Access Control Systems *and* James A. Pepping. Case 28-CA-6942

21 May 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 2 December 1982 Administrative Law Judge David G. Heilbrun issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief to the Respondent'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,[1] and conclusions only to the extent consistent herewith.

The issue in this case is whether employee James A. Pepping was engaged in concerted activity within the definition of *Meyers Industries*, 268 NLRB 493 (1984), when he filed a claim against the Respondent with the Arizona State Labor Department seeking vacation pay assertedly due him. The judge, applying the per se test of *Alleluia Cushion Co.*, 221 NLRB 999 (1975), found that Pepping's activity was concerted. In *Meyers*, however, the Board overruled *Alleluia* and held that in order for an employee's activity to be "concerted," it must be "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." Applying this definition to the instant case, we find that Pepping was not engaged in concerted activity. We further find, contrary to the judge, that the Respondent's threat to sue Pepping if he prevailed on his wage claim did not violate Section 8(a)(1) of the Act.

The facts are as follows: the Respondent is engaged in the design, sale, and installation of security systems. Charging Party Pepping was hired by the Respondent as an installer in February 1981. In early spring 1982,[2] the Respondent experienced serious problems with two security systems which Pepping had installed. The Respondent has a written policy of holding employees financially responsible for any losses they cause the Company in performance of their duties. Based on this policy, Pepping was told that he would have to forfeit his week's vacation pay to help offset the losses the Respondent had sustained. Pepping, whom the judge credited, testified only that he told fellow installer James Felkey of the Respondent's decision to divert Pepping's vacation pay as a cost reimbursement to the Respondent. Pepping did not testify that he told Felkey of his intention to file a claim with the State Labor Department, nor did he testify as to any response by Felkey. The Respondent's witness, Felkey, whom the judge described as "clearly partisan," testified as follows:

> "Well, [Pepping] discussed [the forfeiture] with me, and he though [sic] it was unfair, and that he felt that he should appeal it through proper channels. I advised him that I didn't think that that was necessary, that I thought he could come to an equitable agreement just by discussing it within, but he felt that he had already discussed it far enough . . . that he didn't think he was going to get any reasonable response. . . ."

Thereafter, on 21 May, Pepping filed a formal wage claim with the Arizona State Labor Department. After receiving a copy of the Charging Party's claim about 27 May, the Respondent's president, Charles Byers, quickly informed Pepping that his pay would be reduced to minimum wage and that he would have to provide his own tools and gasoline on the job. Byers added that Pepping had the choice of resigning then or being fired the following week. During this conversation, Byers also indicated that he would sue Pepping if the employee prevailed on his wage claim. Pepping was discharged the following day.

According to Pepping's credited testimony, he never raised the possibility of filing a claim during his conversation with Felkey. Although Felkey does testify that Pepping referred to an appeal "through proper channels," there is no evidence that Pepping sought Felkey's support or in any way linked the state claim to the Respondent's policy as it affected all the employees. We find that neither version of events supports a finding that Pepping engaged in concerted activity as defined in *Meyers*. We therefore conclude that the Respondent did not violate Section 8(a)(1) of the Act by discharging Pepping for filing a wage claim with the Arizona State Labor Department.

We also conclude that the Respondent did not violate Section 8(a)(1) of the Act by threatening to sue Pepping if the State Labor Department ruled in Pepping's favor. The Board has held that an employer violates Section 8(a)(1) by "threat[ening] . . . to resort to the civil courts as a tactic calculat-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they 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 the findings.

[2] All dates hereinafter are in 1982 unless otherwise noted.

ed to restrain employees in the exercise of rights guaranteed by the Act."[3] The Respondent here did not threaten a lawsuit in retaliation against employee activity contemplated by *Clyde Taylor*. Rather, the Respondent's retaliatory threat was grounded on employee activity not encompassed by the Act.

Accordingly, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

[3] *Clyde Taylor Co.*, 127 NLRB 103, 109 (1960).

