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February 25, 2020

National Labor Relations Board
NY Division of Judges
Honorable Benjamin Green

Re: Alameda Center for Rehabilitation and Healthcare Inc.
Case Nos. 22-CA-180564 & 22-CA-188462

Dear Judge Green,

This letter is submitted on behalf of the General Counsel in lieu of a post-hearing brief in the above captioned matter.[1] A compliance hearing concerning the allegations of the Amended Compliance Specification ("ACS") in this matter was held in the National Labor Relations Board's (Board") Region 22 Office in Newark, New Jersey on January 7, 2020.[2] The issue before your Honor is whether the amount of monies owed by Respondent, Alameda Center for Rehabilitation and Healthcare Inc., on behalf of its ten (10) LPN employees named in ACS Attachment A for 401(k) employee contributions, employer matching contributions and lost investment gains were appropriately and reasonably calculated. Board Compliance Officer Rhonda Fricke testified as to the method and legal basis for the calculations resulting in Respondent's total liability set forth in the ACS. Respondent did not call any witnesses to testify at the hearing nor did Respondent present alternative methods of calculating its liability.

The underlying facts of this case are set forth in ALJ Kenneth Chu's Decision ("the ALJD") issued on October 26, 2017: 1199 Service Employees International Union, United Healthcare Workers East, New Jersey ("the Union") and AristaCare, Respondent's predecessor, were parties to a collective bargaining agreement covering AristaCare's LPN employees. This collective bargaining agreement provided, among other benefits, the option to participate in the 401(k) plan, with the employer matching 50% of each employee's contribution, up to a maximum of 3% of the employee's gross salary. (GC 3) On February 11, 2016, in anticipation of acquiring the AristaCare business, Respondent entered into a status quo agreement with the Union, agreeing to maintain wages, benefits and conditions contained in the collective bargaining agreement. (GC 4) However, when Respondent's acquisition of the AristaCare business occurred on April 21, 2016, Respondent failed to have

[1] As used herein, "GC" refers to General Counsel's Exhibits, "R" refers to Respondent's Exhibits, and "Tr" refers to the pages of the official transcript.
[2] The ACS and Attachment A were amended on the record at the start of the hearing. (Tr. 6, GC 1(d), 1(g), 2). On February 11, 2020, Counsel for the General Counsel filed a motion to correct an inadvertent transcription error contained in Attachment A.

a 401(k) plan in place and did not implement a 401(k) plan until about January 1, 2017. Judge Chu found, *inter alia*, that Respondent violated Section 8(a)(1) and (5) of the Act by refusing and failing to withhold the unit employees' 401(k) contributions and make matching contributions to the 401(k) plan and by failing to bargain with the Union regarding the unilateral termination of the LPN 401(k) plan. (GC 1(a)).[3]

In a compliance proceeding, the General Counsel has the burden of proving the amount of gross backpay due each discriminatee. *St. George Warehouse (St. George Warehouse I)*, 351 NLRB 961, 963 (2007). In *Performance Friction Corp*., 335 NLRB 1117 (2001), the Board noted that "[b]oth the Board and the Court have applied a broad standard of reasonableness in approving numerous methods of calculating gross backpay. Any formula which approximates what the discriminatees would have earned had they not been discriminated against is acceptable if not unreasonable or arbitrary in the circumstances. *La Favorita, Inc.*, 313 NLRB 902, 903 (1994), enfd. mem. 48 F.3d 1232 (10th Cir. 1995). After the General Counsel has established the amount of gross backpay due each discriminatee, the respondent then has the burden of establishing affirmative defenses to mitigate its liability, including a willful loss of earnings. *St. George Warehouse I*, supra, at 963; *Grosvenor Resort*, 350 NLRB 1197, 1198 (2007).

To appropriately remedy the type of violations in this case, the Board has consistently ordered employers that have caused employees to lose the opportunity to contribute to a 401(k) plan to pay both the employees' contributions as well as any employer matching contributions in addition to making employees whole for any lost interest earnings and by reimbursing them for other expenses. See *Republic Windows & Doors, LLC*, 356 NLRB 1449, 1450, 1452 & fn. 6 (2011) (ordering employer that created alter ego to avoid its CBA obligations and terminated unit employees to make all employee 401(k) contributions and matching contributions, and to reimburse the employees to the extent they made personal contributions to their 401(k) accounts); *Kane Steel Co.*, 355 NLRB No. 49 at 3-4 & fn. 3 (2010) (ordering employer to make all 401(k) contributions as required by the CBA where it unilaterally ceased making such contributions as required by the CBA; ordering reimbursing of employees to the extent they made personal contributions to their 401(k) accounts); *Webco Industries*, 340 NLRB 10, 12-13; & Appendix, 16-17 (2003) (ordering employer to pay both employee and employer 401(k) contributions at the level the discriminatee contributed prior to his unlawful discharge). Thus, Respondent's Counsel's argument during his opening statement that Respondent should not be responsible for making employees' lapsed contributions as well as its own matching contributions is contrary to Board precedent and must be rejected. (Tr. 13)

