

**Morton Rosen, Selma Rosen and Sanford Rosen t/a
Sylvan Manor Health Care Center and Service
Employees International Union, Local 82. Case
5-CA-13274**

27 April 1984

**SUPPLEMENTAL DECISION AND
ORDER**

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

On 23 December 1983 Administrative Law Judge Sidney J. Barban issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in answer 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 supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Morton Rosen, Selma Rosen and Sanford Rosen t/a Sylvan Manor Health Care Center, Silver Spring, Maryland, its officers, agents, successors, and assigns, shall pay Jacquelyn Davis the sum set forth in the Order.

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. Nor do we find, after a full review of the record and the judge's decision, any evidence to support the Respondent's claim that the judge's findings were the result of bias and prejudice.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

SIDNEY J. BARBAN, Administrative Law Judge. This matter was heard at Washington, D.C., on August 3 and 5, 1983, on a backpay specification dated May 9, 1983, issued pursuant to an order of the National Labor Relations Board directing the above-named Respondent to, *inter alia*, make Jacquelyn Davis (herein Davis) whole for any loss of earnings she may have suffered because of the discrimination against her, plus interest. 264 NLRB

1342 (1982). Respondent's answer raises issues set forth hereinafter.

On the entire record in this case, from observation of the witnesses and their demeanor, and after due consideration of the briefs filed by Respondent and the General Counsel,¹ I make the following

FINDINGS AND CONCLUSIONS

I. THE ISSUES

Both Respondent and the General Counsel agree that the backpay period in this matter begins on April 1, 1981. (All dates herein are in 1981, unless otherwise noted.) The parties disagree as to when the backpay period ended. The General Counsel contends that the backpay period ended on February 11, 1983, when Respondent offered Davis reinstatement. However, Respondent contends that period did not extend beyond September 16, 1981, when Respondent asserts Davis was fired by an interim employer for alleged "gross misconduct," tolling backpay at that point.

Respondent further argues that backpay should be tolled as of the date of Davis' discharge by the interim employer, "if not before," because of an alleged failure by the General Counsel and by Davis "to obtain or present evidence of interim earnings" asserting that the General Counsel is seeking to "escape his obligations" in this regard by "seeking simply shift the burden of proof of Respondent." (Br. 11-12.) The General Counsel argues that the burden of proof as to interim earnings by law falls upon Respondent.

The major issue litigated concerns Respondent's claim that Davis was discharged by an interim employer for conduct justifying tolling backpay at that point. The General Counsel contends that not only was the discharge unjustified, but, in fact, was the result of Davis' involvement with the Union.

**II. DAVIS' EMPLOYMENT DURING THE BACKPAY
PERIOD**

Davis was discharged by Respondent from her job as a nurses assistant on April 1. She credibly testified and I find that she thereupon sought employment at other nursing homes and hospitals in and around Washington, D.C., until she obtained employment at the Hebrew Home of Greater Washington (herein the Hebrew Home or the Home), on April 25, first on a part-time basis and then full time. Davis continued to work for the Hebrew Home until she was discharged on September 16, as discussed hereinafter. Davis then sought work at a large number of places in the area, most of them hospitals and nursing homes, which she named at the hearing. I credit her testimony.² Davis was employed on a temporary

¹ The General Counsel has filed a motion to strike certain arguments in Respondent's brief and Respondent has filed an opposition thereto. I will consider the points made at appropriate places herein.

² Respondent does not controvert Davis' testimony as to her attempts to find employment, except that Selma Rosen, one of the owners of Respondent (herein Rosen), asserts that as a general situation the nursing homes in the area were generally in need of nursing assistants, on the

Continued

basis by the Hospital for Sick Children, on December 7, and continued at that job until April 6, 1982, when her temporary appointment ran out. After her termination by the Hospital for Sick Children, Davis again sought employment from a large number of places, including a number which were not involved with nursing care. These were also named in the record. The only work which she secured was for 3 days from the Union. Davis testified that about a month and a half or 2 months after she lost her job at the Childrens Home, she "began getting discouraged and slowed down my search for work," but she states that she "didn't stop looking, I never stopped looking for employment. I didn't go out as much as I had gone out. But I would get the yellow pages and I would call from the yellow pages, and on Sundays I would get the paper and I would call. But I slowed down my search for work as far as going out." The record shows that previously Davis had driven to various places named, in her car, seeking work.

Respondent also asserts that Davis "admitted . . . to refusing to look in the suburban Virginia area, where there were jobs advertised." (Br. 13.) However, the actual testimony was somewhat different.³ I cannot find on this record that Davis refused to seek jobs in Virginia during the periods with which we are concerned.

