

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

* * * * *
HEALTHY MINDS, INC.
and
KIMBERLY R. DEFRESE-REESE, an Individual
* * * * *

Case 15-CA-231767

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S
BRIEF IN SUPPORT OF EXCEPTIONS**

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**COUNSEL FOR THE ACTING GENERAL COUNSEL'S
BRIEF IN SUPPORT OF EXCEPTIONS**

I. INTRODUCTION AND PROCEDURAL HISTORY

Naricia K. Nelson, Counsel for the Acting General Counsel (General Counsel) in the above case, submits this Brief in Support of Exceptions. This Brief sets forth the General Counsel's position concerning the exceptions to the findings of fact and will identify those areas of the Administrative Law Judge's Decision (ALJD) in which the Administrative Law Judge (ALJ) erred as a matter of law.

The Complaint and Notice of Hearing (CNOH) alleges Healthy Minds, Inc. (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by interrogating and discharging Charging Party Kimberly Defrese-Reese (Reese) because she engaged in protected concerted activities.

On November 5, 2020, ALJ Michael A. Rosas presided over the hearing via Zoom.gov, and on December 21, 2020, ALJ Rosas issued his decision.

General Counsel now files Exceptions and this brief in support excepting to the ALJD finding Reese did not engage in protected concerted activity and dismissing the complaint. Reese engaged in protected concerted activity when she warned another employee about suspected pay violations by the Respondent. Because the ALJ erroneously determined that Reese was not engaged in protected concerted activity, General Counsel respectfully requests the Board find the Respondent violated Section 8(a)(1) of the Act by interrogating and discharging Reese and order a full remedy.

II. OVERVIEW OF THE FACTS

Reese worked as an office manager for the Respondent until her discharge on July 25, 2018. ALJD 3:29, Tr. at 32.¹ As office manager, Reese's job duties included performing receptionist type work, paying the monthly bills, billing Medicaid insurance, and completing payroll for employees working at Respondent and House of Hope, a related business operating as a therapeutic group home for boys. ALJD 3:10-11,30-31, Tr. at 32-33. Reese was supervised by program manager Dr. Nichols. ALJD 3:29-30, Tr. at 32-33.

In or about June 2018, a House of Hope employee, Sarah Hollis (Hollis) asked Reese if Dr. Nichols had the right to withhold paychecks from House of Hope employees until Dr. Nichols got reimbursed from Medicaid. ALJD 5:1-2, Tr. at 40. Reese told Hollis she would find out. ALJD 5: 1-2, Tr. at 40. Reese contacted the Wage and Hour division of the Department of Labor (DOL) to inquire whether Respondent could change employees' scheduled pay dates. ALJD 5:5, Tr. at 40. Reese learned from the DOL investigator that an employer can change a pay date at any time without advanced notice. ALJD 5:6-7, Tr. at 40. Reese also contacted the Arkansas Department of Labor and learned that an employer could make a permanent change to a pay date. ALJD 5:7-10, Tr. at 40. Thereafter, Reese told Hollis about the conversation with DOL and the Arkansas Department of Labor. ALJD 5:11-12, Tr. at 40.

Also in June 2018, Reese contacted DOL a second time to ask whether it was unlawful for House of Hope employees to be paid at the straight time rate when working over forty hours in a week. ALJD 5:15-16, Tr. at 41, Tr. at 84-85. The DOL investigator instructed Reese to have the affected employees contact DOL directly. Tr. at 41. After speaking with DOL, Reese

¹ References to the transcript appear as "Tr. at." The first number refers to the pages; the second to the lines. References to the Decision appear as "ALJD ##:##." References to General Counsel Exhibits appear as "GC-#." References to Respondent Exhibits appear as "R-#."

told House of Hope employees Hollis and Misty Stacy-Hollis (Stacy-Hollis) to have former House of Hope employees Wilson and Jones contact Reese “so Reese could give them the investigators number at Wage and Hour.” Tr. at 41. Wilson and Jones contacted Reese at different times, and Reese instructed them to call the DOL investigator. ALJD 5:24, Tr. at 41-42. Wilson and Jones also asked Reese to provide them with copies of their paystubs. After receiving permission from Dr. Nichols, Reese provided copies of the paystubs to Wilson and Jones. ALJD 5, Tr. at 41-42.

