Jules V. Lane, D.D.S., P.C. *and* Carol Goldkuhle. Case 29-CA-8372

June 11, 1982

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On December 23, 1981, Administrative Law Judge D. Barry Morris issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order,[2] as modified herein.

The Administrative Law Judge found, and we agree, that Dr. James Parks acted as Respondent's agent when he unlawfully announced, 2 weeks after Respondent's recognition of the Union at the Commack facility, that employees at that facility no longer would be permitted to smoke or eat in the lounge or to make personal telephone calls. However, the Administrative Law Judge also found that Parks was not acting as Respondent's agent during his encounters with Commack employees Carol Goldkuhle and Teresa Harsh, and he therefore concluded that Parks' conduct with respect to those employees did not violate Section 8(a)(1). In agreement with the General Counsel's exceptions, we find, for the reasons below, that Parks' conduct was attributable to Respondent and was violative of the Act.

The record discloses that, soon after the recognition of the Union, Respondent requested that dental hygienist Goldkuhle become an independent contractor. Parks subsequently advised Goldkuhle to contact another dental hygienist to whom the same request had been made. Goldkuhle called the employee at home, and they discussed the consequences of becoming an independent contractor as well as the recent decision of the employees at the Commack facility to become unionized. On the following day Parks confronted Goldkuhle and said, "I understand you discussed the union activities on the premises and I have no choice but to tell Dr. Lane to have you fired." Goldkuhle acknowledged having spoken to the other employee about the Union, but asserted that they were both at home at the time of the conversation. Upon hearing that the conversation did not take place on Respondent's premises, Parks responded, "Oh, well in that case there's nothing I can do about that."

The Administrative Law Judge found that, shortly after the Union was recognized, Parks approached employee Teresa Harsh and asked her who started the Union and why the employees wanted the Union. Several days later, Parks asked her the same question again and commented that choosing the Union was a "bad move" and that the employees "should never have gotten involved."

The Administrative Law Judge found that Parks was not acting as Respondent's agent when he engaged in the above conduct. He found that Parks' function was to "help straighten out the office," and that such a function would not encompass interrogating or threatening employees.

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

In the absence of exceptions, we adopt, *pro forma*, the Administrative Law Judge's finding that Respondent did not unlawfully solicit employees to repudiate the Union.

Although the Administrative Law Judge did not specifically find that Respondent's asserted reason for Goldkuhle's discharge was a pretext, it is clear from his analysis that he implicitly made such a finding. Thus, he completely rejected Respondent's contention that it discharged Goldkuhle pursuant to its decision to phase out its dental hygienist program, and he concluded that Goldkuhle's discharge was prompted by her union activities. Where, as here, the asserted reason for a discharge is found to be a pretext, Member Jenkins would not apply the analysis set forth in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). In Member Jenkins' view, that analysis is applicable only in cases involving mixed motives, where a genuine lawful reason and a genuine unlawful reason exist, and it is misleading to apply it in cases like this one.

In finding that Respondent had knowledge of Goldkuhle's union activities, the Administrative Law Judge relied on the "small plant" doctrine and cited *Borin Packing Co., Inc.*, 208 NLRB 280, 287, fn. 31 (1974). We note initially that *Borin Packing Co.* does not support the Administrative Law Judge's finding, since in that case the Board reversed a determination that the employer had unlawfully discharged two employees. The Administrative Law Judge there had relied on the small-plant doctrine, but the Board merely assumed, *arguendo*, that the doctrine was applicable, while finding the evidence insufficient to establish an unlawful motive. 208 NLRB at 281. In any event, we find it unnecessary to rely on the small-plant doctrine in the instant case. Where there is no direct evidence of knowledge, that doctrine permits the Board to infer from the size of the plant and other circumstances that an employer was aware of an employee's union activities. See, e.g., *Florida Cities Water Company*, 247 NLRB 755, 756 (1980); *Marsden Electric Company, Inc.*, 226 NLRB 1097, 1099 (1976); *Wiese Plow Welding Co., Inc.*, 123 NLRB 616, 617-618 (1959). Here, there is substantial direct evidence that Respondent was aware of Goldkuhle's union activities. Supervisor Eleanor Romano and Dr. Lawrence Scharf, the director of the Commack facility, both admitted to Goldkuhle that she was discharged because of such activities, and it is established that Romano said to Goldkuhle shortly after the posting of the recognition agreement, "I understand you started a union." In view of the circumstances, we find that reliance on the small-plant doctrine is unnecessary to establish Respondent's knowledge.

