

**Lucky Stores, Inc. and Mary Louise Neilson. Case  
32-CA-2533**

11 April 1984

**DECISION AND ORDER**

**BY MEMBERS ZIMMERMAN, HUNTER, AND  
DENNIS**

On 9 January 1981 Administrative Law Judge Clifford H. Anderson issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs and briefs in response to each other's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> and to adopt the recommended Order.

**ORDER**

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

<sup>1</sup> In sec. III,B,3,(b),(2), Causation, of his decision, the judge inadvertently stated that the Respondent's Divisional President Hoover admonished Divisional Vice President Herkal about the fact that Charging Party Neilson had bid on a job in the bargaining unit, whereas the record establishes that this admonishment was delivered by Divisional Controller Peterson. The judge's erroneous finding in this regard does not affect our ultimate result in this case.

<sup>2</sup> In affirming the judge's conclusion that Charging Party Neilson was discharged solely because of suspicions held by the Respondent's officials that she would divulge confidential labor relations material, we find it unnecessary to pass on the judge's discussion of the rights of confidential employees under the Act.

**DECISION**

**STATEMENT OF THE CASE**

CLIFFORD H. ANDERSON, Administrative Law Judge. This case was tried before me on September 29, 1980, in Oakland, California, pursuant to a complaint and notice of hearing issued by the Acting Regional Director for Region 32 of the National Labor Relations Board on April 30, 1980, which is based on a charge and amended charge filed on March 4, 1980, and April 29, 1980, respectively, Stores, Inc., herein Respondent. The complaint alleges and the answer denies that Respondent terminated the Charging Party because of her union or other protected concerted activities or in order to discourage employees from joining, supporting, or assisting a union or engaging in other protected concerted activities.

All parties<sup>1</sup> were given full opportunity to participate at the hearing, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file posthearing briefs. Excellent and very helpful briefs were filed by the General Counsel and Respondent.

On the entire record herein and from my observation of the witnesses and their demeanor, I make the following

**FINDINGS OF FACT**

**I. JURISDICTION**

Respondent has been at all times material herein a California state corporation, with an office and place of business in San Leandro, California, engaged in the retail sale of grocery items at various facilities. Respondent, in the course and conduct of its business operations, annually derives gross revenues in excess of \$500,000 and purchases and receives goods and services at its California facilities from outside the State of California of a value in excess of \$50,000.

The complaint alleges, the answer admits, and I find that Respondent is and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

**II. LABOR ORGANIZATION**

The complaint alleges, the answer admits, and I find that Office and Professional Employees Union, Local 29, Office and Professional Employees International Union, AFL-CIO, herein the Union, has been at all times material a labor organization within the meaning of Section 2(5) of the Act.

**III. THE ALLEGED UNFAIR LABOR PRACTICES**

**A. Facts**

**1. Background**

Respondent operates a chain of grocery stores. Its northern food division, herein the Division, operates stores in the Pacific Northwest and in northern California. These facilities employ some 10,000 employees essentially all of whom are represented by various labor organizations in a variety of bargaining units. The Division's headquarters is located in San Leandro, California. Certain of the employees at this location are also represented by labor organizations in various units. One of these units is a clerical unit of approximately 200 employees represented by the Union.

Walter H. Herkal is the vice president and industrial relations manager for the Division. He is in charge of the industrial relations department at San Leandro and reports directly to the Division president, John Hoover. The department is staffed by his assistant and personnel manager Robert Gill, a secretary, and the employees in the personnel department. The personnel department has approximately eight unrepresented clericals, a personnel

<sup>1</sup> The Charging Party elected to participate only as a witness in the proceedings.

specialist, and a supervisor. Herkal has primary responsibility for formulation and implementation of division labor relations policies including such areas as collective bargaining, contract interpretation, and contacts with Federal regulating agencies such as the Equal Employment Opportunity Commission and the NLRB.