DECISION

STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge. This case was heard at Phoenix, Arizona, on October 21, 1982, based on a complaint alleging that Access Control Systems (Respondent) violated Section 8(a)(1) of the Act by constructively discharging James Pepping because of his assertedly protected concerted activities in filing a claim for governmental collection of vacation moneys and to generally discourage employees from engaging in such activities for the purpose of collective bargaining or other mutual aid or protection. The complaint further alleges that, contemporaneous with the described alleged constructive discharge, Respondent threatened to bring a lawsuit against Pepping if he pursued the vacation pay claim as then pending with the Arizona State Department of Labor.

On the entire record,[1] my observation of witnesses, and consideration of oral summations made by the parties at conclusion of hearing, I make the following

FINDINGS OF FACT AND RESULTANT CONCLUSIONS OF LAW

James Pepping was employed from February 1981 to May 1982 as a security systems installer, with responsibilities that also included customer service.[2] His starting hourly pay was $4.50 and this increased to $6 after several months on the job. During most of Pepping's employment he was directly supervised by Jeff Manske, who in turn reported to Respondent's president Charles Byers. In approximately early spring 1982 Don Bliven succeeded to a position as Pepping's immediate supervisor, and around that time Pepping's annual Air Force Reserve tour arose. He testified to arranging job absence with Don Bliven for the purpose of completing this tour, and securing a further agreement that a week of paid vacation time would be added to the total time away from work.[3]

On his return in mid-April Byers called a meeting in his office at which Don Bliven, Manske, and Pepping attended. The subject was Respondent's financial condition at the time, plus past and pending problems with local jobs. Explanation was sought by management concerning customer unhappiness and excessive hours spent, in particular reference to a residential security alarm installation for customer Chauncey (a lawyer) and a business security system at a dental building referred to as the Potter (one of the practicing dentist's) job. Pepping described his role in these jobs, emphasizing that certain unforeseen problems had made the installations difficult, and that he had been saddled for a portion of the time as trainer to newly hired installers without previous experience in the field. After some discussion Byers stated that probable consequences would be forfeiture of vacation pay by Pepping as an offset to the Company's sustained loss on these jobs.[4] Pepping was not inclined to accept this eventuality, but after a day or so had passed Don Bliven told him of Byers' resolute decision to have the vacation pay forfeiture stand. Shortly after receiving this final and official news Pepping mentioned to James Felkey, another installer at the time, that his vacation pay was being diverted as a cost reimbursement to the employer. Felkey's response was inconclusive in the course of "on and off" discussion throughout that day.

Pepping soon filed a formal wage claim dated May 21 with the Arizona State Labor Department, in which he sought to have ostensibly earned vacation pay ordered as an entitlement of employment. Notice of this claim was mailed to Byers' attention by an appropriate cover letter dated May 25. Manske testified uncontradictedly that in "approximately the end of May" Byers had displayed such documentation to him, asking in the process whether Pepping was still "needed . . . any longer" and expressing an intention "to fire him" because an employee "that would file a complaint against him" was not suitable to the firm. Shortly following this Byers called a meeting with Don Bliven and Manske to consider the "results" of Pepping's complaint, and the consensus between only Byers and Don Bliven was to create some adversity that might range from firing to a pay cut.

Pepping testified that about May 26 he was summoned to Byers' office, who opened the discussion by alluding to the wage claim and told Pepping to expect a pay cut to minimum wage plus the fact that he must henceforth use his own tools and gasoline on the job. Byers added that he could resign rather than force an expectancy of

[1] Certain errors in the transcript are noted and corrected.

[2] Respondent is an Arizona corporation which maintains an office and place of business in Tempe, Arizona, where it is engaged in design, sale, and installation of security systems, annually purchasing and receiving (or directing shipment of) goods and materials valued in excess of $50,000 from suppliers actually located in States other than Arizona while selling goods and services valued in excess of $50,000 to customers located outside Arizona. These operational and commerce facts were admitted and stipulated to by Respondent in the course of hearing, or are otherwise apparent from the record as a whole. Further, such facts are, in part, consistent with matters set forth in Respondent's written request for postponement of an earlier scheduled hearing date as made by letter dated September 20, 1982, and in which reference was made to a minimum of two dozen foreign sales of products at $7000 per transaction, all within a 12-month period and thus yielding income in the nature of direct outflow within the meaning of the Board's nonretail jurisdictional standard of at least $84,000. On this basis I find Respondent to be an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

[3] All dates and named months hereafter are in 1982, unless shown otherwise.