On the morning of July 25, 2018, Reese brought some supplies to House of Hope where employee Stacy-Hollis and some of the boys from the group home met Reese in the driveway to help carry the items from Reese’s vehicle. ALJD 6:7, Tr. at 47. While in the driveway of House of Hope, Reese talked with Stacy-Hollis.² ALJD 6:8, Tr. at 47, Tr. at 81. During the conversation, Reese told Stacy-Hollis to “turn in her correct hours on her timecard, because at the time, she had a kind of an hourly salary” status since House of Hope was short-staffed. Tr. at 48. Reese told Stacy-Hollis to “keep up with her timesheets, make sure to turn them in correctly, and watch her back.” Tr. at 47, Tr. at 82. Reese testified she told Stacy-Hollis to keep up with her timesheets and make sure to turn them in correctly because Reese had done “some research and found that she (Reese) could file a third-party complaint with Wage and Hour.” Tr. at 48, 20-23. Stacy-Hollis similarly testified that Reese warned “that Stacy-Hollis needed to watch her back, that she (Dr. Nichols) was sending someone into the house to keep an eye on them (Hollis and Stacy-Hollis).” ALJD 6:18-19, Tr. at 82.

² The ALJ gave more credit to Stacy-Hollis’s testimony over Reese’s version of events regarding the July 25, 2018, conversation. ALJD 6: footnote 26. However, Reese’s testimony is consistent with Stacy-Hollis’s testimony about the events of July 25, 2018, when considered in context with Reese’s testimony about her ongoing wage complaints. Additionally, the ALJ found that the testimony of Stacy-Hollis and Reese regarding the July 25, 2018, meeting was consistent. ALJD 7: footnote 28.

Additionally, Reese told Stacy-Hollis to keep copies of her timesheets because it might be needed in a wage and hour complaint with DOL. Tr. at 48. Reese also told Stacy-Hollis that the Employer had additional workplace pay issues because Reese could possibly have a race discrimination case against Respondent since she was the only office employee who did not get a raise. ALJD 6:12-13, Tr. at 49, Tr. at 82. After this conversation, Reese went on to work at the Respondent's office. Tr. 49.

A. Respondent's Meeting with Reese on July 25, 2018

That same morning on July 25, 2018, Dr. Nichols called Reese for a meeting.³ ALJD 7:4, Tr. at 49. Clinical director Clarence Thomas (Thomas) and Dr. Nichols were present. Tr. at 49. Dr. Nichols asked Reese if she was "gathering documents to make a claim against her with Wage and Hour." Tr. at 50. Dr. Nichols also asked Reese if she was stealing her documents to file a claim with the DOL. ALJD 7:5-7, Tr. at 50. Each time, Reese answered no. ALJD 7:7, Tr. at 50. Dr. Nichols asked Reese if she wanted Stacy-Hollis to come to the meeting. ALJD 7:7-8, Tr. at 50. Reese agreed, and Dr. Nichols summoned Stacy-Hollis to the office. ALJD 7:8, Tr. at 50, Tr. at 112. Dr. Nichols asked Stacy-Hollis about her conversation with Reese that morning. Tr. at 83. Stacy-Hollis told Dr. Nichols what Reese said about "everyone in the office getting a raise but her, and that [Reese] thought it was a race issue." ALJD 7:9-10, Tr. at 51, Tr. at 83, Tr. at 112. Stacy-Hollis told Dr. Nichols that Reese had been "making copies of all the staff's timesheets" and instructed Stacy-Hollis to "make timesheets as well." ALJD 7:11-13, Tr. at 83. Reese emphatically denied making copies of employees' timesheets and called Stacy-Hollis a liar. ALJD 7:13-14, Tr. at 50-51, Tr. at 84. However, Reese admitted she told Stacy-Hollis about having a race discrimination case because Reese did not get a raise. ALJD 7:14, Tr. at 51.