The Charging Party commenced employment with Respondent as a clerical in the personnel department in 1973 and resigned in late 1977. In mid-1978 she returned to Respondent's employ as a temporary employee but soon thereafter accepted permanent employment as secretary to Herkal and Gill. She served in this capacity until October 5, 1979.<sup>2</sup> The Charging Party, as secretary to Herkal, was a party directly and indirectly to the formulation and implementation of labor relations policies of the Division. She opened incoming material and prepared and or reviewed outgoing correspondence for Herkal. Her physical proximity to Herkal's office combined with his habit of leaving his door open during strategy sessions with management colleagues and during electronically amplified or "squawk box" telephone conversations with others exposed her to essentially all of Herkal's communications made when in his office.

## 2. Events leading to the Charging Party's termination

In May and June the unrepresented employees in the personnel department raised certain grievances concerning working conditions with management and Herkal, with the Charging Party serving as their advocate. On July 3, Herkal met with these employees and the Charging Party and addressed their grievances. Immediately following that session he had a separate meeting with the Charging Party wherein he admonished her, as a confidential employee, not to act on behalf of the personnel department clerical employees. Gill took the Charging Party's role in these matters badly and thereafter withheld normal courtesies and regular work assignments from the Charging Party, who was offended and responded in kind. Their continuing mutual hostility soon became obvious to Herkal.

The Charging Party and Herkal had a conversation concerning this difficulty, which occurred on September 13 according to the Charging Party's recollection, while Herkal recalled that it occurred about a month after the July 3 meeting.<sup>3</sup> Herkal discussed with the Charging

Party her difficulties with Gill. In the conversation the Charging Party indicated she was unhappy with her current circumstances. Herkal said he would look for a different position for her. He thereafter did look for other positions for her but did not find a position he felt appropriate.

A decertification petition regarding the Union-represented clerical unit at the facility was filed on August 29. An election in that unit was conducted by the Board on September 28, and, following resolution of objections filed by Respondent, the Union was certified as representative of employees on April 3, 1980. The Charging Party's sister, Diane Soares, was at all relevant times a member of the clerical unit and a public and active supporter of the Union.<sup>4</sup> Between September 28 and October 5, Soares was appointed to the Union's negotiating committee as was unit member Marva Tyler. Tyler was a friend of the Charging Party and they had lunch together on a regular basis. The fact of the union negotiations committee appointments was quickly learned by Respondent.

Herkal at all times regarded the Charging Party as a loyal and highly competent employee. At the hearing he denied any belief that the Charging Party had or would disclose Respondent's confidential information to union supporters or other unauthorized individuals. The Charging Party also denied that she had engaged or would have engaged in such activity. No evidence was introduced to contradict these assertions. Herkal's executive colleagues, however, took a contrary view and modified their patterns of behavior in September so as to prevent the Charging Party from having access to strategic information regarding Respondent's decertification election campaign in the clerical unit and other labor relations matters. Herkal credibly testified that his relationship and influence with Respondent's higher management officials noticeably slipped as a result of their distrust of the Charging Party and their dissatisfaction with Herkal for not sharing their suspicion.

September 28, before the election, the Charging Party signed her name to a public job posting notice, thereby applying for a position within the represented clerical unit. Whatever the reality, higher management believed that this was an act of disloyalty on the part of the Charging Party. Management believed that an important issue in the election campaign was whether the Union-represented employees would be able to achieve equal wages and working conditions if they chose to be without union representation. Management perceived the Charging Party's public application for a "union" job to be an affirmation by an unrepresented employee in a relatively high position—the Charging Party—that a "union" job was preferable to her own unrepresented position. Thus, such a public bid was, in management's view, a strong attack on their argument that an unrepre-

<sup>2</sup> All dates hereinafter refer to 1979 unless otherwise indicated.

