Brunner Engineering & Manufacturing Company, d/b/a Monico Manufacturing & Supply Company, Inc. *and* David Randolph Armstrong. Case 16-CA-10342

12 September 1983

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 20 December 1982 Administrative Law Judge Stephen J. Gross issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief.

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.

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 and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] The General Counsel 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*, 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.

We agree with the Administrative Law Judge's finding that Respondent demoted employee Armstrong from a welder's position to a helper's position because of Armstrong's assertion that welding duties were aggravating a hand injury. We also agree that Respondent later terminated Armstrong because of poor performance and because he asserted that the helper's duties also aggravated his hand injury. In these circumstances, in agreeing with the Administrative Law Judge's findings that Respondent did not violate either Sec. 8(a)(1) or (4) as alleged, we find it unnecessary to pass on his finding that the filing of a worker's compensation claim is protected concerted activity.

DECISION

STEPHEN J. GROSS, Administrative Law Judge: On March 9, 1982, Respondent Brunner Engineering & Manufacturing Company, d/b/a Monico Manufacturing & Supply Company, Inc. (hereinafter Monico or the Company) was advised by the Oklahoma workers' compensation court that one of Monico's employees, David Armstrong, had begun an action against Monico in that court. Six days later Monico demoted Armstrong from welder to helper. That led Armstrong to file an unfair labor practice charge on March 19, 1982, against Monico claiming that Company had demoted him because of his workers' compensation litigation against the Company. On April 1 the Company fired Armstrong.

In a complaint dated April 27, 1982, the General Counsel alleged that Armstrong's demotion was a result of his worker's compensation claim against Monico, and that the Company's discharge of Armstrong was a product both of Armstrong's worker's compensation claim and of his filing of charges with the Board against Monico. In its answer to the General Counsel's complaint, Monico admitted the complaint's jurisdictional allegations but denied any wrongdoing.

I heard the case in Muskogee, Oklahoma, on July 22, 1982.

For the reasons discussed in the remainder of this Decision my conclusion is that Monico has not violated the Act in any respect and that the complaint should be dismissed.

The Events Leading to Armstrong's Demotion

Armstrong began working for Monico in December 1979. In August 1980, in the course of his work at Monico, Armstrong hit his hand on a piece of metal, fracturing a bone near his wrist.

Although a physician gave Armstrong a clean bill of health about 4 weeks after the accident, his hand continued to bother him. The muscles in his hand seemed weak and easily fatigued, and his hand often hurt. Armstrong's work at Monico (involving using a hammer, carrying relatively heavy objects, and rotating his hand) exacerbated the fatigue and soreness.

In February 1981 Armstrong voluntarily left Monico to work elsewhere. Two months later Armstrong asked Monico for his job back, Monico assented, and Armstrong resumed his work at Monico as a welder.

Armstrong's hand continued to bother him. In August 1981 he asked Monico if the Company would pay for further medical attention to his hand since "it seemed like it was just getting continually worse."[1] The Company agreed, and after numerous visits to three different physicians Armstrong was told that an operation appeared to be necessary. The operation took place on December 2, 1981, and Armstrong returned to work on January 4, 1982.

On returning to work Armstrong found that while the pain in his hand had lessened, his hand was still weak; and when it tired in the course of his work at Monico, "it hurt and got sore."[2]

Armstrong was now convinced that his hand would never return to normal. Without mentioning this concern to anyone at Monico, Armstrong contacted an attorney about filing a worker's compensation claim against Monico. The attorney had him visit a Dr. Richard Loy. Loy prepared a report to the attorney stating that "as a result of the continuous and repetitious use and injury to the right hand terminating in the inability to work on

[1] Tr. 35 (witness Armstrong).
[2] Tr. 42 (witness Armstrong).

November 27, 1981 and requiring surgery Mr. Armstrong has sustained 27 percent permanent partial impairment of the right hand."

On March 3, 1982, Armstrong's attorney filed a "Motion of Claimant to Set for Hearing" with the Oklahoma workers' compensation court (without first contacting Monico directly). The court wrote to Monico on March 8 advising that Armstrong had commenced "a legal action in this Court" against Monico. A form signed by Armstrong was attached to the court's letter. The form included the following questions and answers:

> Q. List parts of body injured
>
> A. Reinjury right wrist.
>
> Q. How did the accident occur?
>
> A. Contineous [sic] and repetitious use.
>
> Q. Name of object . . . which directly injured you?
>
> A. Effort of labor.
>
> Q. Nature of injury?
>
> A. Cyst and aggravation broken bone previous injury Aug., 1980.
>
> Q. Date of accident?
>
> A. November 27, 1981.