³ The Judge found that Reese and Stacy-Hollis gave consistent testimony as to what was said during the July 25, 2018, meeting. ALJD 7: footnote 28.

Dr. Nichols said she knew Stacy-Hollis was telling the truth because Stacy-Hollis would not have known about the raises in the office. ALJD 7:15-16, Tr. at 84. Dr. Nichols then fired Reese. ALJD 7:16-17, Tr. at 51, Tr. at 84, Tr. at 112.

B. Reese's Ongoing Wage and Overtime Complaints

A month later, on August 30, 2018, Reese, Wilson, and Jones filed a collective complaint for unpaid overtime against Respondent in the United States District Court in the Western District of Louisiana. ALJD 7:29-31, Tr. at 54, GC-5. On August 3, 2020, United States District Judge Terry A. Doughty issued a ruling granting a Motion for Summary Judgment in part and requiring Respondent pay Reese, Wilson, and Jones unpaid wages. ALJD 7:1-2, GC-6.

III. THE ALJ ERRED IN FINDING THAT REESE DID NOT ENGAGE IN PROTECTED CONCERTED ACTIVITY (Exceptions 1, 2, 3, 9, 10, 11, 12, 13, 14, 15, 16, and 17)

A. Reese Was Engaged in Protected Concerted Activities on July 25, 2018

The ALJ incorrectly found that Reese was not engaged in protected concerted activity on July 25, 2018, when she discussed filing a collective action with Wage and Hour against Respondent. ALJD 8:35-37, ALJD 9:10-15.

Although the ALJ correctly found that Reese engaged in protected activity on July 25, 2018, when Reese discussed the Respondent's payroll practices and potential wage violations with Stacy-Hollis, the ALJ erred in finding that Reese's conduct was not concerted. ALJD 9:10-15. Despite finding there was clear and consistent evidence that Reese was advocating for all hourly employees when she contacted Wage and Hour about filing a complaint against Respondent for unpaid overtime wages, the ALJ erred in finding there was no linkage to group action. ALJD 10:22-24. The ALJ determined Reese's conversation with Stacy-Hollis was not concerted because Stacy-Hollis immediately reported the conversation to Sarah Hollis, and

Hollis subsequently reported the conversation to Dr. Nichols. ALJD 10:22. Contrary to the ALJD, it is irrelevant whether Stacy-Hollis supported or agreed with Reese's motivations for filing a claim for unpaid overtime. ALJD 9:10-15. *See Unique Pers. Consultants*, 364 NLRB No. 112 (Aug. 26, 2016) (employee engaged in protected concerted activity when she discussed with her coworker the discipline she received and the unfairness of the employer's dress code); *Fresh & Easy Neighborhood Market, Inc.* 361 NLRB 151, 153-154 (2014) (finding concertedness is not dependent on a shared objective or on the agreement of one's coworkers with what is proposed). Furthermore, Reese's discussion with Stacy-Hollis was part of Reese's ongoing efforts to ensure Respondent was properly compensating employees. The record shows in June 2018, Reese had conversations with Hollis and Stacy-Hollis about her contacts with Wage and Hour and requested Hollis and Stacy-Hollis have former employees Wilson and Jones contact her. ALJD 5: 19-22, Tr. at 41. By July 25, 2018, Stacy-Hollis was well aware of Reese's efforts to investigate filing a wage complaint against Respondent. Therefore, Reese informing Stacy-Hollis on July 25, 2018, to "keep up with her timesheets, make sure to turn them in correctly, and watch her back" was consistent with and a logical outgrowth of Reese's ongoing efforts to file a wage complaint with DOL. Tr. at 47, Tr. at 82. *See Salisbury Hotel*, 283 NLRB 685, 687 (1987) (finding that an individual employee's telephone call to DOL about the employer's lunch hour policy was protected concerted activity because it was a logical outgrowth of employees' earlier complaints about the policy); *Every Woman's Place*, 282 NLRB 413, 413 (1986) (employee engaged in protected concerted activity when she called Wage and Hour about an overtime compensation issue was protected activity because it was a logical outgrowth of earlier complaints that employees made to the employer). *See also Amelio's*, 301 NLRB 182, 182 fn. 4 (1991) (the Board will find that an individual is acting on the authority of

other employees where the evidence supports a finding that the concerns expressed by the individual employee are a logical outgrowth of the concerns expressed by the group). Moreover, as the ALJ noted, Stacy-Hollis reaped the rewards of Reese's efforts when Stacy-Hollis received unpaid overtime wages after Reese followed through on filing a collective complaint with DOL on August 30, 2018. ALJD 9:10-11, GC-5.