<sup>3</sup> Virtually the only facts about which witnesses disagreed at the hearing appeared in the somewhat varying testimony of the Charging Party and Herkal. Their versions of events and conversations were essentially corroborative. I found each to be a straightforward witness. They impressed me as equally honest and willing to testify completely and responsibly without regard to the consequences to their respective positions. Generally I find it unnecessary to resolve the minor variations in their testimony and, where not otherwise noted, credit each as to the specific recollections of things said and done where the other did not deny the event. Here I credit the Charging Party because of her specific recollection of the date of the conversation and her ability to connect the date to that of a document she retained. Herkal's placement of the conversation, while also credible, was not as certain or specific as that of the Charging Party.

<sup>4</sup> Herkal and the Charging Party disputed whether Soares' role as a union activist was discussed at the time of the Charging Party's hire as Herkal's secretary. I find this difference unnecessary to resolve because Soares' union activities were admittedly known and a factor under consideration at the time Herkal determined to discharge the Charging Party.

sented employee is as well or better off than a union-represented one.

The fact that other more senior employees who were in the bargaining unit also had signed up for the posted job made it unlikely that the Charging Party would be selected for the position. This was so because vacancies were filled consistent with the seniority provisions in the then expired contract. Management believed that the Charging Party well knew her bid for the job was unrealistic because she had no seniority within the unit as compared to other job applicants who had signed the posting before her. Therefore management believed her purpose was not to obtain the position but rather to undermine management's position in the union campaign. Almost immediately the Charging Party's action in signing the posting became known. Both Respondent's Division president and its controller immediately came to Herkal and offered the posting as evidence in confirmation of their suspicions of the Charging Party's disloyalty and in contravention of Herkal's previous assertions of confidence in the Charging Party. When this occurred, Herkal determined finally that the Charging Party must be dismissed.

The following week, Herkal set in motion the process of severing the Charging Party's employment. He consulted with counsel and notified his superior of his decision to terminate the Charging Party. He had her termination paycheck prepared.

On Friday, October 5, Herkal called the Charging Party into his office. Herkal told her that, although he had confidence in her, his colleagues did not. In support of these suspicions he mentioned the union activities of both the Charging Party's sister and friend and their positions on the union negotiating committee. He also mentioned the Charging Party's action in signing up for the "union" job. Herkal asked the Charging Party to resign but made it clear that if she did not resign she would be terminated. He also suggested however that Respondent would record her employment severance as voluntary and that Respondent would not contest any unemployment claims asserted by the Charging Party. The conversation was an emotional one for each participant. The Charging Party and Herkal remained in the office until after its close of business to allow the Charging Party to collect herself and leave the premises without confronting other employees while she was in an emotional state.

The Charging Party's employ ended on October 5. She had not been offered reinstatement as of the date of the hearing. Respondent introduced uncontradicted evidence showing that no disciplinary action had been taken as of the date of the hearing against employees who participated in the June/July grievance matter or against employees involved in the decertification campaign and election.

## B. Analysis and Conclusions

### 1. The activities of the Charging Party

There was no dispute at the hearing that three separate sets of circumstances described above constituted the sum total of the activities of the Charging Party which—although there is dispute as to their relative contribu-

tions—caused her termination. First was the Charging Party's participation as intermediary for the personnel department employees in the discussions with management concerning working conditions in June and July, with the resulting strain in her working relationship with Gill. Second was the relationship by acquaintance and consanguinity of the Charging Party to active union supporters in the clerical unit during the decertification campaign. Third was the act of publicly signing up for a "union" or clerical unit position immediately before the decertification election.

Without discussing the Charging Party's status as a confidential employee,<sup>5</sup> it is clear and I find that each of these three types of activity is protected activity. The Charging Party's participation with other employees for their benefit is protected concerted activity. *Salt River Valley Water Users' Assn. v. NLRB*, 206 F.2d 325 (9th Cir. 1953). Discrimination against the friend or relative of a union activist is likewise prohibited by the Act. See, e.g., *Hickman Garment Co.*, 216 NLRB 801 (1975). Attempts to utilize a hiring process established in a collective-bargaining contract are also protected by the Act. *Anaconda Aluminum Co.*, 160 NLRB 35 (1966); *Slotkowski Sausage Co.*, 242 NLRB 731 (1979).<sup>6</sup> Thus all the activities engaged in by the Charging Party were activities protected under the Act.