Consistent with Board law, Compliance Officer Fricke prepared a reasonable calculation of the employees' contributions, Respondent's matching contributions and the employees' lost investment gains, as detailed in Attachment A, as amended. As Fricke testified, these calculations were based on her review of the Board Order and the payroll

[3] Respondent did not file exceptions to the ALJD with the Board and on December 11, 2017, the Board issued an order adopting the ALJD. (GC 1(b)). On August 10, 2018, the United States Court of Appeals for the Third Circuit issued a judgment enforcing the Board Order. (GC 1(c)).

records provided by Respondent. Fricke testified without dispute that the backpay period runs from Respondent's first payroll on May 5, 2016 (payroll period ending April 30, 2016) to the January 26, 2017 payroll, when Respondent put its 401(k) plan in place and first began making 401(k) deductions from participating employees' pay. (Tr. 21-22, GC 5)[4]

Fricke further testified that the Regional Director determined that the employees entitled to the remedy calculated in the ACS are: (1) those who had participated in the prior 401(k) plan; or (2) those who were not participants in the prior plan but who signed up immediately to participate when Respondent's 401(k) plan became available in 2017. Following the Board law cited above, it is reasonable to assume that the Category 1 employees, who had participated in the prior plan, would have continued to participate in the 401(k) plan throughout the backpay period had a plan been in place and available. Fricke testified that she was able to identify nine employees[5] for inclusion in Category 1 as Respondent's May 5, 2016 payroll records show that those nine employees had deductions taken from their pay for contribution to the 401(k) plan. Respondent's following payroll showed that these same employees had the same amounts refunded. Fricke was able to determine that the deductions and refunds to these nine employees were related to the 401(k) because "S4" was the payroll code used by Respondent for both the 401(k) deductions and refunds. As for the employee in Category 2, because of her prompt enrollment as soon as Respondent's 401(k) plan became available, it is reasonable to assume that she would have participated in the 401(k) plan earlier in the backpay period had a plan been available. Enid Rivera is the only employee in Category 2 and her 401(k) deductions began during the January 26, 2017 payroll, the first payroll after Respondent's plan became available. (Tr. 22-25, GC 5, 6)

Respondent's counsel called no witnesses at the hearing and offered no alternate formulas or calculations but argued in his opening statement that no monetary remedy is warranted because it is too speculative to assume that any of the employees would have contributed to a 401(k) plan during the backpay period. Respondent specifically noted that Enid Rivera had not participated in the prior 401(k) plan, and Margaret Ogundare and Neha Patel did not re-enroll in Respondent's 2017 plan until July 27, 2017 and April 28, 2018, respectively. Respondent also argued that because Lamercie St. Juste re-enrolled at 5% contribution, her calculations should be based on 5%, and not on her prior 10% contribution rate. (Tr. 11-18) Again, Respondent's position is without merit or legal support.

In this regard, in *Lou's Transport*, 366 NLRB No. 140 (2018), the employer unsuccessfully proffered the same argument as does Respondent - that it was mere speculation that the discriminatee would have continued to contribute to the 401(k) plan. The Board in that case affirmed the ALJ's findings that "it is impossible to know whether [discriminatee] would have consistently contributed to a 401(k) fund during the backpay period, but the inference that he would do so is based upon his consistent practice of

[4] Though in its Amended Answer, Respondent generally denied these dates when a 401(k) plan was eliminated and then put in place, it is undisputed that the dates came directly from Respondent's payroll.

[5] These nine employees are Maribel Gonzalez, Faimy Louis Jean, Guernelie Mondesir, Margaret Ogundare, Neha Patel, Nidhi Patel, Gilma Rivera, Alucienne Sainte, and Lamercie St. Juste. (Tr. 23-24, GC 2)

contributing to the 401(k) fund while employed by Respondent…When, as here, a claimant's prior conduct supports an inference that they would have acted in a consistent manner, the benefit of doubt goes in favor of the aggrieved and against the wrong-doer." *Id* at slip op. at 9.

Similarly, the inference with respect to the instant nine "Category 1" employees who participated in the prior 401(k) plan is that they would have acted in a consistent manner by participating in Respondent's 401(k) plan during the relevant backpay period had a plan been available. Further, the discriminatees' choices as to re-enrollment or contribution levels **after** the backpay period are irrelevant to determine Respondent's liability during the backpay period. See *Webco Industries*, 340 NLRB 10, 12-13; and Appendix, 16-17 (2003), where the Board found the 401(k) calculations reasonable because it was based on the discriminatee's pre-discharge 12% contribution rate, and not his post-reinstatement rate of 15%. Thus, contrary to Respondent's claim that Lamercie St. Juste's calculations should be based on her contribution rate after the backpay period, it is appropriate to calculate her remedy at her prior contribution rate of 10%.