The Events of March 10, 1982

Monico received the letter from the workers' compensation court and the attached form on March 9. That led Armstrong's immediate supervisor, John Copeland, to meet with Armstrong in Copeland's office on the morning of March 10. Copeland started the meeting by asking whether Armstrong's hand still bothered him. Armstrong responded that it did and that "it seemed like a lot of the strength was gone out of it." Copeland then told Armstrong that Monico had received Armstrong's worker's compensation claim, suggested that Armstrong should have talked to Copeland or Richard Nurrie (Monico's president) about the matter before filing such a claim, and said that Armstrong was "going about the whole deal backwards."[3] Armstrong, taking that as a proposal by Monico that Armstrong withdraw his claim, told Copeland that "I'm going to go through with it."

The meeting ended on that note, but about an hour later Copeland called Armstrong into a meeting with Nurrie. According to Armstrong this meeting also began with the question of whether Armstrong's hand still bothered him. Armstrong again said that his hand did bother him, that "it got sore and tired quick and it seemed like a lot of the strength was gone out of it." That led Nurrie to ask Armstrong for details about what kind of jobs "aggravated his symptoms." Armstrong's response indicated that most of the kinds of work that he did at Monico resulted in soreness and tiredness in his hand. But Armstrong went on to say "that it wasn't anything" that he "couldn't handle"—that he had been suffering the same pain and tiredness since his original injury back in August 1980. "And the pain . . . never affected my work production."

[3] The description of the meeting between Armstrong and Copeland is based entirely on Armstrong's testimony. Copeland did not testify.

With the benefit of hindsight and considerable discussion of the matter at the hearing in this proceeding, it is fairly clear what Armstrong had in mind by filing a worker's compensation claim alleging disability and at the same time telling management that he wanted to continue his work at Monico. As Armstrong saw it, his August 1980 accident had resulted in a permanent impairment in the use of his right hand. That is what his claim was about. As a separate matter, because of that accident his hand got sore and tired in the course of his work at Monico—without, however, further damaging his hand. Thus his work at Monico did in fact "aggravate the *symptoms*" that he had been talking about. But the pain and tiredness were not unbearable. And since Armstrong liked the work and pay scale at Monico, he wanted to continue there.

But Armstrong never made that position clear to Monico. Rather, the form that Monico had received from the workers' compensation court plus Armstrong's comments at the two meetings on March 10 gave the Company a very different view of the matter. As far as the Company was concerned: (1) Armstrong was asking for a considerable sum of money[4] on the ground that, as a result of a condition created by his accident in 1980, Armstrong's "continuous and repetitious" work as a welder at Monico up through November 1981 had permanently damaged his hand; and (2) according to Armstrong his work at Monico was continuing to have precisely the same adverse effects on his hand that had led him to institute the worker's compensation litigation against the Company.

As Monico saw it that meant that Armstrong's request that he continue to work for Monico as a welder was either irrational or an indication that the disability claim was fraudulent. What gave strength to that second possibility was the alleged date of the accident, as indicated on Armstrong's form that Monico had received from the court. The form specified that the "accident" occurred on November 27, 1981. Armstrong had not worked on that day. In fact Monico was closed on that day.

After the meeting between Nurrie, Copeland, and Armstrong, the Company reacted to both alternatives. As Nurrie testified:

> [W]e . . . called the insurance company and told them to put a hold on all further payments to Mr. Armstrong . . . . In this case I felt there might have been some fraudulent intent on his part and we wanted to hold the case . . . . [There] was just something funny about the whole thing, because he said that he was hurt, and he wanted to work in the position that was hurting him. And this, to me, it just didn't seem right.

The other path the Company took was to consider what kind of job Armstrong could be given that would not include work of the kind that Armstrong said had "aggravated" his hand. Most kinds of welding work

[4] If Armstrong were able to prove a permanent 27 percent disability to his hand, he would be entitled to 27 percent of 67 percent of his weekly wage for 200 weeks. That amounts to over $10,000.

were out of the question. And while there was one kind of welding job that Armstrong said he could do without hurting his hand (running an automatic welder), as a matter of operational flexibility Monico could not employ anyone as a welder whose job availability was that limited. Monico accordingly created a "helper" job for Armstrong that involved cleaning, errand running, and the like. The new job meant a demotion in two respects: the nature of the work and the pay scale. Armstrong had been getting $8 per hour. The new job would pay $5.25.