### 2. Confidential employees and confidential information—the rights of employees under Section 8(a)(1) and (3) of the Act

#### a. The rights of a confidential employee

The Charging Party clearly meets the Board's narrow definition of confidential employees as persons "who assist and act in a confidential [relationship] to persons who formulate, determine, and effectuate management policies in the field of industrial relations." (Emphasis added.) *B. F. Goodrich Co.*, 115 NLRB 722, 724 (1956). The parties, based on a complete record on the issue, stipulated that the Charging Party was such an employee and I so find.

Respondent argues that the Charging Party, as a confidential employee, is "excluded under the Act and may not engage in protected activity." In support of its argument Respondent cites various court decisions.<sup>7</sup> Board law in this area is contrary and has not changed. My discretion in this area is best illuminated by the following recent Board admonition to an administrative law judge:

<sup>5</sup> See sec. III,B,2, *infra*, for a discussion of the confidential status of the Charging Party and the consequence to her rights under Sec. 8(a)(1) and (3) of the Act.

<sup>6</sup> Respondent's cited case, *Tabernacle Community Hospital*, 233 NLRB 1425 (1977), is distinguishable because no collective-bargaining agreement existed in that case to give constructive concert to the single employee's activities. Respondent also notes the Seventh Circuit denied enforcement of *Slotkowski Sausage Co.* at 620 F.2d 642 (7th Cir. 1980). As is discussed in greater detail, *infra*, I am bound by Board precedent.

<sup>7</sup> *HCREMC v. NLRB*, 627 F.2d 766 (7th Cir. 1980); *NLRB v. Wheeling Electric Co.*, 444 F.2d 783 (4th Cir. 1971); *Peerless of America, Inc. v. NLRB*, 484 F.2d 1108 (7th Cir. 1973); *NLRB v. North Arkansas Electric Cooperative*, 446 F.2d 602 (8th Cir. 1971).

Additionally, we would note that the Administrative Law Judge's finding that confidential employees do not enjoy protection under the Act, although consistent with the decisions of several courts of appeals, is, with all respect to those courts of appeals, inconsistent with current Board law. See *Hendricks County Rural Electric Membership Corporation*, 236 NLRB [1616] (1978). It is well settled that it is the duty of an administrative law judge "to apply established Board precedent which the Supreme Court has not reversed." *Iowa Beef Packers*, 144 NLRB 615, 616 (1965).<sup>8</sup>

I have no discretion, even were I to disagree with the Board doctrine, but to apply current Board law. Therefore, I find that the Charging Party has no fewer rights under Section 8 of the Act as a result of her confidential employee status than any other employee subject to the Act.

*b. Rights of employers to protect the confidentiality of labor relations material*

While rejecting any holding reducing the Section 8 rights of confidential employees because of their status as confidentials, the Board has addressed the question of guarding confidential information. The Board recognizes an employer may have a "legitimate desire to protect the confidentiality of its labor relations matters from disclosure to others." *Jos. Schlitz Brewing Co.*, 211 NLRB 799 (1974). As in *Schlitz*, such a legitimate interest may justify terminating an employee with a social or marital relationship to union adherents if the employer suspects the employee may "leak" confidential information. This right to take action against an employee in order to protect the confidentiality of labor relations material applies not just to "confidential" employees but to all employees. Confidential employees are not the only employees who may have access to confidential labor relations material. Other employees may have legitimate access to such information and any employee may improperly seek to obtain it. Thus, even though the Charging Party under Board law retains the full protection of Section 8 of the Act, despite her status as a confidential employee, she like all employees may have proper action taken against her if it is done in order to preserve labor relations material confidentiality.