[2] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

After a careful review of the record, we find that the Administrative Law Judge erred in failing to attribute Parks' conduct to Respondent. In ascertaining Parks' agency status, we must determine whether, under all of the circumstances, employees would reasonably believe that Parks was reflecting company policy and speaking and acting for management by questioning Harsh and by telling Goldkuhle that he would attempt to have her fired.[3] The circumstances to be considered included Parks' position and duties[4] as well as the context in which his conduct occurred.[5]

In the instant case, as found by the Administrative Law Judge, Parks was hired as an assistant to Dr. Bruce Safran, Respondent's dental director. Parks traveled among Respondent's various offices, serving as Safran's "eyes and ears" and ensuring that employees adhered to the guidelines established by the main office. As the Administrative Law Judge also found, one of Parks' functions was to "help straighten out" the Commack facility. Parks' responsibilities, therefore, served to set him apart from other employees and to leave no doubt that he enjoyed a distinct position.

In examining the context of Parks' conduct, we note that his encounters with Goldkuhle and Harsh were consistent with other unfair labor practices committed by Respondent. Thus, it is noteworthy that Parks' questioning of Harsh was similar in substance to the other unlawful interrogations by Respondent's supervisors, who questioned employees as to what the Union was doing and why they had selected the Union.[6] The other interrogations occurred shortly after the Union was recognized and, therefore, coincided in time with Parks' inquiries. Further, Parks' threat to discharge Goldkuhle proved to be an accurate prediction of the consequences of engaging in union activities, in view of Goldkuhle's unlawful discharge only a few weeks later.[7] These circumstances strongly suggest a connection between Respondent's unlawful activity and Parks' conduct. Finally, we find it especially significant that Parks directly participated in other unlawful activity by announcing, in the presence of Supervisors Romano and Scharf, that employees no longer would be permitted to smoke or eat in the lounge or to make personal telephone calls. We agree with the Administrative Law Judge that employees would reasonably believe that Parks, in making the announcement with Respondent's representatives present, was reflecting company policy and speaking and acting for management. However, in view of Parks' duties and the context of his conduct, we see no reason to draw a distinction between that incident and his encounters with Goldkuhle and Harsh. We therefore find that employees could reasonably believe that Parks was reflecting company policy and speaking and acting for management when he threatened Goldkuhle with discharge and interrogated Harsh about the Union. Consequently, we further find that Respondent violated Section 8(a)(1) in connection with those incidents.

AMENDED CONCLUSIONS OF LAW

Insert the following as paragraph 3 and renumber the subsequent paragraphs accordingly:

"3. By threatening to discharge Carol Goldkuhle if she engaged in union activities, Respondent has violated Section 8(a)(1) of the Act."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Jules V. Lane, D.D.S., P.C., Commack, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 1(a) and reletter the subsequent paragraphs accordingly:

"(a) Threatening to discharge employees if they engage in union activities."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT threaten to discharge employees if they engage in union activities.

[3] *Community Cash Stores, Inc.*, 238 NLRB 265 (1978); *Aircraft Plating Company, Inc.*, 213 NLRB 664 (1974).

[4] *American Lumber Sales, Inc.*, 229 NLRB 414, 420 (1977); *Samuel Liefer and Harry Ostreicher, a Copartnership, d/b/a River Manor Health Related Facility*, 224 NLRB 227, 235 (1976); *Aircraft Plating Company, Inc., supra.*

[5] *Wm. Chalson & Co., Inc.*, 252 NLRB 25, 34 (1980); *Community Cash Stores, Inc., supra; American Lumber Sales, Inc., supra* at 420; *Aircraft Plating Company, Inc., supra.*

[6] See *Wm. Chalson & Co., Inc., supra* at 34; *American Lumber Sales, Inc., supra* at 420; *Aircraft Plating Company, Inc., supra.*

[7] See *Community Cash Stores, Inc., supra* at 266; *Aircraft Plating Company, Inc., supra.*

WE WILL NOT interrogate employees concerning their union activities.

