does not come close to that which would forfeit the Act's protection. Her "disrespectful" conduct occurred in meetings held to discuss the terms and conditions of the physicians' employment. Dr. McCallum's comments pertained to these conditions and did not even rise to the level of "an outburst." Merely speaking loudly or raising one's voice while engaging in protected concerted activity generally will not deprive an employee of the Act's protection. *Alton H. Piester, LLC.,* 353 NLRB No. 33, slip op. at 6 (2008); *Firch Baking Co.,* 232 NLRB 772 (1977). There is nothing about Dr. McCallum's conduct that warrants departing from this general rule.

I do not credit Dr. Murray's self-serving testimony that Dr. McCallum "rolled her eyes and huffed at me, and slammed her hand on the desk multiple times." (Tr. 502.) There is no corroboration for this testimony, not even from Bridenbaugh.[8] Even if I were to credit this testimony, McCallum's conduct would be a far cry from the type of egregious conduct that would negate the protected nature of her conduct.

Supervisory Status

Section 2(11) of the Act defines "supervisor" as any 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.

A statutory supervisor is not an employee pursuant to Section 2(3) of the Act and thus is not protected by Section 8 of the Act. Respondent has the burden of proving that Dr. McCallum was a statutory supervisor.

The Board defines the power to effectively recommend as meaning "that the recommended action is taken with *no* independent investigation by superiors." *ITT Lighting Fixtures*, 265 NLRB 1480, 1481 (1982). *Wesco Electrical Co.,* 232 NLRB 479 (1982). In a series of decisions issued on September 29, 2006, the Board expounded on what constitutes the responsibility to direct employees, to assign employees and when the exercise of such authority requires the use of independent judgment. *Oakwood Healthcare, Inc*., 348 NLRB 686 (2006); *Croft Metals, Inc*., 348 NLRB 717 (2006); *Golden Crest Healthcare Center*, 348 NLRB 727 (2006)

Evidence Relied on by Respondent for its Contention that Dr. McCallum was a Statutory Supervisor

Respondent relies on the following evidence, almost all of which involves incidents occurring at least 5 years prior to Dr. McCallum's termination, for its contention that Dr. McCallum was a statutory supervisor pursuant to Section 2(11) of the Act in July 2008:

1. Attachment C to her latest employment contract, Respondent Exhibit 1, states that among Dr. McCallum's duties is to "participate in supervision of ancillary staff." Respondent's reliance of Dr. McCallum's job description is misplaced. The Board has long held that job titles and descriptions prepared by employers are not controlling; rather the Board looks to the authority actually possessed and the work actually performed by the alleged supervisor. See, e.g., *Heritage Hall*, *E.P.I. Corp.,* 333 NLRB 458, 458–459 (2001) ("It is well settled that employees cannot be transformed into statutory supervisors merely by vesting them with the title or job description of supervisor.").

2. Respondent's Exhibit 4, a memorandum from Dr. McCallum dated October 24, 2000, in which she raised some concerns about the performance of nurse Karen McKibben. Dr. McCallum made no recommendations or suggestions that McKibben be disciplined. As of 2008, Site Director Wanda Justice made an independent investigation of any physician complaint against a nurse, before deciding what action to take, if any. (Tr. 438.)

3. Respondent's Exhibit 5, a January 29, 2001 memorandum in which Dr. McCallum suggested that Heather Martin either be fired immediately or be placed on probation. However, Dr. McCallum stated that she would defer to Clinical Manager Cynthia Harness in whatever action Harness chose to take.

4. Respondent's Exhibit 6, a memorandum of a February 15, 2002 meeting attended by Dr. McCallum at which the conduct of LPN Laura Bowens was discussed. Bowens had administered an allergy injection at 10 times the proper dosage, causing a patient to experience a severe allergic reaction. There is no evidence that Dr. McCallum recommended that any disciplinary measures be taken against Bowens. FHI terminated Bowens on February 15. Bowens' supervisor, Margaret DeSantos, signed the termination notice; Dr. McCallum did not.

5. Respondent's Exhibit 7, an April 23, 2002 memo by Dr. McCallum recommending that disciplinary action be taken against Dawn Jessee. Jessee's supervisor, Margaret DeSantos issued Jessee a warning the same day.

6. Respondent's Exhibit 8, a November 5, 2002 memo in which Dr. McCallum complained about the work performance of Robyn Smith several days earlier. Dr. McCallum did not recommend that any discipline be taken against Smith. Mark

include hospital hours in the calculation of full-time employment or percentage thereof.

[8] Bridenbaugh testified to "heavy sighs" from Dr. McCallum at the April 17 meeting.

Bridenbaugh terminated Smith on November 8. Bridenbaugh's termination letter on its face indicates that the termination was the result of Smith's failure to comply with instructions on many occasions, not simply the incident about which Dr. McCallum complained.