*c. The Employer's standard of care in protecting labor relations confidentiality*

If an employer may take action to protect the confidentiality of its labor relations material, a question remains: What standard of care is an employer held to in taking such action? Normally an employer is strictly liable when it takes action against an employee because of a good-faith but mistaken belief that the employee has engaged in misconduct during otherwise protected concerted activity. *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964). Thus, if the employee has not engaged in the misconduct, despite the employer's belief, the employer

stands liable for its actions. It appears however that, in the case of suspected destruction of the confidentiality of labor relations materials, the Board has adopted the philosophy of the Roman apothegm that Caesar's wife ought to be above suspicion. In *Illinois Bell Telephone Co.*, 228 NLRB 942 (1977), the Board held not improper an employer's action against an employee who would soon have potential access to confidential labor relations material. The basis of the employer's suspicion was the fact that the employee's brother was a chief steward and executive board member of the labor organization representing a significant number of the employer's employees. In addressing the question of the danger of the sister leaking confidential information to her brother, the Board noted:

[T]he fact that the possibility does exist in a more than conjectural sense entitles the Employer to protect himself against it. [228 NLRB 942 fn. 1.]

Thus mere doubt appears sufficient to justify action against an employee with actual or potential access to confidential labor relations material.<sup>9</sup>

*d. Summary*

In summary, I reject Respondent's affirmative defense that the Charging Party as a confidential employee is exempt from the protections of Section 8(a)(1) and (3) of the Act. I do accept, however, the proposition that an employer may take action against an employee because it suspects that employee may divulge or has divulged confidential labor relations material to unauthorized persons. Further, I find that such suspicion, to be sufficient, need only be "more than conjectural."

3. Respondent's motive in terminating the Charging Party<sup>10</sup>

There is no dispute that the Charging Party's activities, discussed supra, were the basis of Respondent's decision to discharge her. The fundamental factual issue at the hearing was the motive of Respondent in acting on these activities when it terminated her.

If the Charging Party was fired to punish the Charging Party because of her protected activities, or to punish others because of their protected activities, or both, Respondent has violated the Act. If Respondent terminated the Charging Party solely because of a more than conjectural suspicion that she might divulge confi-

<sup>9</sup> Were strict liability the test, Respondent here has clearly violated the Act for there is no evidence indicating that the Charging Party at any time breached the confidentiality of Respondent's labor relations material and I specifically find that she did not.

<sup>10</sup> Respondent at the hearing argued that the Charging Party voluntarily quit. The evidence indicates without contradiction that she was told by Herkal to quit or be terminated. I find that she was terminated. Her choice to resign or to be fired was in actuality no choice at all. Respondent also litigated the Charging Party's preparations to enter another profession, presumably in support of the proposition that she would have voluntarily left Respondent's employ in any case. The evidence did not show that the Charging Party had a fixed intention to terminate her employment with Respondent at any specific time. Any further analysis of such facts, were it otherwise appropriate, would properly take place in the compliance stage of a proceeding.

<sup>8</sup> *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979); see also *Peavey Co.*, 249 NLRB 853 (1980).

dential labor relations material, its action was not improper.

*a. Whether Respondent terminated the Charging Party to punish others for their protected activity and/or as an integral part of an illegal pattern of conduct*

The complaint alleges as a single violation the discharge of the Charging Party. Respondent presented undisputed testimony that no other employee who engaged in protected concerted or union activity was terminated or disciplined. There is therefore no evidence of an illegal pattern of conduct by Respondent in the context of which the Charging Party's discharge must be judged. Further, there is no evidence that the Charging Party's discharge was intended to be or actually was held out to other employees as punishment for or a warning to those other employees who engaged in union or protected concerted activities. On the contrary there is considerable credible evidence that Respondent sought to have the Charging Party quit her employ rather than fire her. It offered to acquiesce in whatever claims the Charging Party made with the state unemployment authorities. Herkal allowed the Charging Party to remain in his office after her termination until after the close of business so that she could make her exit without contacting other employees. No evidence was presented that other employees were ever told of the reasons for the Charging Party's discharge. This evidence and the absence of any contrary evidence indicate that Respondent made no effort to publicize the basis for the Charging Party's termination; rather I find it attempted to keep the matter confidential.<sup>11</sup> I find therefore that the General Counsel has not sustained its burden of proof with regard to the contention that Respondent fired the Charging Party to discriminate or to chill the protected activities of other employees.