WE WILL NOT impose stricter work rules because of employees having engaged in union activities.

WE WILL NOT discriminatorily discharge employees for activities protected by Section 7 of the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL offer Carol Goldkuhle full and immediate reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without loss of seniority or other rights or privileges previously enjoyed, and WE WILL make her whole for any loss of earnings she may have suffered by reason of the discrimination against her, with interest.

JULES V. LANE, D.D.S., P.C.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge: This case was heard before me in New York City on July 13, 29, 30, and 31, 1981. The charge was filed on October 10, 1980, and amended on October 29, 1980. The complaint was issued on December 10, 1980, alleging that Jules V. Lane, D.D.S., P.C. (Respondent), violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. A brief was filed by the General Counsel.[1]

Upon the entire record of the case, including my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a New York corporation, with its principal office and place of business in Hicksville, New York, is engaged in providing dental and related services. During the 12 months preceding the issuance of the complaint, Respondent's gross revenues were in excess of $250,000. During the same period Respondent purchased, directly and indirectly, and caused to be delivered to its New York facilities, goods valued in excess of $50,000, from suppliers located outside the State of New York. Respondent admits that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and I so find.

II. THE LABOR ORGANIZATION INVOLVED

Local 144, Hotel, Hospital, Nursing Home and Allied Health Services Union, Division 100, SEIU, AFL-CIO (Local 144), is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The amended complaint[2] alleges that Respondent violated Section 8(a)(1) and (3) of the Act by discharging its employee, Carol Goldkuhle, because of her union activities, by interrogating its employees concerning their union activities; by imposing stricter work rules; and by soliciting employees to repudiate Local 144. Respondent denied the allegations.

The issues are: (1) Did Respondent discharge its employee, Carol Goldkuhle, because of her union activities; (2) did Respondent interrogate its employees concerning their union activities; (3) did Respondent impose stricter work rules upon its employees; and (4) Did Respondent solicit employees to repudiate Local 144.

B. *The Facts*

1. Background

Carol Goldkuhle began her employment with Respondent as a dental hygienist in June 1979. She worked in Respondent's Commack office which employed approximately 16 persons other than the dentists and the office manager. In March 1980[3] she discussed with a representative of Local 144 the possibility of bringing a union into the Commack office. A meeting was set up during the second week of March at the Candlelight Diner in Commack, which was attended by approximately 8 to 10 employees. At the meeting, the Union was discussed, authorization cards were distributed, and Goldkuhle was selected as the union representative. During the next several days Goldkuhle distributed authorization cards to those employees who had not attended the meeting.

On April 7 Respondent entered into a recognition agreement, recognizing Local 144 as the exclusive bargaining representative of the employees at the Commack facility. On the same day, a copy of the recognition agreement was posted on the bulletin board of the facility.

2. Discharge of Goldkuhle

Several days after the posting of the agreement, Goldkuhle was called by Dr. Bruce Safran, dental director of Respondent. Goldkuhle credibly testified that Safran asked her if she would "sign on as an independent contractor." Goldkuhle told Safran that she questioned the

[1] In addition, Respondent submitted a letter dated September 25, 1981, which I have duly considered.

[2] At the hearing General the Counsel moved to amend the complaint. The motion was granted.

[3] All dates refer to 1980 unless otherwise specified.

legality of that arrangement and she would "have to get some advice on it and get back to him." About a week later, the office manager, Eleanor Romano, told Goldkuhle that Safran was waiting for her answer and that she should telephone him. Goldkuhle testified that she called Safran and told him:

> I thought about this. I wasn't sure of the legality of it. I want to be considered part of the team here, and at this point we had a union and that he should have been talking with my rep and not to me, and he just said, "Well, we'll see about that."

On April 21, several days after that conversation, Safran telephoned Goldkuhle at home, on her day off, and told her "Carol, we don't want you to come back to work anymore."