III. DAVIS' EMPLOYMENT AT THE HEBREW HOME

As noted, Davis was employed on a part-time basis by the Hebrew Home on April 25, 1981. She was thereafter employed by the Home on a full-time basis until she was terminated on September 16, 1982. While employed at the Hebrew Home, Davis was considered a good employee. Indeed, DeVault, on Davis' separation form, rated her "good" on the four categories of "Attendance," "Efficiency," "Attitude," and "Competency." In July 1981, Davis' immediate supervisor, in recommending that she be given permanent status, stated that Davis "has been performing her duties efficiently as a nurses assistant. She is caring toward the residents [as the Home referred to patients] and has a good rapport with her fellow employees."

Shortly before September 16, Rosen, who is, as noted, one of the owners of Respondent, called Samuel Roberts, executive director of the Hebrew Home, on the tele-

basis of her understanding from her contacts with other establishments, not specified as to time. Virginia DeVault, associate director of nursing at the Hebrew Home (herein DeVault sometimes erroneously spelled DuVall in the transcript), a witness for Respondent, also indicated difficulty in securing nursing assistants because of the location of the Home, and said she "assumed" other homes were in need of nurses assistants. In addition, she referred to newspaper ads for nurses assistants, but none was produced. She did not specify the time periods referred to.

³ Davis' testimony was as follows:

Q. (Mr. Davison) Ms. Davis . . . are you telling us now that there simply weren't any nursing assistant jobs for 3.35 an hour or more within an area of, say four or five miles from your home? There just weren't any?

A. No.

Q. Nothing at all?

A. The only listing for nursing assistants were—was in Virginia. The Hebrew Home had a listing for nursing assistant. It was in Virginia.

In fact, the Hebrew Home was in suburban Maryland, no less difficult of access than suburban Virginia.

phone and, after chiding him on the Home's hiring a number of employees who had left Respondent's employ, said, according to Roberts, that "we were employing a former employee of hers, and that the employee was a marginal employee, and we had made a choice, and we may have difficulty with her." Roberts states that Rosen named the employee as Jacquelyn Davis.⁴ Both Roberts and Rosen state that Rosen did not refer to Davis' involvement with the Union. However, Rosen's testimony at another place makes clear that because of the frequent interchange of employees among the nursing homes, the nursing homes were aware of what was going on at the other homes. I have no doubt in the circumstances and find that the supervisors at the Hebrew Home became quickly aware of Davis' union involvement at Respondent's establishment. Roberts states that he advised the director of nurses at the Hebrew Home, May Siegel, of the call from Rosen; he states that he would have felt "derelect" if he had not done so. DeVault, who was an assistant to Siegel, testified that she had been made aware that Davis had previously worked for Respondent, but could not recall from whom she had learned this. She denied learning about Davis from Rosen, or that Rosen had called her in the period immediately before she discharged Davis. Inasmuch as the purpose of Robert's advising Siegel of Rosen's call was to alert the Home's supervisors of a possible personnel problem, I find it more than likely, and infer that Siegel informed her assistant, DeVault, of the message passed on by Roberts on this occasion.

Davis testified that a week before she was discharged, DeVault spoke to her and several other nurses aides, some of them previous employees of Respondent, while they were at the nurses station, stating "that Mrs. Rosen from [Respondent] had called her and asked her why she had hired all of her employees. Mrs. DeVault turned to me and said, 'Especially you.' Mrs. Rosen asked why did she hire that bad girl. Mrs. DeVault stated that 'Jackie, were you really trying to get a union?' I said yes."

DeVault denied having any conversation with Rosen about Davis before on or about April 5, 1982.⁵ DeVault specifically denied the conversation asserted by Davis, or that in early September 1981 she had a conversation with Davis and other nurses aides about a telephone call she allegedly received from Rosen.

Respondent argues that, in resolving this credibility conflict, the General Counsel's "failure to present testimony from any of [the three employees still employed at the Hebrew Home who Davis identified as present at this conversation], or to explain his failure to do so, warrants the inference that their testimony would not have supported Davis." (Br. 9.) That statement is followed by an attack on the General Counsel for failing to call these employees as witnesses, which is the subject of the Gen-

⁴ Rosen says she only referred to the employee as "Jackie," which I find quite improbable. Rosen testified that she told Roberts that she knew that the Home had hired other employees from Respondent, "but you might have one who is trouble," referring to Davis.

