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Dreamclinic, LLC and Debora Nelli. Case
19-CA-088440

November 25, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON
AND SCHIFFER

The General Counsel seeks a default judgment in this case pursuant to the terms of an informal settlement agreement. Upon a charge and an amended charge filed by employee Debora Nelli on August 31, and October 25, 2012, respectively, the General Counsel issued the complaint on November 29, 2012, against Dreamclinic, LLC (the Respondent), alleging that the Respondent violated Section 8(3) and (1) of the Act by issuing a written warning to, and discharging, Nelli for her union and protected concerted activities, and that it violated Section 8(a)(1) of the Act by maintaining overly broad rules in its employee handbook. The Respondent filed an answer and an amended answer to the complaint on December 27, 2012, and April 1, 2013, respectively.

Subsequently, on April 2, 2013, at the outset of the hearing, Administrative Law Judge William Nelson Cates granted the General Counsel's motion to amend the complaint to delete the allegation that the Respondent violated Section 8(a)(3) and (1) of the Act by issuing the written warning to Nelli. In addition, at the hearing on April 2, the judge approved an informal settlement agreement, entered into by the parties that day, settling all of the complaint's allegations, as amended at the hearing. Among other things, the settlement agreement required the Respondent to: (1) post at its facilities and on its intranet the appropriate Board notice for 60 days and mail and email the notice to all employees; (2) make Nelli whole by paying her \$3500 in backpay; (3) remove from its files all references to Nelli's discharge and notify her in writing that this had been done and that the references would not be used against her in any way;¹ (4) rescind certain handbook confidentiality rules which prohibit employee communication about matters that could reasonably be construed to include terms and conditions of employment; and (5) rescind a handbook rule that restricts employees from solicitation while "on the job" or "during working hours" and on the Respondent's premises.

¹ The Notice to Employees included in the settlement agreement states that Nelli was offered, but declined reinstatement.

The settlement agreement also contained the following provision:

The Charged Party agrees that in case of non-compliance with any of the terms of this Settlement Agreement by the Charged Party, and after 14 days notice from the Regional Director of the National Labor Relations Board of such non-compliance without remedy by the Charged Party, the Regional Director will issue a complaint that will include the allegations spelled out above in the Scope of Agreement section. Thereafter, the General Counsel may file a motion for default judgment with the Board on the allegations of the complaint as amended on the record on April 2, 2013. The Charged Party understands and agrees that all of the allegations of the complaint will be deemed admitted and it will have waived its right to file an Answer to such complaint. The only issue that may be raised before the Board is whether the Charged Party defaulted on the terms of this Settlement Agreement. The Board may then, without necessity of trial or any other proceeding, find all allegations of the complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Party on all issues raised by the pleadings. The Board may then issue an order providing a full remedy for the violations found as is appropriate to remedy such violations. The parties further agree that a U.S. Court of Appeals Judgment may be entered enforcing the Board order ex parte, after service or attempted service upon Charged Party/Respondent at the last address provided to the General Counsel.

By letter dated April 18, 2013, the Region's compliance officer advised the Respondent to take the steps necessary to comply with the terms of the settlement agreement and outlined the Respondent's obligations. By letter dated November 4, 2013, the Region's compliance officer informed the Respondent that although the Region had received Nelli's required backpay check, the Respondent had not yet complied with any of the settlement's additional terms. The letter instructed the Respondent immediately to comply and again outlined the Respondent's obligations. The letter also stated that, if the Respondent did not comply within 14 days, the Regional Director would be advised to initiate default procedures as set forth in the settlement agreement. By email dated March 27, 2014, the Region responded to several questions from the Respondent about its outstanding obligations and urged compliance. By email dated April 16, 2014, the Region's compliance officer notified the Respondent that unless it complied by April

30, 2014, the Regional Director would likely initiate default proceedings. The Respondent failed to comply.