Approximately 10 minutes after the conversation with Safran, Romano called. Goldkuhle credibly testified that Romano said the following: "Carol, Dr. Safran told the girls he was firing you. I'm very sorry. I want you to know I had nothing to do with it." And she said, "You know, it was because of the union activities."

Several days later Goldkuhle went to the Commack office and spoke with Dr. Lawrence Scharf, the director of the office. Goldkuhle credibly testified that she told Scharf "I think [the discharge is] because of the union." Scharf replied, "So do I."

Respondent contends that Goldkuhle was discharged because Respondent was in the process of phasing out its dental hygienists. However, the record does not support Respondent's contention. Safran conceded that Goldkuhle was the only hygienist who was fired. While several hygienists in some of Respondent's other offices left their positions, this was done on their own accord. In addition, while Goldkuhle was initially employed on a part-time basis, on February 26, less than 2 months prior to her discharge, she was asked to work full time. Theresa DeGolyer credibly testified that Goldkuhle was maintaining a heavy schedule and had approximately 4 weeks' advance bookings at the time of her discharge. With respect to Goldkuhle being asked to become an independent contractor, Safran testified that he discussed this with her in June 1979, at the time of her initial interview. While this may be the case, there is nothing in the record to indicate the matter was again discussed with Goldkuhle prior to Safran's call to her, soon after the posting of the recognition agreement.

3. Interrogation

Goldkuhle credibly testified that after the recognition agreement was posted, Romano said to her, "I understand you started a union. Will you be getting more benefits?" DeGolyer similarly testified that 2 days after the recognition agreement was posted Romano said to her, "Come on Terri, tell me about this Union." DeGolyer also testified that during the third week of May Scharf said to her and two other employees, "Girls, I don't know why you started this whole union business." Teresa Harsh corroborated this testimony. She credibly testified that Scharf asked her who started the Union. Similarly, Linda Mistretta credibly testified that soon after the recognition agreement was posted Scharf asked her "what's going on with the Union," and "why is the Union coming in." Mistretta testified that several weeks later Scharf again asked the same questions. Scharf conceded that on two different occasions he asked Mistretta "what was going on" with the Union.

4. Announcement of stricter work rules by Parks

Safran testified that Dr. James Parks was his assistant who was hired in December 1979. It was Parks' function to travel to the various offices, observe office procedures and "see that the guidelines that we set down from the main office were being adhered to." Safran testified that Parks functioned as his "eyes and ears." Goldkuhle testified that Parks was "Safran's representative in the Commack office."

DeGolyer credibly testified that 2 weeks after the recognition agreement was posted, a meeting of approximately eight employees took place with Parks, in the presence of Romano and Scharf. Parks announced at this meeting that there was to be no more smoking or eating in the lounge. DeGolyer also credibly testified that Parks told the employees that there were to be no more personal phone calls. Harsh corroborated this testimony. DeGolyer credibly testified that these instructions had not been given before the recognition agreement was posted. Similarly, Harsh credibly testified that these were "new rules that were instituted" after the recognition agreement was posted.

Safran conceded that he instructed Parks to enforce the regulation that personal phone calls were to be made on the phone downstairs and that there was to be no eating or smoking in the patient areas. While Safran testified that these were standing regulations, I credit the testimony of DeGolyer and Harsh that the regulations, if indeed there had been any, had not been previously enforced. The enforcement came only after the posting of the recognition agreement.

5. Solicitation to repudiate Local 144

The amended complaint alleges that Respondent solicited its employees to repudiate Local 144. In this regard, Safran credibly testified as follows:

> Terry [Harsh] came to me in October of 1980 and told me that she was dissatified with the union, that she didn't know what they were doing for them and she said she had called up a couple of times and left messages and no one ever called her back, and she didn't know what was going on with the union, whether they were coming in or not. . . . She asked me how she could get out of it. If there was a way [she] could get out of the union.

Safran testified that he told Harsh that he did not know but that he would ask his attorney. Safran testified that he then asked his attorney and subsequently supplied Harsh with the number of the "Information Officer" of the NLRB. Harsh, for the most part, corroborated Safran's testimony. She testified that she told Safran that she was "disgusted with the Union" and that Safran gave

her the telephone number of the "Information Officer." Harsh testified that she spoke to the "Information Officer" who told her that the way to get out of the Union was to send a letter signed by the employees stating that they did not want the Union to represent them. Harsh testified that such a letter was never sent and Safran never approached her and asked her why this was not done.