The Events of March 15 and 18, 1982

The Company's decision to change Armstrong's job from welder to helper was implemented on March 15. Copeland gave Armstrong a memorandum that summarized the Company's understanding of the situation and concluded:

> We feel that the aggrivation [sic] of this injury would be extremely unwise and painful for the employee.
>
> In conclusion we feel David [Armstrong] would be better suited in another position that did not require such use of his hand. Also his pay scale would be changed as to the position he accepts.

Armstrong's response was to tell Copeland that absent a medical opinion on the matter the Company had no right to say that it would be unwise for Armstrong to continue as a welder. Armstrong proposed that he see a physician (at Monico's expense) and Copeland agreed.

On March 18, Dr. William Harrison examined Armstrong and gave him a note reading that "there are no restrictions on this patient's ability to do his welding." (Armstrong did not, however, tell Harrison about Dr. Loy's report.) That same day Armstrong gave Harrison's note to Copeland and asked if he could have his welding job back. Copeland asked Armstrong whether Armstrong was still "going to go ahead" with his "little deal." When Armstrong said that he was, Copeland said that "things were going to stay the way they were."[5]

The next day, March 19, Armstrong filed a charge with the Board.

Armstrong's Discharge

Armstrong was not a success in his new job. Armstrong did very little work and a great deal of complaining, with the complaining generally taking the form of how much practically anything he did hurt his right hand. Armstrong was not warned or disciplined for his behavior. But by the end of the month Copeland told Nurrie that Armstrong should be fired. Nurrie agreed that Monico should not continue to employ Armstrong, but felt that the Company ought to "lay off" Armstrong, rather than fire him. According to Nurrie:

> [W]hen you fire somebody, it's harder for them to get work. And I had nothing against David and . . . I thought maybe he might be able to work for somebody else and do a good job for them. It might have been something just with us. And so I thought it would be best to term it a lay-off and so it would make it easier for him.

Nurrie gave Copeland the job of breaking the news to Armstrong. And in accordance with Nurrie's orders Copeland told Armstrong that Monico was going to have to let him go "because business was going slow."

Armstrong subsequently spoke to Copeland several times about going back to work for Monico. Copeland initially responded by referring to Monico's slow business (despite the fact that business was not slow). Later, however, he made it clear that Monico was not going to rehire Armstrong whatever the circumstances.

Other Considerations

Armstrong's capabilities as a welder. At the time Armstrong was demoted he was one of Monico's four or so "top welders." In the course of his work at Monico he had received a number of pay increases and he had never been disciplined. It is clear, in other words, that Armstrong had been performing competently, and that nothing about his output suggested that he should be demoted. Monico does not argue otherwise.

Workers' compensation matters. Oklahoma's workers' compensation law requires an employer to file a "Notice of Injury" with the Oklahoma workers' compensation court whenever an employee reports an on-the-job injury. Monico does in fact comply with that requirement and also complies with the requirement that it "provide first-aid, medical and surgical, and other like services immediately."[6] Monico is insured against expenses arising out of employee injuries. All of the medical bills arising from an employee's injury and the worker's compensation payments to an employee (when an employee misses work because of an injury) are paid by Monico's insurance carrier.

Where an employer does not file a "Notice of Injury" report, the employee may do so (as we have seen in Armstrong's case). Monico's insurance carrier is responsible for paying for any medical, workers' compensation, and litigation costs arising out of an employee's notice of injury claim. Thus in Armstrong's case, if Monico had not ordered its insurance carrier to hold up action the carrier would have "handled the whole incident."[7]

Monico's attitude toward expenses arising out of employee injuries. Putting aside the March 1982 matter involving Armstrong, the record reflects that Monico's attitude toward expenses arising out of on-the-job accidents is one of allowing employees to obtain whatever medical services it takes "to alleviate the situation."[8] In Armstrong's case, for example, in 1980 and 1981 he reported himself injured on the job eight times. Those injuries resulted in at least 10 visits to doctors, a total of 6 or 7 weeks off from work (with Armstrong receiving $150 per week in workers' compensation payments), physical therapy expenses, pharmaceutical expenses, and an oper-

[5] Tr. 59 (witness Armstrong).

[6] Resp. Exh. 5.