Assuming *arguendo* that Reese's discussion with Stacy-Hollis was not concerted, the record also shows that Dr. Nichols believed Reese was engaged in concerted activity. In June 2018, after having conversations with former House of Hope employees Wilson and Jones about filing a complaint for unpaid overtime wages with DOL, Wilson and Jones asked Reese for copies of their timesheets. ALJD 5:24, Tr. at 41-42. Dr. Nichols gave Reese permission to provide Wilson and Jones with copies of their timesheets. ALJD 5:28-30, Tr. at 41-42. The very next month, during the July 25, 2018, meeting, Dr. Nichols asked Reese if Reese was "gathering documents to make a claim against her with Wage and Hour." Tr. at 50. Because Dr. Nichols asked if Reese was gathering documents to make a claim against her with Wage and Hour, it shows that Dr. Nichols believed Reese was acting in concert with other employees to file a claim against the Respondent. *See, e.g., Lou's Transport, Inc.*, 361 NLRB 1446, 1447 (2014) (finding employer unlawfully discharged employee based on belief the employee was engaged in concerted activity). Accordingly, Respondent discharging Reese because it believed she was engaging in protected concerted activity violates Section 8(a)(1) of the Act.

Additionally, although ALJ correctly found that Reese's statement to Stacy-Hollis that she may have a race discrimination claim was protected activity, the ALJ erred in finding this discussion was not concerted. ALJD 8:35-37, ALJD 10:35-36. The Board recognizes that employee complaints regarding racially discriminatory terms or conditions of employment are a

matter of mutual concern for employees. Discussions concerning an employer's alleged racial discrimination raise the same considerations identified by the Board with respect to discussion over "vital" terms and conditions of employment as a rationale for finding them inherently concerted. *See e.g., Dearborn Big Boy No. 3, Inc.*, 328 NLRB 705, 710, n.33 (1999) (alleviating racial discrimination is in the interest of all employees in the workplace and as such is protected concerted activity, irrespective of race or ethnicity of the person bringing the change); *Churchill's Restaurant*, 276 NLRB 775, 777 (1985) (employee statement protesting employer's alleged discriminatory treatment against Hispanic employees regarding terms and conditions of employment was protected concerted activity); *Vought Corp.*, 273 NLRB 1290, 1294 (1984) (employee statement was protected and concerted because it concerned employer's alleged racial discrimination); *Honeywell, Inc.*, 250 NLRB 160, 160-61, 161 n.6 (1980) (finding employee graffiti accusing the employer of racially discriminatory promotional practices was protected concerted activity). Regardless of whether Reese contemplated any further group activity in protest of the Respondent's alleged racial discrimination, Reese's conversation with Stacy-Hollis carried at least the possibility of bolstering support for future action amongst employees or encouraging others to come forward with complaints about alleged racial bias. *See Fresh & Easy*, 361 NLRB at 153 (employee engaged in concerted activity by asking coworkers for signatures on a document to be used in support of her sexual harassment claim). Again, it is irrelevant if Stacy-Hollis shared Reese's concerns about racial discrimination. *See Meyers Indus.*, 281 NLRB 882 (1986) (even activity that "involves only a speaker and a listener" qualifies for protection, because "such activity is an indispensable preliminary step to employee self-organization").