*b. Whether Respondent terminated the Charging Party because she engaged in protected activity or because of a suspicion that she would disclose confidential labor relations material*

I have found, supra, that the activities of the Charging Party which—all parties agree—resulted in her discharge were protected activities. I have further found that a defense in law exists if an employer terminates an employee because of a more than conjectural belief that the employee had or would divulge confidential labor relations material. I have also found that insufficient evidence exists to support the General Counsel's allegation that the Charging Party was terminated in order to punish others for their protected activities. The question remains, given the admitted foundation facts which caused the discharge: What was the motive of Respondent in discharging the Charging Party?

I am convinced that Respondent's agent Herkal terminated the Charging Party because of the suspicions of his superior and peers regarding the Charging Party's ability

<sup>11</sup> Herkal also delayed the consummation of the Charging Party's termination until the decertification election was concluded to avoid any allegation that the termination affected the balloting.

to maintain confidentiality.<sup>12</sup> I make this finding and specifically reject the argument of the General Counsel that retaliation rather than suspicion was Respondent's motive for terminating the Charging Party for the following reasons.

(1) Animus

First, there is little or no evidence that Herkal bore any hostility toward the Charging Party a result of her protected activities. Counsel for the General Counsel argues Herkal's remarks to the Charging Party when he learned of the unrepresented clerical claims, "Boy, this is really something," demonstrate animus toward protected activity and the Charging Party as a result thereof. He also asserts that Herkal's instruction to the Charging Party to abandon her role as intermediary in the personnel department grievance matter and his "misleading Neilson about his intended course of action" also support such a finding of animus. This evidence is modest in its force at best and must be discounted by the passage of time between the conduct and the Charging Party's termination.

The General Counsel also asserts that the failure to transfer the Charging Party rather than terminate her and the use of a unit employee to temporarily fill in for the Charging Party after her termination each support a finding of illegal motive by Respondent. I reject these contentions. Rather I find that Herkal did in fact look for possible jobs for the Charging Party but that he did not find anything available. Further I do not find the record evidence of the circumstances of the Charging Party's replacement persuasive of any proposition. Business necessity and the fact that Respondent's suspicions were directed only to the Charging Party make Respondent's use of unit member substitutes in the Charging Party's former position understandable and not so unusual as to raise an inference that the discharge was tainted.

It is true that the Charging Party's protected activity as intermediary for the unrepresented clericals resulted in Gill's displeasure with her<sup>13</sup> and triggered the subsequent deterioration in their working relationship. This circumstance then engendered the expression of unhappiness by the Charging Party to Herkal described supra, and Herkal's attempts to find her another job within the organization. At the threshold, I am unable to conclude that this evidence will support a finding that the sequence of events is attributable to discrimination against the Charging Party because of her protected concerted activity. This is unnecessary to decide, however, because I am convinced that, even if true, Respondent would have terminated the Charging Party even if the events concerning the unrepresented clericals and Gill had

<sup>12</sup> I further find that the Charging Party was terminated because Herkal felt the disapproval of his peers and superior who acted as they did because they were suspicious of the Charging Party and upset with Herkal for not sharing that suspicion. The difference between these two theories is not of consequence. Causa causae est causa causati.

<sup>13</sup> There is no evidence that Gill sought the Charging Party's discharge or was involved in the decision to discharge her.

never occurred.<sup>14</sup> Thus I find that these earlier events are not controlling in my determination of the validity of Respondent's actions in terminating the Charging Party.