⁵ It appears that Davis, at the unfair labor practice hearing, testified concerning the conversation with DeVault set forth above. Rosen, it seems, called DeVault to obtain her version of the facts involved.

eral Counsel's motion to strike. Though I disagree with a number of the things asserted by Respondent in support of his argument, I see no reason to strike the argument. However, I do not believe that the circumstances in this case warrant an inference that the witnesses not called would necessarily fail to support Davis. The witnesses were equally available to Respondent, who also did not call them. Though Respondent argues that it was unaware of the missing witnesses before the hearing in this instance (a matter which the General Counsel disputes, with some basis), the record shows that Respondent was given a recess at the end of the case to locate one missing witness employed by the Hebrew Home. I fail to see why Respondent could not have brought the others, if they supported DeVault's position. An inference is not justified merely because the General Counsel and Respondent did not present corroborative evidence. See McCormick, *Evidence* § 272 (2d ed. 1972).⁶

I have no doubt that a conversation occurred to the effect testified by Davis, though it is probable that DeVault referred to a call which Rosen had made to the Hebrew Home which was critical of Davis rather than to a call made directly to DeVault. As the record shows, such a call did occur and undoubtedly was passed on to DeVault as has been found. It has also inferred and found as stated above, the supervision at the Home was aware of Davis' involvement with the Union, which is confirmed in DeVault's question of Davis.

Testimony concerning the incident which led to Davis' discharge a week later was adduced through Alvina Jason, now employed in the accounting department of the Home, but who was at the time a secretary in the social services department of the Hebrew Home. At the hearing my impression was that Jason's recollection of the circumstances was something less than clear and not completely reliable. This is confirmed in the record as indicated in some instances hereinafter.

On Monday, September 14, about noon, Jason was sitting with a patient, a Ms. Price, in a room at the Home, when she says that she heard a noise or "commotion" in the hallway. At the time the hall area was very busy with patients going to or being assisted to the dining room. Jason was sitting at the window of the patient's room, near Price, who was asleep. There was apparently another bed in the room which must have been closer to the door inasmuch as Price's bed was by the window.⁷ Jason asserts that as she was looking at the doorway, which was wide enough to accommodate a wheelchair, she saw a nurses aide (whom she later identified as Davis) push a patient, who Jason says was walking feebly. Jason says that she cannot recall whether the patient was using a cane or a walker, asserting the incident

⁶ There are many reasons why witnesses are not, and should not be, called. I recall an instance in which a witness not called by either side was put on the stand at my insistence to resolve a difficult credibility conflict. The missing witness concluded by saying that though he was there at the time, he did not recall the incident sufficiently to be of any assistance.

⁷ Jason originally testified that she was not sure whether there was another bed in the room—though she thought so—but denied that there was anyone but Ms. Price in the room. Later she stated that she was not sure whether a second person was in the room, "or whether the bed was empty."

occurred 2 years ago. She says that what she saw through the doorway angered her and she came out into the hall, where she states that she saw Davis push the patient again.⁸ About this time she says she heard Davis say "something like" (Jason is not sure because of the passage of time) "I'm not going to do this every day." Jason says that Davis was very angry though no basis for such a conclusion was given. Later she said that Davis was shouting at the patient.⁹ Jason states that she approached Davis, ascertaining her name from a name tag suspended around her neck, and asked Davis if she could help Davis. The latter replied, "No, I'm just taking her into the dining room." Though Jason asserts that she was concerned that the patient might have been hurt,¹⁰ she made no effort to secure the patient's name, or secure the assistance of a floor nurse. Jason says that she decided that the incident was "none of my business." She thereupon returned to Price's room. After remaining there about an hour and a half, she did some typing and other work in the social services department. It was at this point she says she decided to report the incident she had observed to DeVault. Two days later, on September 16, at the request of DeVault and the administrator of the Home, Jason submitted a written report stating:

On Monday, September 14, 1981, while volunteering on the 2nd floor of the Smith-Kogod Building, I witnessed a nursing aide, Jacquelyn Davis, push a Resident down the corridor toward the activity center. When the Resident did not move as fast as she would have liked her to, she placed both her hands on the Resident's back and pushed her again, shouting, "Come on and get in here, I'm not going to do this every day."

Later that day, DeVault had Jason repeat her charges to Davis in DeVault's office.¹¹ Davis vigorously denied the accusations. DeVault, asserting that she was satisfied that the patient had not been hurt, made no further investigation.

When asked how seriously she took such allegations of patient abuse, DeVault replied, "It's strictly terminate." However, the evidence shows that in the case of two nurses aides fired on July 24 for verbal and physical abuse of a patient, these two were fired only after a second offense.¹² At the close of the interview with

⁸ When initially describing this incident on direct examination, Jason used the word "push" and sometimes also "shove." Early in her cross-examination, however, she strongly denied that she said "push," insisting that she had only used the word "shove." Thereafter, in her testimony she described the action as "push."