7. Respondent's Exhibit 9, Dr. McCallum's very positive January 16, 2000 evaluation of nurse Heather Callahan. Dr. McCallum concluded by stating that Callahan, "deserves whatever recognition for her hard work that the organization can offer." On February 11, 2000, Respondent granted Callahan a merit increase in salary. There is no evidence that Dr. McCallum played any role in determining the specific amount of the increase. There is in fact, no indication as to what effect, if any, her January 16 evaluation was given with respect to the increase.

8. Respondent's Exhibit 10, Dr. McCallum's August 2, 2000 memorandum regarding Kelly Hamilton-Lott. In this memo, Dr. McCallum stated, in pertinent part:

> Recently my primary nurse moved out-of-state. I had to select a new primary nurse, and I had several choices. I chose Ms. Hamilton with enthusiastic certainly.
>
> . . . .
>
> I feel that she well deserves any pay raise that this organization has to offer her.

FHI's site director has approached Dr. McCallum with a choice of applicants for the job of Dr. McCallum's primary nurse and asked her who she would like to select. (Tr. 181–182.)

The current site director, Wanda Justice, "does her best" to honor the preferences of a physician regarding assignment of a primary nurse. (Tr. 412–413.) She also considers the preferences of the nurses. However, Justice has the authority to assign a physician a primary nurse contrary to the physician's preference and has done so. For example, she reassigned nurse Terra Betz from Dr. Ellis Frazier to another physician, despite Dr. Frazier's desire to retain Betz as his primary nurse. (Tr. 442–443.) Justice, not a physician, assigned Betz as primary nurse first to Dr. Ucci and then to Dr. Sharma. Justice did not consult with Dr. Sharma before assigning Betz to be his primary nurse.

9. Whenever Respondent was considering hiring another physician for Chillicothe, FHI arranged for a candidate under strong consideration for hire to go to dinner with some or all the physicians who were already working at this site. The physicians reviewed the applicant's résumé and discussed his or her compatibility with the incumbent doctors. Dr. McCallum attended five or six such dinners between 1999 and 2008.

Dr. McCallum, also on one occasion, sat in on Wanda Justice's interview of an LPN candidate. She told Justice, who supervises the FHI nurses, that the candidate was acceptable. Justice, who is FHI's Chillicothe site manger, has the ultimate authority to hire and assign nurses to physicians on a temporary or permanent basis. On at least one occasion, Justice declined to hire an applicant recommended by a physician for a front desk position.

10. Dr. McCallum's January 21, 2003 peer review/evaluation form for Kelly Hamilton Lott, Respondent's Exhibit 12. Lott received a modest salary increase the same day. However, Dr. McCallum did not recommend any specific salary increase and there is no evidence that she played any role in granting the raise to Lott. Dr. McCallum has filled out one or two similar evaluation forms for Lott since 2003. Whether a physician fills out such an evaluation is strictly voluntary and some physicians complete nurse evaluations more often than others.

Wanda Justice, FHI's site director, makes a determination as to whether a nurse gets a raise and, if so, how much of a raise. She considers physician input, but also such factors as a nurse's attendance record. Justice's recommendation regarding a raise is subject to the approval of either Executive Director Mark Bridenbaugh or Chief Operations Officer Melissa Walls. Even assuming that physicians can recommend a specific salary increase for a nurse, FHI does not automatically grant such an increase. FHI has pay scales for nurses to which it strictly adheres.

11. Respondent's Exhibit 13 regarding a bonus plan for nurses which was to be effective on a trial basis for three months beginning on October 30, 2006. Dr. McCallum played a role in developing this plan. There is no evidence that the plan was fully implemented. Even if it was implemented, the program was discontinued by the end of January 2007.

Responsible Direction of Other Employees

To be deemed a statutory supervisor on the basis on an individual's authority to responsibly direct other employees, the employer must hold the individual accountable for the performance of other employees. In *Oakwood Healthcare, Inc*., 348 NLRB at 692, the Board stated:

> Thus, to establish accountability for purposes of responsible direction, 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.

There is no credible evidence that FHI held Dr. McCallum accountable for the performance of nurses or other employees. Thus, she was not a supervisor by virtue of her authority to responsibly direct other employees.

Assignment and Effectively Recommending Assignment

The Board stated in *Oakwood Healthcare,* above at 689, that, "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."

In *Greenspan, D.D.S., P.C.,* 318 NLRB 70 (1995), enfd. mem. 101 F.2d 107 (2d Cir. 1996), the Board determined in a case similar to the instant matter, that the authority of dentists employed by Dr. Greenspan to recommend transfer of dental assistants who were assigned to them was exercised too infrequently to establish the dentists' supervisory status. The Board did not overrule *Greenspan* in its *Oakwood Healthcare* trilogy. In fact it cited *Greenspan,* above at 730 fn. 9 of the *Golden*

Crest decision for the proposition that, "the Board has declined to find individuals to be supervisors based on alleged authority that they were never notified they possessed, where its exercise is sporadic and infrequent."[9] Thus, I find *Greenspan* to be controlling precedent in the instant case.