Ignoring Gill, who did not put pressure on Herkal to fire the Charging Party, there is no evidence that Herkal's management colleagues, who complained to him of their lack of confidence in the Charging Party, sought to discriminate against the Charging Party or any other employee because of union or other protected concerted activities.

#### (2) Causation

The growing pressure on Herkal from his management colleagues and his superior, Division President Hoover, to remove the Charging Party from her confidential position despite his continuing loyalty to her makes it clear to me that Herkal would have discharged the Charging Party because of these pressures irrespective of his own opinions and suspicions regarding her activities. These individuals demonstrated by their actions in dealing with Herkal that they were suspicious of the Charging Party's probity regarding labor relations matters. When Hoover learned of the union job sign-up by the Charging Party, in Herkal's testimony, he "hot footed it" to Herkal's office, the posting in hand, and admonished Herkal: "See. I told you so. All this precaution that I took—now it's been revealed. I was right and you were wrong." Thus the thrust of Hoover's argument goes to labor relations confidentiality and not protected or union activity. This evidence, and the absence of persuasive evidence tainting the motives of Hoover's and Herkal's other colleagues, convinces me that the pressure put on Herkal was based solely on suspicions concerning labor relations confidentiality.<sup>15</sup> Inasmuch as I find peer pressure was the cause of Herkal's discharging the Charging Party, I further find she was discharged solely because of the suspicions, albeit mistaken but more than conjectural, of higher management officials that the Charging Party was divulging or would divulge confidential labor relations material, and because of the pressure Herkal received from these agents to remove her from access to such material. I also find that there is insufficient evidence to support a finding that the Charging Party was fired in whole or in part for the purpose of discriminating against her because of her protected or union activities or the protected or union activities of others.

<sup>14</sup> Even assuming that the General Counsel established a prima facie case that these earlier activities would have caused the Charging Party's discharge, I find that Respondent has met its own burden of proof by showing that the termination would have occurred in any case because of later events. This finding frees Respondent from any liability for the assumed wrongful prior circumstances. *Wright Line*, 251 NLRB 1083 (1980).

<sup>15</sup> Based on this evidence, I reject the General Counsel's argument that the timing of the discharge supports a retaliation theory. Rather I find the timing supports the admitted proposition that the sign-up on the union posting was "the final straw." The question of motive, however, is not resolved by the timing of events here.

I therefore find that Respondent did not violate the Act when it terminated the Charging Party. Accordingly I shall recommend dismissal of the complaint.

#### 4. Summary and conclusion

I have found that the Charging Party is a confidential employee but I have rejected Respondent's contention that this in any way diminishes her rights under Section 8(a)(1) and (3) of the Act. I have also found that the Charging Party was involved in three circumstances: (1) She acted as an advocate for certain unrepresented employees in their attempts to improve their working conditions; (2) she was friends with and the sister of employees of Respondent who were active in support of the Union; and (3) she publicly signed a job posting for a job in the Union-represented unit under contractual rules. I found in each of these circumstances that the Charging Party's acts and relationships were protected under the Act and that Respondent could not discriminate against the Charging Party as a result thereof. I have found that, as a result of the three circumstances described above, Respondent's agents formed a mistaken but more than conjectural belief that the Charging Party was or would improperly transmit Respondent's confidential labor relations material to unauthorized individuals. As a result of this mistaken belief Respondent terminated the Charging Party. I find that Respondent's belief as described above is a legitimate business reason for terminating the Charging Party. I have found insufficient evidence to prove Respondent terminated the Charging Party for any other reason. I find therefore that the Act has not been violated. Accordingly, I shall therefore dismiss the complaint in its entirety.

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(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. Respondent did not violate the Act by discharging the Charging Party.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommendation<sup>16</sup>

#### ORDER

It is ordered that the complaint be dismissed in its entirety.

<sup>16</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.