[7] Tr. 133 (witness Nurrie).

[8] Tr. 40 (witness Armstrong quoting his supervisor).

ation on Armstrong's wrist. Through all of that Monico never indicated that it was concerned about the bills arising out of those incidents.

Armstrong, of course, was not the only employee to be accidentally injured on the job. In 1980 Monico received 24 reports of injury from employees; in 1981 it received about 26 reports of injury; and that same pace continued in 1982. Again, there is no evidence that Monico reacted unfavorably in any of those cases.

Armstrong was the only employee in recent years to claim a partial disability as a result of an on-the-job injury. But according to Company President Nurrie, Monico had been faced with disability claims in the past and had turned the claims over to its insurance carrier for routine handling.

Disciplinary procedures. In late January 1982 Monico was acquired by Brunner Engineering Company, which, in turn, is a subsidiary of Handy & Harmon. An official of Handy & Harmon met with Monico employees shortly after the acquisition and distributed a booklet stating the "general policies" of Monico.

One part of the booklet deals with "terminations" of employees. And in that part the booklet indicates that while certain types of employee behavior could result in immediate dismissal, substandard quality or quantity of production

> . . . are less serious and, as a result, would require repeated acts to constitute termination. In these cases, you would probably be given several warnings, which failure to heed would result in your termination.[9]

Conclusion

As Board law now stands, an employer violates the National Labor Relations Act if it takes action against an employee because the employee filed a worker's compensation claim: *Krispy Kreme Doughnut Corp.*, 245 NLRB 1053 (1979), enf. denied 635 F.2d 304 (4th Cir. 1980). And the facts are clear that Armstrong would not have been demoted and then fired if he had not brought a worker's compensation action against Monico.

But that is not the end of the matter. Monico did not relieve Armstrong of his welding duties because of any irritation about Armstrong making a claim against the Company. Rather, it did so because of the information on the worker's compensation form that Armstrong filed. Because of that information and because of Armstrong's statements to Copeland and Nurrie on March 10, the Company reasonably came to the conclusion that Armstrong's ongoing work at Monico was either: (1) damaging his hand; or (2) providing the basis for a fraudulent claim by Armstrong that it was damaging his hand. In either event the appropriate action for the Company to take was to relieve Armstrong of the duties that he (and the filed form) said were "aggravating" his hand. Indeed it would have been foolhardy for the Company not to do so.

[9] G.C. Exh. 5 at part XXX.

As for the demotion, given Monico's reasonable belief about the need to relieve Armstrong of most of the duties of welders in the Company's employ, Monico was under no obligation to keep Armstrong on as a welder or to continue to pay him welder's pay (or, for that matter, to continue to employ him in any capacity). In sum, there was nothing unlawful about Monico's action demoting Armstrong on March 15, 1982.

Monico's decision to fire Armstrong merits scrutiny for two reasons. First, Armstrong was fired less than 2 weeks after he filed a charge with the Board against Monico. Second, his discharge was not in accord with the announced general policies of Monico.

In that latter regard, Armstrong received no warnings about needing to perform his job better. Yet the implication of Monico's general policies booklet is that employees will not be fired for low production until they have failed to respond to warnings of their supervisors in that respect. And in many circumstances an employer's failure to follow its announced policies in disciplining an employee suggests that the employer's stated reason for the discipline may be a subterfuge.

But I am not persuaded that Monico's failure to comply with its own policies when it fired Armstrong is an indication of discriminatory action by the Company. For one thing, it is far from clear that Monico has ever actually acted in accord with the "general policies" booklet. The policies were new at Monico (they first came into being in February 1982); and they were not created by Monico's supervisors but rather were the policies of Handy & Harmon that an official of that company said would be followed at Monico.

Most importantly, Armstrong was fired not merely for inadequate effort but also for his continuing complaints about the adverse effect that his work was having on his hand. Given the Company's belief that those complaints indicated that the work was damaging Armstrong's hand (or that Armstrong would claim that it was in the course of litigation against the Company), Monico's decision to fire Armstrong is unremarkable.

As for Copeland telling Armstrong that the reason he was being discharged was because of slow business (when business was not in fact slow), I am persuaded that Nurrie testified accurately in stating that Copeland's remarks were a function of Nurrie's decision to use a form of termination of employment that would be least harmful to Armstrong in his efforts to obtain another job.

ORDER[10]

The complaint is dismissed in its entirety.

[10] In the event no exceptions are filed as provided by 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.