"Category 2" employee Enid Rivera is equally entitled to the same remedies as the nine "Category 1" employees. Although Rivera did not participate in the prior plan, her immediate enrollment following the availability of Respondent's January 2017 401(k) plan demonstrates that she would have enrolled during the backpay period, but for the unlawful unavailability of a plan to enroll in. Thus, because Respondent unlawfully failed to timely put a 401(k) plan in place, Rivera was deprived of an investment opportunity. Like Rivera, the discriminatees in *Alaska Pulp Corp*., 326 NLRB 522 (1998), also had no history of participating in their employer's 401(k) plan because the plan was established after the employer unlawfully failed to reinstate them, but the Board ordered the employer to compensate them for the lost opportunity to participate in the plan by establishing a plan for each discriminatee and to contribute for the discriminatees who should have been reinstated when the plan was implemented. The Board noted that this remedy "is necessary to effectuate the policies of the Act and well within our remedial authority, and is not punitive in nature." *Id*. at 526.

By unlawfully failing to provide a 401(k) plan for its employees to participate in starting from the time it acquired the AristaCare business, Respondent unlawfully denied its employees the opportunity for significant investment gains. Fricke testified that consistent with Board precedent, she attempted to use the gains information from the prior AristaCare 401(k) plan to calculate the employees' lost investment gains, but because that plan no longer existed, there were no return rates available. Instead, Fricke used the S&P 500's rates of returns (GC 7) to estimate the profits in this case because S&P 500 rates track Vanguard 500 rates, and the Board has found that using Vanguard 500's return rates was appropriate where the employer's fund no longer existed and the return rates were unavailable.[6] Respondent has presented no record evidence to demonstrate that the use of S&P 500 quarterly rates of returns results in an unreasonable approximation of the rates of returns.

[6] *Lou's Transport*, 366 NLRB No. 140, slip op. at 9.

Finally, Fricke explained in detail the method used to calculate the remedy set forth in the ACS. (GC 2) For example, the total contribution rate for Maribel Gonzalez, the first employee named in Attachment A, is 4.5% (Column D) or the sum of Gonzalez's 3% of her gross pay (Column B) plus Respondent's matching of 1.5% (Column C). 4.5% of Gonzalez's gross pay for the Second Quarter of 2016 is $392.00 (Column E). Gonzalez's lost investment for that same quarter is $7.45 (Column F) – the result of the S&P 500 quarterly returns of 1.90% x $392.00. The same method of calculation was utilized for the third and fourth quarters of 2016 and the first quarter of 2017, using the S&P 500 quarterly return rates for those quarters, yielding a total of $1,757.16 (Column M). (Tr. 27-32) This method of calculation is reasonably based and comports with applicable Board precedent.

Respondent argues that it is not liable for the 401(k) contributions and investment gains described in the ACS because, it claims, the discriminatees failed to mitigate their damages. (GC 1j, R1). Respondent's argument has no bases in law and Respondent provided no legal precedent requiring discriminatees in these circumstances to mitigate damages. To the contrary, in *KSM Industries, Inc.*, 355 NLRB 1344 (2010), enfd 682 F.3d 537 (7th Cir. 2012) the Board held that it was the employer's burden to establish any facts about interim earnings or benefits and rejected the employer's argument that a discriminatee's failure to participate in an interim employer's 401(k) plan was a failure of the duty to mitigate damages. The Board's holding is significant here because in the instant case, there was not even an interim 401(k) plan available for the discriminatees to participate in, thus Respondent's employees could not possibly have mitigated any damages. Indeed, Respondent could not provide any explanation as to how its employees could have mitigated damages given that it was Respondent's own unlawful failure to provide a 401(k) plan which prevented its employees from participating in that investment during the backpay period. Therefore, Respondent's 'mitigation of damages' defense should be rejected.[7]

For all of the foregoing reasons, as supported by established Board precedent, the Counsel for the General Counsel's method of calculating Respondent's liability herein has been shown to be appropriate and reasonable. Moreover, it is respectfully submitted that Respondent has failed to meet its burden to prove that the remedial 401(k) employee contributions, employer matching contributions and investment gains amounts set forth in the ACS and Attachment A are unreasonable. Therefore, Respondent should be ordered to pay both the employees' 401(k) contributions as well as employer matching contributions in addition to making employees whole for any lost investment gains, and any other relief deemed appropriate.

Respectfully submitted,

/s/

Sharon Chau
Counsel for the General Counsel

[7] Respondent's second defense in its amended answer, claiming to have no knowledge or information regarding the calculations detailed in Attachment A, is disingenuous and should also be rejected, considering the Region's numerous communications with Respondent's counsel regarding these calculations. (GC 1j, ¶10-13, GC 8a-c)

CERTIFICATION

This is to certify that copies of the foregoing Post-Hearing letter brief on Behalf of the General Counsel to the Administrative Law Judge have been duly served on the Administrative Law Judge, Respondent's counsel and Charging Party's counsel on February 25, 2020 as follows:

BY ELECTRONIC FILING

Honorable Benjamin Green
National Labor Relations Board
NY Division of Judges

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