[4] Manske was also penalized with loss of commission on the jobs because of their outcome.

being fired the next week. Pepping recalled that Byers added he would resist the vacation claim, and that if "the Industrial Commission" forced the Company to pay this he would simply sue Pepping in return. The conversation of only these two ended on Pepping's statement that he would take the matter under advisement. The following morning (which was in fact Friday, May 28) Pepping appeared at the premises and advised Byers that he would neither resign nor agree to the undesirable terms of employment which had been outlined. On this, by Pepping's version of things, Byers stated that he was fired and should leave. Pepping testified that, moments later as he was proceeding to check out his tools in the presence of Don Bliven and Felkey, remarks were exchanged in which he reemphasized in a clarifying manner that he was clearing out simply because of involuntary termination. Soon again after this Pepping passed close to where Byers, Don Bliven, and Felkey were grouped, and Byers called him over to express his own contention that "for the record" Pepping's departure from employment was "because of not accepting the new contract."

Respondent's witnesses were Felkey, office employee Patricia Bliven, and Byers, the latter of whom appeared and functioned as representative for purposes of this hearing and thus testified by narration. Felkey stated that he had assumed progressively more diverse duties over the course of 1-1/2 years in this employment. He was acquainted with the Potter job as one that was "prewired," and had later found this to have been sloppily performed. He recalled the occasion of Pepping having voiced his distress over imminent loss of vacation pay, to which Felkey had replied that the matter should be worked out by internal "equitable agreement." He also testified to remarks on the morning of May 28 at the company yard, as to which he recalled Pepping having said that he had decided to leave employment rather than take an hourly pay cut back to $4.50. Patricia Bliven testified to a written company policy, acknowledgment of which was in some instances signed by employees, under which traceable dereliction in performing job tasks would result in the employer offsetting any associated and extraordinary business costs against employees earnings. She also recalled an incident of December 1981, mentioned to Byers at the time, in which seemingly excessive mileage reimbursement had initially been claimed by Manske and Pepping.

Byers testified that a company rule covered all employees and required them to compensate for job errors or omissions, as known to be the case from numerous tellings of this consequence. He described the local projects as having generated many customer complaints,[5] and losses into the thousands of dollars, all as preceding and justifying the April meeting in his office at which sanctions were imposed on Manske and Pepping. Byers believed that problems simply worsened after that, and in consequence he called Pepping on May 27 to discuss his preceived poor performance, and to outline an expectancy of reduced pay down to possibly only the minimum wage rate. Byers' version is that resignation was the alternative course chosen by Pepping, and he reaffirmed this intention of quitting the next morning in the presence of Felkey and Don Bliven. Byers also stated that he had informed Pepping of an intention to bring court action if necessary to enforce the forfeiture of vacation pay, but that he was not capriciously opposed to Pepping's right in filing the official wage claim.

On the few factual issues in dispute I credit the General Counsel's witnesses. Both were impressive on demeanor grounds and displayed careful differentiations of recall with an honest-appearing effort at presenting the truth of their experiences. I have given due consideration to Pepping's direct interest in the outcome of this proceeding and to Manske's faintly disguised antipathy toward Respondent (from which he voluntarily terminated in June), but find no basis from these or other factors to discount their persuasive testimony in any regard.[6] Respondent's witnesses Felkey and Patricia Bliven were clearly partisan; however, the only point of factual conflict is where Felkey attributes a verbalized statement of quitting employment to Pepping on the morning of May 28. As to this I discredit Felkey, believing him to be mistaken in fact and otherwise catering to Respondent's position. I also discredit Byers on the same point and on his version of previous conversations with Pepping, for I assess his testimony on demeanor and other bases as eagerly disposed against Pepping to the point of exaggerated misstatement, noting further that he grossly misrecalled the rather vivid context of his final conversational exchange with Pepping in terms of whether it was an afternoon or a morning episode.