6. Other allegations

The amended complaint also alleges that Respondent threatened to discharge an employee. In this connection Goldkuhle testified that after she was asked to become an independent contractor, Parks told her to call the dental hygienist in the Hicksville office and discuss the matter with her. After having such a discussion with the other hygienist, Goldkuhle credibly testified that Parks confronted her and stated: "I understand you discussed the union activities on the premises and I have no choice but to tell Dr. Lane to have you fired." After telling Parks that she spoke to the other hygienist from her home, Parks responded, "Oh, well in that case there's nothing I can do about that."

In her brief, counsel for the General Counsel points to an incident involving Parks as another example of alleged unlawful interrogation. Harsh credibly testified that Parks asked her "who's idea was it to start the union and why we wanted the union." Harsh further credibly testified that several days later Parks again questioned her concerning the Union and "he suggested that it was a bad move, that we should never have gotten involved."

C. *Discussion and Analysis*

1. Supervisory status

At the hearing, Respondent stipulated that Safran and Scharf are supervisors within the meaning of Section 2(11) of the Act. However, Respondent contends that neither Romano nor Parks is a supervisor within the meaning of the Act.

a. *Romano*

Goldkuhle testified that Eleanor Romano had the position of office manager and in that capacity she hired employees, she fired her daughter Tina Goldkuhle, and assigned work. DeGolyer similarly testified that Romano hired employees and assigned work. Harsh testified that it was Romano who discharged Tina Goldkuhle, and that Romano assigned work and disciplined employees. The parties stipulated that Romano was paid $250 per week whereas the salaries of the other employees ranged from $117.80 to $175 per week. Based on the evidence in the record it is clear that Romano is a supervisor within the meaning of Section 2(11) of the Act.

b. *Parks*

The amended complaint alleges that Parks was either a supervisor or agent of Respondent. Concerning the allegation that he was a supervisor, I find that the record does not sustain a finding that Parks was a supervisor within the meaning of the Act. DeGolyer testified that she did not consider Parks a "supervisor." Harsh testified that Parks did not hire employees, fire them, or assign work. Safran testified that Parks did not hire or fire employees. Accordingly, I find that Parks was not a supervisor within the meaning of Section 2(11) of the Act.

With respect to the question of whether Parks was an "agent" of Respondent for certain purposes, the Board has stated the criteria to follow in determining agency. In *Community Cash Stores, Inc.*, 238 NLRB 265 (1978), the Board stated:

> [W]e rely on the substantial evidence in the record indicating that Clowney had the apparent authority to act for Respondent in its antiunion campaign. The critical issue in making this determination is whether under all the circumstances the employees would reasonably believe Clowney was reflecting company policy and speaking and acting for management.

Harsh testified that Parks was in the Commack office "to help straighten out the office." As discussed earlier, Safran testified that Parks functioned as his "eyes and ears" and that it was Parks' assignment to see that guidelines that were set down in the main office were "being adhered to."

I find that Parks' announcement that there was to be no more smoking or eating in the lounge, and no more personal phone calls, was in his capacity as "agent" of Respondent. This announcement was made in the presence of Romano and Scharf, both supervisors. Parks was regarded as "Safran's representative in the Commack office." In addition, Safran conceded that he instructed Parks to enforce the regulation that personal phone calls were to be made only on the phone downstairs and that there was to be no eating or smoking in the patient areas. Accordingly, with respect to any announcements that Parks made concerning office procedures, I believe that the employees could reasonably believe that Parks was "reflecting company policy and speaking and acting for management." See also *Wm. Chalson & Co., Inc.*, 252 NLRB 25, 33–34 (1980).

Concerning Parks' threat to discharge Goldkuhle and his questioning Harsh concerning her union activities, I find that he was acting independently and not as an "agent" of Respondent. As previously noted, it was Harsh's understanding that Parks was sent to "help straighten out the office." While this could well have encompassed such matters as eating, smoking, and personal phone calls, it would not in the normal course include threats to discharge or questioning as to union activities. In this respect, I do not believe that the evidence in the record indicates that Parks had the "apparent authority to act for Respondent."[4]

[4] Accordingly, the allegations that Respondent violated the Act through Parks' threatening to discharge an employee and through Parks' interrogation of an employee concerning her union activities are dismissed.