B. Reese's Protected Concerted Activities on July 25, 2018 Are A Logical Outgrowth of Her Protected Concerted Activities in June 2018 (Exceptions 3, 9, 15, and 16)

The ALJ correctly found Reese engaged in protected concerted activity when she assisted former House of Hope employees Wilson and Jones with filing claims for unpaid overtime wages. ALJD 10:16-19. *See, e.g., Reliant Energy*, 357 NLRB 2098, 2100 & n.19 (2011); *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505-506 (2d Cir. 1942). *See also, Office Depot*, 330 NLRB 640, 642 (2000) (employer unlawfully discharged employee because she commented to an employee of a third party that he was working for a scab newspaper); *New York Party Shuttle, LLC*, 359 NLRB 1046 (2013) (tour guide's email and Facebook entries appealing to employees of different employers constituted protected concerted activity).

However, the ALJ erred in finding there was no nexus between Reese's June 2018, protected concerted conduct and Respondent discharging Reese the following month on July 25, 2018. ALJD 8-9:42-44, 1-2. Reese's July 25, 2018, conversation with Stacy-Hollis was a logical outgrowth of her protected concerted conduct in June 2018. As discussed *supra*, in June 2018, Reese had conversations with Sarah Hollis and Misty Stacy-Hollis about her contacts with Wage and Hour and requested Hollis and Stacy-Hollis have former employees Wilson and Jones contact her. ALJD 5: 19-22, Tr. at 41. After having conversations with Wilson and Jones about filing complaints with DOL for unpaid overtime wages, Wilson and Jones asked Reese for copies of their timesheets. ALJD 5:24, Tr. at 41-42. Because Reese received permission from Dr. Nichols to provide Wilson and Jones with copies of their timesheets, the Respondent clearly had knowledge that Reese made copies of timesheets for Wilson and Jones. ALJD 5:28-30, Tr. at 41-42. Furthermore, it is Reese's uncontroverted testimony that on July 25, 2018, the very next month, Dr. Nichols summoned Reese for a meeting. ALJD 7:4, Tr. at 49. During the July

25, 2018, meeting, Dr. Nichols questioned Reese about “gathering documents to make a claim against her with Wage and Hour” and “gathering documents to make a claim against her with Wage and Hour.” Tr. at 50. Because Dr. Nichols questioned Reese about making copies of timesheets to file a claim with Wage and Hour, it can reasonably be inferred that Dr. Nichols assumed Reese made copies of the timesheets for Wilson and Jones with the intention of filing a complaint with DOL, which is further supported by the fact that on August 30, 2018, the very next month, Reese, Wilson, and Jones filed a collective complaint for unpaid overtime against Respondent in the United States District Court in the Western District of Louisiana. ALJD 7:29-31, Tr. at 54, GC-5. Hence, there is sufficient evidence Reese’s conduct on July 25, 2018, was a logical outgrowth of her protected concerted activity in June 2018.

IV. THE ALJ FAILED TO FIND RESPONDENT INTERROGATED REESE AND STACY-HOLLIS IN VIOLATION OF THE ACT. (Exceptions 1, 2, 4, 5, 6, and 9)

Because the ALJ erred in finding that Reese was not engaged in protected concerted activity on July 25, 2018, the ALJ incorrectly found the Respondent did not violate the Act when it interrogated Reese and Stacy-Hollis about their protected concerted activities on July 25, 2018. ALJD 9:17-18. On July 25, 2018, Dr. Nichols, the Respondent’s co-owner and highest-ranking officer, capable of issuing discipline to employees, questioned Reese and Stacy-Hollis about their protected concerted activities in a supervisor’s office and in the presence of clinical director Thomas. Dr. Nichols asked Reese if she was “gathering documents to make a claim against her with Wage and Hour.” Tr. at 50. Dr. Nichols also asked Reese if she was stealing her documents and if she was using timesheets to file a claim with the DOL. Tr. at 50. Dr. Nichols went so far as to call Stacy-Hollis in the office to elicit information about Reese’s conversation with Stacy-Hollis. Tr. at 50, Tr. at 83, Tr. at 112. Because Respondent inspired fear in the questioning by summoning Stacy-Hollis to her office in order to intimidate Reese, created an

atmosphere of unnatural formality by unnecessarily including clinical director Thomas in the meeting, and used the questions to obtain information to discharge Reese, it is indisputable that Respondent violated the Act when Dr. Nichols unlawfully interrogated Reese and Stacy-Hollis about their protected concerted activities in violation of Section 8(a)(1) of the Act. *See Unique Pers. Consultants*, 364 NLRB No. 112 (Aug. 26, 2016) (affirming ALJ's finding that the primary purpose of the questioning was to determine whether or not the employee spoke to a co-worker about her protected activity and therefore the interview amounted to an unlawful interrogation); *Salon/Spa at Boro, Inc.*, 356 NLRB 444, 459 (2010) (questioning employees about their conversations with coworkers and talking negatively about management amounted to an unlawful interrogation).