Accordingly, pursuant to the terms of the noncompliance provision in the settlement agreement, on September 17, 2014, the Regional Director reissued the amended complaint, and the General Counsel filed a Motion for Default Judgment with the Board.² On September 18, 2014, the Board issued an order transferring the proceeding to the Board and Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

According to the uncontroverted allegations in the motion for default judgment, the Respondent has failed to comply with the terms of the settlement agreement by failing to: (1) post and provide its employees with the requisite physical and electronic Notice including by email and mail; (2) repeal the policies and handbook rules discussed in the settlement agreement and inform employees that the rules are no longer in effect; (3) expunge from its files all references to Nelli's discharge; and (4) notify Nelli in writing that the references have been removed and the discharge will not be used against her in any way. Consequently, pursuant to the noncompliance provisions of the settlement agreement set forth above, we find that the Respondent's answer and amended answer to the original complaint have been withdrawn, and that all of the allegations in the complaint as amended at the April 2, 2013 hearing are true.³ Accordingly, we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a State of Washington limited liability company with two offices and places of business in Seattle, Washington, has been engaged in providing massage therapy and acupuncture services.

In conducting its business operations described above during the 2012 calendar year, a representative period, the Respondent derived gross revenues in excess of \$500,000 and purchased and received at its Seattle, Washington, facilities, goods valued in excess of \$5000

from companies within the State of Washington that, in turn purchased those goods directly from entities outside the State of Washington.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

Larisa Goldin	-	Owner
Jamie Rindlisbacher	-	Clinic manager (former)
Melissa Holm	-	Clinic manager (current)

At all material times, the Respondent has maintained an employee handbook containing the following Articles providing as follows:

Article 2.2.2, Code of Conduct: "Disclosing confidential or proprietary Company information to unauthorized persons" is improper conduct that will result in disciplinary action, including termination.

Article 2.2.6, Classification and Handling of Confidential Information policy: "Employee information, Compensations, ... Schedules and estimates, ... Information presented at status meetings" are defined as "confidential company information" that "must not be divulged to any external parties other than authorized persons and should be used only for the Company's benefit. Communicating confidential information to a co-worker should only be done when it's essential for that person to perform his or her job. ... Improperly divulging or using confidential information may result in corrective action, up to and including termination."

Article 2.2.9, External Communication: "Written or electronic approvals must be obtained from the President before proceeding with the following: All external communication distributed via the general media (including newspapers, magazines, radio, TV, etc.) or printed media (including brochures, handbills, leaflets and direct mail . . ." as well as "company information communicated, shared or processed by vendors, customers, or third-party providers" and "initiation of any campaign in which the clinic will play a significant role."

Article 2.2.10, Legal Inquiry: "If anybody insides or outside the company (employee, former employee, job

² As explained below, the reissued complaint inadvertently failed to include the provisions as amended at the April 2, 2013 hearing.

³ See *U-Bee, Ltd.*, 315 NLRB 667, 668 (1994).

applicant, customer, clinic visitor, etc.) has a legal inquiry or requests a legal action, direct the inquiry to the President.”

Article 2.2.13, Internet Use: “It is the responsibility of every individual to ensure the company’s communication systems are used ... in a fashion that does not improperly disclose confidential, sensitive, or proprietary information to unauthorized individuals. ... Don’t send information that is Dreamclinic confidential, or proprietary. ... Users are advised not to use the Internet for any purpose that would reflect negatively on the clinic.”

Article 2.2.17, Non-Solicitation of Clients: “Solicitation of any kind during working time and while on the job is not allowed. ... Solicitation during working hours and on the clinic’s premises can be disruptive to our operations.”

About January 8, 2012, the Respondent’s employee Nelli engaged in concerted activities with other employees for mutual aid and protection by expressing concern about a newly announced company policy of deducting costs of services from employees’ pay whenever customers complained about those services.

About January 9, 2012, Nelli engaged in concerted activities with other employees for mutual aid and protection by telling the Respondent, through Rindlisbacher, that the deductions policy would be unfair and possibly illegal.

About January 10, 2012, Nelli engaged in concerted activities with other employees for mutual aid and protection by sending an email to all employees stating that the deduction policy might violate Washington law.

In early 2012, Nelli told the Respondent through Rindlisbacher that the Respondent’s therapists should have a union.

About January 11, 2012, the Respondent, by Rindlisbacher, issued a written reprimand to Nelli.⁴ About March 2, 2012, the Respondent, by Goldin, discharged Nelli.

The Respondent discharged Nelli because of Nelli’s conduct described above and to discourage employees

from engaging in these and other union and/or protected concerted activities.