2. Discharge of Goldkuhle

Three weeks after the posting of the recognition agreement, Goldkuhle was discharged. Ten minutes after Goldkuhle received the telephone call from Safran discharging her, she received another telephone call from the office manager, Romano, who conceded that the discharge was because of Goldkuhle's union activities. Likewise, several days later, when Goldkuhle returned to the Commack office, Scharf, the director of the office, agreed with Goldkuhle's assessment that the discharge was because of her union activities. Goldkuhle was the union representative in the organizing campaign. It was she who distributed authorization cards to those employees who had not attended the meeting at the Candlelight Diner. It is clear that Respondent knew of Goldkuhle's activities. Soon after the recognition agreement was posted, Romano said to Goldkuhle, "I understand you started a union." In any event, inasmuch as there were only approximately 16 employees in the Commack facility, the Board's "small plant" doctrine would apply. *Borin Packing Co., Inc.*, 208 NLRB 280, 287 fn. 31 (1974).

The timing of the discharge is closely related to the posting of the recognition agreement, the discharge having come just 3 weeks after the posting of the agreement. Concerning animus and the reason for the discharge, both Scharf and Romano conceded that Goldkuhle was discharged because of her union activities.

The Board has recently restated the test to be applied in so-called mixed-motive cases. *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). The Board requires that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Once this is established, the burden shifts to the employer to demonstrate that the "same action would have taken place even in the absence of the protected conduct." I believe that the record demonstrates that the General Counsel has made a *prima facie* showing that union activity was a motivating factor in the discharge.

Respondent contends, however, that it was in the process of phasing out its dental hygienists. As discussed earlier, Goldkuhle was the only hygienist to have been fired. In addition, less than 2 months prior to her discharge, her position was changed from part time to full time. Furthermore, the record indicates that she was maintaining a heavy schedule and had approximately 4 weeks' bookings at the time of her discharge. While in the long run Respondent may have wished to entirely phase out its dental hygienist program, it is clear that Goldkuhle's discharge on April 21 was not because Respondent had then concluded that it wished no longer to have a dental hygienist at the Commack facility. Instead, the discharge on that particular day was because of Goldkuhle's union activities.

Accordingly, I find that Respondent has not demonstrated that the "same action would have taken place even in the absence of the protected conduct." I conclude, therefore, that by discharging Goldkuhle for her union activities Respondent has violated Section 8(a)(3) and (1) of the Act.

3. Interrogation

I have credited DeGolyer's testimony that 2 davs after the recognition agreement was posted, Romano said to her, "Come on Terri, tell me about this union." I have also credited DeGolyer's and Harsh's testimony that during the third week of May Scharf said to them, "Girls, I don't know why you started this whole union business." Furthermore, I have credited Mistretta's testimony that soon after the recognition agreement was posted Scharf asked her "what's going on with the Union," and "why is the Union coming in." I find that these questions, by supervisory personnel, constituted coercive interrogation, in violation of Section 8(a)(1) of the Act. See *Williamsport Plumbing and Heating Co., Inc.*, 253 NLRB 883 (1980); *Americana Health Care Corporation of Ohio d/b/a Barberton Manor*, 252 NLRB 380 (1980).

4. Stricter work rules

I have found that soon after the recognition agreement was posted, employees were instructed that there was to be no more smoking or eating in the lounge and no more personal phone calls. While there may have been standing regulations with respect to these matters, the regulations had not been previously enforced. Enforcement of these rules came only after the posting of the recognition agreement.

In *Larsen Supply Co., Inc.*, 251 NLRB 1642 (1980), the Board stated:

> It is well settled that an employer violates . . . the Act when it initiates changes in employees' working conditions in order to retaliate against them for selecting a union as their bargaining representative.

I find that the imposition of the stricter work rules was in retaliation for the employees' selecting the Union as their representative and came soon after the posting of the recognition agreement. This constitutes a violation of Section 8(a)(1) and (3) of the Act.