V. THE ALJ FAILED TO FIND RESPONDENT DISCHARGED REESE IN RETALIATION FOR HER PROTECTED CONCERTED ACTIVITIES (Exceptions 1, 2, 3, 7, 8, and 9.

Because the ALJ failed to find Reese engaged in protected concerted activities and Respondent interrogated Reese and Stacy-Hollis in retaliation for their protected concerted activities, the ALJ erred in finding Respondent did not discharge Reese in retaliation for her protected concerted activities. It is undisputed that Respondent knew Reese had a conversation with Stacy-Hollis about potentially filing a collective action for unpaid overtime wages and an employment discrimination claim based on race. ALJD 9-10: 45-47, 1. Additionally, the timing of Reese's discharge clearly establishes Respondent retaliated against Reese for engaging in protected concerted activities. After confronting Reese about gathering documents to make a claim with Wage and Hour and Reese's discussion with Stacy-Hollis about discrimination and overtime issues, Dr. Nichols challenged Reese about providing time records to other employees and immediately discharged Reese. ALJD 9-10:45-47,1-5, Tr. at 49-51, Tr. at 83-84, Tr. at 112.

The cause and effect prove Respondent discharged Reese in retaliation for her protected concerted activities.

Moreover, the ALJ correctly found that the Respondent's proffered reasons for discharging Reese-problems with clocking-in and clocking-out and a vaguely characterized failure to comply with company rules were inconsistent with those expressed by Dr. Nichols on July 25, 2018, specifically copying or stealing timesheets and badmouthing the company. ALJD 10: 1-5. *See Atelier Condo & Cooper Square Realty*, 361 NLRB 966, 999 (2014) ("piling on" of unsubstantiated reasons for disciplinary action taken against an employee is evidence of unlawful motivation); *Approved Elec. Corp.* 356 NLRB 238, 239 (2010) (finding employer gave shifting reasons for discharge when initial letter claimed layoff was due to staffing cuts, but at hearing the employer claimed discharge was for unrelated nondiscriminatory reason: excessive cell phone use and poor job performance). As the ALJ found, the Respondent discharged Reese after learning on July 25, 2018, that Reese was copying employees' timesheets and asked Stacy-Hollis to do the same to facilitate the filing of a collective action for overtime wages. ALJD 9-10: 47, 1. Accordingly, there is sufficient evidence the Respondent discharged Reese in retaliation for her protected concerted activities.

Based on the above, Reese's conduct on July 25, 2018, was not only protected, but also concerted as a matter of law. Accordingly, Respondent violated Section 8(a)(1) of the Act by interrogating and discharging Reese in retaliation for her protected concerted activities.

VI. CONCLUSION

For the reasons discussed above, General Counsel requests the Board reverse the findings of the ALJ that the Respondent did not violate the Act by interrogating and subsequently discharging Reese on July 25, 2018. Additionally, General Counsel seeks an order requiring

Respondent to (1) cease and desist from engaging in such conduct; (2) make Reese whole for her loss of employment with Respondent; (3) expunge the discharge notice from Reese's employment and disciplinary files; (4) offer immediate and full reinstatement to Reese 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 (5) post an appropriate notice to employees in all entities in which Dr. Nichols has an ownership interest.

Dated: February 9, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2021, a copy of the Counsel for the Acting General Counsel's Brief In Support of Exceptions was electronically filed via NLRB E-Filing system with the Board's Executive Secretary.

I further certify that on February 9, 2021, a copy of the Counsel for the Acting General Counsel's Brief In Support of Exceptions was served via e-mail on the following:

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