Significantly in one recent decision where the Board found that adverse action against an employee for an apparent intention to involve the "Department of Labor" did not mean a violation, where the employee's concerns as to wage and vacation benefits pertained strictly to herself. However rationale of that case did recognize that where an employee acted alone, and enlisted the aid of a governmental agency in support of some claim, concertedness is present when the underlying problem is one relating "to a matter of common concern to other employees." *Inked Ribbon Corp.*, 241 NLRB 7 (1979). It is plain that the business policy of holding employees financially responsible for deficiency of job performance was seriously promulgated by Respondent and, as testified to by both Patricia Bliven and Byers himself, existed as a constant tool for management to avoid or discourage the incurring of unwarranted job costs. It is this very characteristic that gave Pepping's conduct its concerted nature within the meaning of *Alleluia Cushion Co.*, 221 NLRB 999 (1975), and its progency, for his wage claim was more than an individual effort at escaping penalty but a triggering test of Respondent's fundamental ability to en-

[5] Respondent introduced letters into evidence, which amply detailed the nature of complaints by customers Chauncey and Potter in terms of faulty design, installation, or operation of the desired security alarm systems or their component parts.

[6] I have also duly considered the episode of erroneous mileage reports having been submitted to Patricia Bliven by Manske and Pepping, and find it inunconsequential in its essence with regard to their present credibility as well as so remote in point of time as to be without notable value to Respondent's case.

force such a term and condition of employment.[7] Thus a matter of *common employee concern* was present, and in such instance the Board consistently finds that invoking the authority of an appropriate governmental agency is a concerted activity within the meaning of Section 7 of the Act. Cf. *W. C. Electrical Co.*, 262 NLRB 557 (1982), and cases cited therein.

The United States Court of Appeals for the Ninth Circuit has indicated its view of "concerted activities" to mean that an employee must be acting with or on behalf of other employees, and not solely by and on behalf of . . . himself." *Pacific Electricord Co.*, 361 F.2d 310 (9th Cir. 1966). This view was predictably followed when the court found that an aggrieved employee was acting not only *by* but *for* himself. *NLRB v. C & I Air Conditioning*, 486 F.2d 1977 (9th Cir. 1973). See also *NLRB v. Bighorn Beverage*, 614 F.2d 1238 (9th Cir. 1980); *Bay-Wood Industries v. NLRB*, 666 F.2d 1011 (6th Cir. 1981). Notwithstanding the thrust of such cases, and whatever prospect is present as to the Federal courts' acceptance of what constitutes protected concerted activity within the meaning of the Act, I am bound by Board precedent and the principles clearly enunciated in this area. *J. N. Moser Trucking*, 249 NLRB 720 at 723 (1980).

The second allegation brought here against Respondent is the matter of threatening legal action on improper grounds. I have credited Pepping's straightforward recollection of being told that he might be sued for having made his vacation pay claim, and I reject Byers' characterization of his remark as advisory rather than threatening. A plainly inhibiting effect would flow from such an utterance, and the rights of employees would be seriously impaired if such heavy-handedness were without a remedy. On this basis I find a second violation to have occurred in this regard, and although not as in other instances having ripened into actual proceedings is at least a matter deserving cease and desist sanctions. See *United Credit Bureau of America*, 242 NLRB 921 (1979); *Power Systems*, 239 NLRB 445 (1978).

Accordingly, I render conclusions of law that Respondent, by discharging Pepping because he filed a claim with the Arizona State Labor Department seeking vacation moneys assertedly due to him, and by threatening to bring a lawsuit against him should be pursue such claim, has engaged in unfair labor practices within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

[7] Here the Arizona State Labor Department eventually closed its file on Pepping's claim as a matter which "cannot be resolved" under its jurisdiction.