5. Solicitation to repudiate the union

The amended complaint alleges that Respondent solicited employees to repudiate Local 144. In this regard the record demonstrates that Harsh approached Safran and told him that she was "dissatisfied with the Union" and asked if there was a way she "could get out of the Union." Safran told Harsh that he did not know but that he would consult his attorney. After consulting his attorney, he supplied Harsh with the telephone number of the NLRB's "Information Officer." Safran never inquired as to what steps, if any, Harsh took with respect to her request.

Section 8(a)(1) of the Act provides that it is an unfair labor practice for an employer to interfere with the rights guaranteed to employees in Section 7. Section 7 gives employees the right to select or reject a bargaining representative. The question is whether furnishing the telephone number of the NLRB's "Information Officer," where an employee stated that she was "dissatisfied with

the Union" and asked "how she could get out of it," constitutes interference violative of the Act.

In *Tartan Marine Company*, 247 NLRB 646 (1980), the company posted a "Notice To Employees" which informed them that they had the right to cancel their union cards and have them returned. The notice further advised the employees that "if they decided to get their cards back, they should write a letter to the Union with a copy to the Board asking that their cards be cancelled and returned to them." The notice set forth the address of the union representative and Region 11 of the Board. The Board affirmed the Administrative Law Judge's decision, which stated, in pertinent part (at 656):

> [T]he mere publication to employees of the addresses of the Union and Region 11 is not, in my opinion, unlawful encouragement or solicitation of employees to cancel their union cards, given their right to do so, and the employer's right to so state.

I believe the instant proceeding is analogous to the situation in *Tartan Marine*. Respondent was told by an employee that she was dissatisfied with the Union and asked how she could get out of it. Respondent merely gave the employee the telephone number of the NLRB Regional Office. I do not believe that this constituted interference with the employee's Section 7 rights.

In support of her position, counsel for the General Counsel has cited *Cumberland Shoe Co.*, 160 NLRB 1256 (1966). I believe the facts in that case, however, are clearly distinguishable from the instant proceeding. In *Cumberland Shoe* the company took an active role in trying to get the employees to withdraw from the Union. As the Board stated (at 1259):

> We think that Respondent violated Section 8(a)(1) when Bransford went beyond his legal advice and assisted employees to the considerable extent that he did in attempting to withdraw from the Union. Once an employee entered Bransford's office, Bransford literally took command of the situation and shepherded the employee through the process of drafting and mailing the withdrawal letter, and then informing the employee that a copy of the letter would be kept in his personnel file. Inherent in the situation was, in our view, an influence exerted by Bransford upon such employees to complete the process of withdrawing from the Union which interfered with the rights of the employees not to do so if, at any point, they chose not to complete the process.

Accordingly, I believe that Respondent did not interfere with the employees' Section 7 rights and this allegation is dismissed.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By discharging Carol Goldkuhle for activities protected by the Act, Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(3) and (1) of the Act.
4. By interrogating employees concerning their union activities, Respondent has violated Section 8(a)(1) of the Act.
5. By enforcing stricter work rules because of the employees' union activities, Respondent has violated Section 8(a)(3) and (1) of the Act.
6. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
7. Respondent did not violate the Act in any other manner alleged in the complaint.

The Remedy

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

Respondent, having discharged Carol Goldkuhle in violation of the Act, I find it necessary to order Respondent to offer her full reinstatement to her former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of earnings she may have suffered from the time of her termination to the date of Respondent's offer of reinstatement.

Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[5]

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended.

ORDER[6]

The Respondent, Jules V. Lane, D.D.S., P.C., Commack, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees concerning their union activities.

(b) Changing employees' working conditions because of their union activities.

(c) Discharging employees for activities protected by Section 7 of the Act.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

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[5] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716, 717-721 (1962).

[6] In the event no exceptions are filed as provided in Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

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

(a) Offer Carol Goldkuhle immediate and full reinstatement to her former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of earnings, in the manner set forth in the section above entitled "The Remedy."

(b) Post at its facility in Commack, New York, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that those allegations of the complaint as to which no violations have been found are hereby dismissed.

[7] In the event that 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."