UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CSS HEALTHCARE SERVICES, INC.

and Case 10-CA-37628

VICTORIA TORLEY, An Individual

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF
OPPOSING RESPONDENT'S EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

The undersigned Counsel for the General Counsel files this Answering Brief pursuant to Section 102.46(d)(1) of the Board's Rules and Regulations. This Answering Brief will respond to Respondent's exceptions to the administrative law judge's findings that Charging Party Victoria Torley, herein called Torley, was an employee of Respondent, and that Torley was engaged in protected concerted activity.

I. Respondent Excepts to the Administrative Law Judge's Finding that the Charging Party Was an Employee of Respondent

Respondent asserts in its exceptions that Torley was an independent contractor and not an employee of Respondent protected by the National Labor Relations Act, herein called the Act. Respondent further argues that even if Torley was in fact an employee of Respondent, Torley is still not entitled to relief

under the Act since she was employed in the State of Georgia, an employment-at-will state.

Throughout its Exceptions and Brief in Support of its Exceptions, Respondent repeatedly misrepresented testimony in the official record to support its position that Torley was an independent contractor. The administrative law judge's finding that in late October or early November 2007, prior to working for Respondent, Torley was hired by Georgia Community Care Solutions (GCCS) is undisputed (ALJD p. 2, lines 1-3). In support of its assertion that Torley was hired as an independent contractor by GCCS, Respondent relies on Torley's testimony at transcript pages 13, 14, and 25. Torley testified that she worked for GCCS from about October or November 2007 until about April 2008 and that she was by hired by GCCS to prepare and submit applications on behalf of GCCS for the Intensive Family Intervention Program (Tr. at 13, 14). Torley also testified about her duties in preparation for a July 2008 audit of Respondent by the Georgia Department of Human Resources and an August 18, 2008, meeting Respondent had with the audit team (Tr. at 25). Torley's testimony on those transcript pages does not address Torley's employment status with GCCS as asserted by Respondent. The administrative law judge noted that Respondent focused a substantial amount of time on Torley's initial employment with GCCS, even though GCCS was not a party to the proceeding. The administrative law judge found Torley's status with GCCS irrelevant in view of the fact Torley was employed by Respondent at the time of her discharge (ALJD at 10, lines 25-28).

The administrative law judge found that at the time of her discharge, Torley was a full-time employee of Respondent and, like Respondent's other employees, Torley had to account for her time and did not receive health insurance benefits. The administrative law judge also found that although Torley worked with little supervision, this was due more to the professional nature of Torley's work (ALJD p. 10, lines 28-35). Respondent asserts that Torley's employment with Respondent was on a part-time basis, and that Torley understood that her employment with Respondent was part-time, with no benefits, set work schedule, or supervision. In support of these assertions, Respondent erroneously relies upon Torley's testimony on transcript page 17; page 53, lines 7-10; page 96; and page 97, lines 13-19.

Torley testified that during her first month working for Respondent, she worked a part-time schedule but that subsequently her work hours increased to up to 40 hours per work week and some Saturdays (Tr. at 17, 96). Torley further testified about a September 3, 2008, conversation she had with Respondent's Chief Executive Officer John Agulue, herein referred to as CEO Agulue. Specifically, Torley testified that in response to CEO Agulue's comment on September 3, 2008, that Respondent did not need a full-time behavioral specialist and therefore Torley's services were no longer needed, she reminded CEO Agulue that, although Torley was not performing behavioral specialist duties for Respondent on a full-time basis, she performed additional duties beyond those of a behavioral specialist (Tr. at 53). Torley testified about her work

schedule and supervision while employed by GCCS, not during her employment with Respondent (Tr. at 97).

Respondent notes that taxes were not deducted from Torley's pay and that she received no benefits while working for Respondent. In support of this position, Respondent relies on Torley's testimony at transcript page 107, lines 15-23 and page 57, lines 12-14. Torley's testimony relied upon by Respondent concerned a September 3, 2008, electronic mail that Torley sent to Respondent regarding her job title only, as well as her attendance at Respondent's staff meetings while she worked for GCCS (Tr. at 107, 57). There is no reference to tax deductions in this referenced record testimony.

Respondent alleges that Counsel for the General Counsel failed to present any witnesses to corroborate Torley's testimony. However, as noted by the administrative law judge, the testimony of the General Counsel's witnesses Jean Manko, Camille Richins, and Troy McQueen all corroborate various aspects of the Charging Party's testimony, as well as refute many aspects of CEO Agulue's testimony (ALJD p. 5, lines 16-20; p. 7, lines 19 and 20; p. 8, lines 9-15; p. 9, lines 29-38; p. 11, lines 44-48; p. 12 line 1). In fact, Respondent did not present any witnesses to corroborate any of CEO Agulue's relevant testimony.

Respondent argues that because the State of Georgia is an employment-at-will state, it is irrelevant whether Torley was an employee of Respondent or an independent contractor, and that Respondent was therefore free to discharge Torley for any reason, regardless of motive. Respondent asserts that the State of Georgia has never recognized the National Labor Relations Act as an

exception to its labor laws, and therefore the administrative law judge erred in applying the Act to this case.

The United States Supreme Court has consistently held that the Act preempts state law where the activities in question are protected by Section 7 of the Act or where the activities constitute an unfair labor practice under Section 8 of the Act. The purpose of the preemption doctrine is to prevent conflict between state and local regulation and Congress' integrated scheme of regulation. Therefore, state jurisdiction must yield in such circumstances because the National Labor Relations Board is invested with the exclusive power to adjudicate conduct which is clearly, or even arguably, protected or prohibited by the Act. *Trades Council v. Associated Builders,* 507 U.S. 218 (1993); *Building Trades Council v. Garmon*, 359 U.S. 236, (1959); *Garner v. Teamsters Union*, 346 U.S. 485 (1953). Thus, Respondent's argument that state law is controlling is without merit.

II. Respondent Excepts to the Administrative Law Judge's Finding that the Charging Party Was Engaged in Protected Concerted Activities

Respondent argues that Torley was not engaged in protected concerted activities because she did not communicate her concerted activities to any outside entities. However, Respondent's reliance on *Eastex Inc. v. NLRB*, 437 U.S. 556 (1978), is misplaced. In *Eastex*, the Court rejected the Petitioner's argument that employees lose the Act's protections when they utilize channels outside the employee-employer relationship to attempt to improve their working conditions. The Court in that case did not require, or even suggest, that

employees are required to utilize outside channels in order to invoke the Act's protection.

The administrative law judge credited Torley's testimony that employees were not satisfied with certain terms and conditions of their employment, that their concerns were communicated to management, and Torley's uncontroverted testimony that just days prior to her discharge, she notified Respondent that she was invoking whistleblower status and that the employees were a collective bargaining unit. The administrative law judge concluded that the evidence presented was sufficient to establish that Respondent, by its acknowledged responses to Torley's obvious protected concerted activity, at least believed that Torley was involved in protected concerted activity, which motivated Respondent to discharge her (ALJD p. 11 lines 15 -36). In view of the fact that the administrative law judge's findings if fact and conclusions of law are supported by the record evidence, and Respondent's exceptions to these findings are based on its misinterpretation of the record evidence and inapplicable analysis of the case law, there is no basis for reversing the administrative law judge's finding that Respondent violated Section 8(a)(1) of the Act by discharging Torley.

Respectfully submitted,

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Dated at Atlanta, Georgia
this 13th day of November, 2009

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was electronically served upon all parties on this, the 13th day of November, 2009:

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