The Board also cited *Greenspan*, as well as *Highland Telephone Cooperative,* 192 NLRB 1057, 1058 (1971), in a more recent case, *Shaw, Inc.,* 350 NLRB 354, 357 fn. 21 (2007), for the proposition that "isolated exercise of authority is insufficient to establish supervisory status." In *Highland,* the record established that an employee was granted a raise after his crew leader had recommended the raise and that crew leaders were occasionally consulted as to employees' progress. However, the Board found this evidence insufficient to establish the crew leaders' supervisory status. In *Shaw*, the Board found a foreman's participation in the decision to suspend two employees to be insufficient to establish his supervisory status.

In *Greenspan,* the office manager assigned individual dental assistants to a particular dentist, as a permanent assignment. However, if a dentist told Dr. Greenspan that he or she did not want to work with the dental assistant assigned to him or her, Dr. Greenspan's normal practice was to transfer the dental assistant. Indeed, in one case he transferred a dental assistant within a half-hour of his dentist's request.

The administrative law judge found "the credible evidence therefore establishes that on one occasion a dentist effectively recommended that a dental assistant be hired and that on three occasions dentists effectively recommended that the dental assistants then working with them be transferred to another dentist." Id. at 76. The judge found, and the Board agreed that:

> The work of the employees herein is to perform dental work on Respondent's patients for about 7 hours a day. If once a year they ask Dr. Greenspan to transfer their dental assistant to another dentist and he follows that recommendation, these activities are "incidental and extraordinary exceptions" to their dental practice and does not, without more, make them supervisors within the meaning of the Act.

Id. at 76.

Thus, even assuming that Dr. McCallum effectively recommended the assignment of other employees, I conclude that per the *Greenspan* case, she did so too infrequently over the course of her nine year employment by FHI to be deemed a supervisor pursuant to Section 2(11) of the Act.[10]

Effectively Recommending Hiring

First of all, I conclude that Dr. McCallum's attendance at lunch or dinner with physicians that FHI was considering for hire was activity too infrequent to make her a supervisor. Moreover, the record does not establish that she had the authority to effectively recommend hiring. The applicants with whom the physicians dined had effectively already been selected for hire. Secondly, neither Wanda Justice nor any other witness could testify to an instance in which Respondent rejected a job applicant solely or even primarily on the basis of input from its incumbent physicians. (Tr. 231–232, 477–479.) Moreover, the record indicates that FHI made its hiring decisions independent of the input of its doctors. As example is Wanda Justice's decision not to hire a front desk applicant, after she interviewed the individual, despite a physician's recommendation that the applicant should be hired. (Tr. 448.)

Discipline

The record establishes that Dr. McCallum neither disciplined employees, nor under *Wesco Electric* standard, effectively recommended discipline. FHI did not discipline employees without doing an investigation independent of any of Dr. McCallum's recommendations and there is no evidence that discipline recommended by Dr. McCallum was imposed without management independently evaluating an employee's misconduct.

Reward

Dr. McCallum did not have the authority to reward other employees, nor did she do so. Moreover, the record establishes that Dr. McCallum's recommendations for rewarding her primary nurse were not acted on without independent action by Respondent's management.

Conclusions of Law

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

2. The Respondent violated Section 8(a)(1) by discharging Dr. Kristine McCallum for engaging in protected concerted activity.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent violated Section 8(a)(1) by discharging Dr. Kristine McCallum because she engaged in protected concerted activity, Respondent must offer her full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed, and to make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her.

Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also be required to remove from its files any and all references to the unlawful discharge of Dr. McCallum, and to notify her in writing that this has been done and that the discharge will not be used against her in any way.

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[9] The Board also cited *Volair Contractors, Inc.,* 341 NLRB 673, 675 (2004), which also relied on the holding in *Greenspan* in a finding that an employee was not a statutory supervisor, as alleged by his employer.

[10] I would note that there is no evidence that Dr. McCallum recommended assignment of nurses other than which nurse should be assigned as her primary nurse. I believe that Sec. 2(11) contemplates the exercise of a more generalized authority to recommend the assignment, discipline or reward, etc. of other employees apart from recommendations regarding a single or a very few personal assistants.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, Family Healthcare, Inc., Chillicothe, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging its employees for engaging in protected concerted activity.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Dr. Kristine McCallum 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 or privileges previously enjoyed.

(b) Make Dr. Kristine McCallum whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, with interest, in the manner set forth in the remedy section of this decision.

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

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Chillicothe, Ohio facility, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. 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 July 28, 2008.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., February 5, 2009

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 discharge you or otherwise discriminate against you for engaging in concerted protected activity.

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

WE WILL, within 14 days from the date of the Board's Order, offer Dr. Kristine McCallum 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 or privileges previously enjoyed.

WE WILL make Dr. Kristine McCallum whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

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

FAMILY HEALTHCARE, INC.

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[11] 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.

[12] 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."