CONCLUSIONS OF LAW

By maintaining an employee handbook containing the provisions described in paragraphs (a) through (f) above, and by discharging Nelli for her union and protected concerted activities and to discourage employees from engaging in these or other union and/or protected concerted activities, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

In addition, by discharging Nelli for her union and protected concerted activities and to discourage employees from engaging in these or other union and/or protected concerted activities, the Respondent has discriminated against Nelli in regard to hire or tenure or terms or conditions of employment, thereby discouraging membership in a labor organization in violation of Section 8(a)(3) and (1) of the Act. The Respondent’s unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, we shall order the Respondent to comply with the unmet terms of the settlement agreement approved by the administrative law judge on April 2, 2013, by posting hard copies of the Notice to Employees at its facilities; distributing the notice electronically, including by emailing the notice to its employees and posting the notice on the Respondent’s intranet; and duplicating and mailing the notice to all employees employed since January 1, 2012. In addition, we shall order the Respondent to repeal the policies and handbook rules addressed in the settlement agreement. Finally, the Respondent shall remove from its files all references to Nelli’s discharge and notify her in writing that this has been done and that the discharge will not be used against her in any way.

In limiting our affirmative remedies to those enumerated above, we are mindful that the General Counsel is empowered under the default provision of the settlement agreement to seek “a full remedy for the violations found as is appropriate to remedy such violations.”⁵ However, in his Motion for Default Judgment, the General Counsel

⁴ The original complaint alleged that the written reprimand violated Sec. 8(a)(1) and (3) of the Act. At the April 2, 2013 hearing the judge approved the General Counsel’s motion to amend the complaint to delete the legal conclusion that this conduct violated the Act. The General Counsel explained that the charge involving the reprimand was untimely, having been filed more than 6 months after the reprimand was issued. We note that the reissued amended complaint inadvertently failed to include the April 2 amendment. However, this Order and the attached Notice reflect only the allegations in the complaint as amended at the April 2, 2013 hearing.

⁵ As set forth above, the settlement agreement provided that, in case of noncompliance, the Board could “issue an order providing a full remedy for the violations found as is appropriate to remedy such violations.”

has not sought such additional remedies and we will not, sua sponte, include them within this remedy.⁶

ORDER

The National Labor Relations Board orders that the Respondent, Dreamclinic LLC, Seattle, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees for their union and protected concerted activities and to discourage employees from engaging in these or other union and/or protected concerted activities.

(b) Maintaining rules or policies which define “confidential information” as information which could reasonably be construed to include terms and conditions of employment, including but not limited to, employee information, compensations, schedules and estimates and information presented at status meetings; specifically:

i. Rules which prohibit employees from disclosing employee information, compensations, schedules and estimates, and information presented at status meetings to people the Respondent has not authorized;

ii. Rules which prohibit employees from divulging “confidential information” as described above to external parties or limiting disclosure to situations that are only for the Respondent’s benefit;

iii. Rules which prohibit employees from communicating “confidential information” as described above to co-workers or limiting such disclosure to those situations in which the communication is essential for job performance;

iv. Rules which allow employees to discuss their terms and conditions of employment only when it is essential for job performance;

v. Rules which indicate to employees that divulging or using “confidential information” as described above may result in corrective action, up to and including termination;

vi. Rules which require that employees receive written or electronic approval from the Respondent’s President before communicating with the general media or in printed media, including brochures, handbills, leaflets, and direct mail, literature and other such material about the Respondent, its products, services or facilities;

vii. Rules which restrict external communication in which the Respondent would play a significant role;

viii. Rules which restrict external communication with vendors, customers or third party providers;

ix. Rules which require employees to direct any legal inquiry from outside sources to the Respondent’s President;

x. Rules which restrict employees from disclosing on the internet the Respondent’s “confidential, sensitive or proprietary” information;

xi. Rules which restrict employees from disclosing information on the internet that the Respondent has classified as “Dreamclinic confidential”; and

xii. Rules that restrict employees from using the internet for any purpose that would reflect negatively on the Respondent.

(c) Maintaining any rules or policies which restrict employees’ solicitation “while on the job” or “during working hours and on the Clinic’s premises.”

(d) 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 policies and rules in the employee handbook that are outlined above, specifically Article 2.2.2, Code of Conduct; Article 2.2.6, Classification and Handling of Confidential Information policy; Article 2.2.9, External Communication; Article 2.2.10, Legal Inquiry; Article 2.2.13, Internet Use; and Article 2.2.17, Non-Solicitation of Clients.

(b) Remove from its files any reference to the unlawful discharge of Debora Nelli and notify Nelli in writing that this has been done and that the discharge will not be used against her in any way.

(c) Within 14 days after service by the Region, post at its facilities located at 902 NE 65th Street, Seattle, Washington, and MarQueen Hotel, Suite 107, 600 Queen Anne Ave. N., Seattle, Washington, copies of the attached notice marked “Appendix.”⁷ Copies of the notice, on forms provided by the Regional Director for Region 19, 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. The Re-

⁶ See, e.g., *Benchmark Mechanical, Inc.*, 348 NLRB 576 (2006).

⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted and Mailed by Order of the National Labor Relations Board” shall read “Posted and Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

spondent shall also 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 January 1, 2012. Those notices will be signed by a responsible official of the Respondent and show the date of mailing. The Respondent will also post a copy of the notice on its intranet and keep it continually posted for 60 consecutive days. The Respondent shall also email a copy of the signed notice to all of its employees who work at the at 902 NE 65th Street, Seattle, Washington facility and the MarQueen Hotel, Suite 107, 600 Queen Anne Ave. N., Seattle, Washington facility.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 19 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. November 25, 2014

Mark Gaston Pearce,	Chairman
Harry I. Johnson, III,	Member
Nancy Schiffer,	Member

(SEAL) 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, mail and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT do anything to prevent you from exercising the above rights.

YOU HAVE THE RIGHT to freely communicate with other employees and external parties about your terms and

conditions of employment, including but not limited to, your wages and hours, and to complain to us on behalf of yourself and other employees, and WE WILL NOT do anything to interfere with your exercise of that right.

WE WILL NOT maintain rules or policies which:

- Define “confidential” information as information which could reasonably construed to include terms and conditions of employment, including but not limited to, employee information, compensations, schedules and estimates, and information presented at status meetings.

WE WILL NOT maintain rules or policies which interfere, restrain, or coerce employees from exercising their Section 7 rights. Specifically, we will not maintain rules which prohibit you from:

- Disclosing employee information, compensations, schedules and estimates, and information presented at status meetings to people we haven’t authorized;
- Divulging our “confidential” information to external parties, or limiting disclosure to situations that only are for the Company’s benefit;
- Communicating our “confidential” material to your co-workers, or limiting disclosure only those situations when it is essential for you to perform your job;
- Discussing your terms and conditions of employment only when it is essential for you to perform your job;

Or rules which,

- Indicate that your divulging or using “confidential” information may result in corrective action, up to and including termination;
- Require written or electronic approval from the President before you communicate with the general media or in printed media (including brochures, handbills, leaflets, and direct mail), literature, and other such material about us, our products, services, or facilities;
- Restrict your external communication in which we would play a significant role;
- Restrict your external communications with vendors, customers, or third party providers;
- Require you to direct any legal inquiry from outside sources to the President;
- Restrict your disclosing on the Internet our “confidential, sensitive, or proprietary” information;
- Restrict you from disclosing information on the Internet that we have classified as “Dreamclinic confidential;” and

- Restrict you from using the Internet for any purpose that would reflect negatively on us.

With respect to solicitation, WE WILL NOT maintain any rules or policies which:

- Restrict your solicitation “while on the job” or “during working hours and on the Clinic’s premises.”

WE WILL repeal, then revise where necessary, the rules in our handbook on the subjects discussed above.

WE WILL NOT fire you because you exercise your right to bring issues and complaints to us on behalf of yourselves and other employees, or because you express an interest in organizing.

WE HAVE offered Debora Nelli her job back, along with her seniority and all other rights or privileges, and she has declined reinstatement.

WE WILL pay Debora Nelli for the wages and other benefits she lost because we fired her in accordance with the terms of this agreement.

WE WILL remove from our files all references to the discharge on March 2, 2012, of Debora Nelli and WE WILL notify her in writing that this has been done and

that the discharge will not be used against her in any way.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

DREAMCLINIC, LLC

The Board’s decision can be found at www.nlr.gov/case/19-CA-088440 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