⁹ I note that the first time Jason described the incident, Jason asserted that Davis "said something like 'I'm not going to do this every day.'" (Emphasis added.) It does not appear that Davis was involved in the commotion that Jason first heard in the hallway.

¹⁰ Jason so testified at first, but later she denied that she had so testified.

¹¹ Davis, while admitting the confrontation, denies that Jason was the person brought into DeVault's office to accuse her on this occasion.

¹² It appears from the exhibits in the record that these two were fired for stuffing a washcloth in the mouth of a patient who insisted that she be taken to the bathroom. At least one other nursing aide asked to be transferred so that she would not have to work with these two. No other example of discharge for patient abuse appears in the record.

Davis in her office, DeVault discharged Davis. She says that she advised Davis that Davis could have a grievance hearing the next morning, but that Davis did not come for the hearing. Davis denies that she was advised of her right to such a hearing.

Notwithstanding my considerable doubts as to Jason's reliability as a witness, I am convinced that she saw Davis put her hands on the back of an elderly patient whom she was assisting to the dining room. Though Jason emphasizes that Davis "pushed" or "shoved" the patient, I also have no doubt that she is overstating and coloring the situation. She describes the patient as elderly and senile (at some points she does not seem so sure that she was senile) and shuffling down the hall. Any considerable pressure on the back of such a patient would undoubtedly cause this patient to stumble or fall. There is no evidence of this, however. Indeed, Jason was so sure the patient did not fall and was not injured she did not seek assistance from a floor nurse, or attempt to ascertain the patient's identity. Nor did she attempt to bring the incident to anyone's attention until a considerable time later, when she says she began to have second thoughts about it. I cannot find on this record that Davis was abusing a patient on this occasion. Nor do I think that Respondent's claim to the contrary is strengthened by Jason's assertion that Davis "shouted" at the patient. I note that, when she first described the incident, Jason testified that Davis "said something like 'I'm not going to do this every day.'" (Emphasis added.)¹³

DeVault's decision to terminate Davis in these circumstances raises some questions. Davis had previously been a very good employee with whom the Home had no problems. Her immediate supervisor described Davis as caring toward the [patients]." DeVault was convinced that the patient had not been harmed during this incident. And notwithstanding her determination not to permit abuse of the patients—with which I heartily agree—it appears that in the past not all allegations of patient abuse have been considered grounds for immediate discharge. Nevertheless, I do not find, as General Counsel urges, that Davis was discharged on this occasion because of her previous involvement with the Union.

Conclusions

Respondent argues that "a backpay recipient, such as Jacquelyn Davis, forfeits backpay when she voluntarily quits a job or is terminated for gross misconduct" (Br. 5).

¹³ Jason's tendency to color her account with her own personal input is illustrated in her memo of September 16, in her statement that Davis pushed the patient "when the patient did not move as fast as she would have liked her to"—an obvious personal comment and conclusion of Jason.

There are, indeed, a number of cases which hold that when an employee entitled to backpay quits interim employment willfully or without cause, the employee should be considered to have incurred a willful loss of pay. See, e.g., *Medline Industries*, 261 NLRB 1329 (1982), cited by Respondent. Likewise, in a number of cases in which an employee entitled to backpay has been discharged by an interim employer, the Board has also considered whether the employee has engaged in conduct which amounted to a willful loss of pay. However, no case has been cited in which an employee's backpay has been diminished because of such discharge and I am aware of none. See *Kansas Refined Helium Co.*, 252 NLRB 1156 (1980), and cases cited at 1162; *Gary Aircraft Corp.*, 211 NLRB 554 (1974); *Fort Lock Corp.*, 233 NLRB 78 (1977), holding in various circumstances that though the employee involved was discharged by an interim employer the employee's conduct did not constitute willful loss of pay.

"While the General Counsel has the burden of proof to establish gross backpay," the respondent has the burden of proof to show diminution of that amount, whether such diminution results from the willful loss of earnings by the failure to either look for or keep a substantially equivalent job" *Fort Lock Corp.*, supra at 80; *Kansas Refined Helium Co.*, supra. I find that it has not been shown in this case that Davis engaged in such willful or gross misconduct as to constitute a willful loss of earnings within the Board's precedents.

Recommendations

Respondent does not deny the gross backpay figures set forth in the specification. Though Respondent denies Davis' interim earnings conceded by the General Counsel in the specification, Respondent has not submitted any different figures, or, as has been found, any other reason to diminish the backpay to which Davis is entitled. According to my calculations from the specification, the net backpay due Davis is \$8,206.20. In his brief the General Counsel, without any explanation therefor, asserts that Davis is due \$9,985.26.

On the basis of these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended

ORDER

Morton Rosen, Selma Rosen and Sanford Rosen t/a Sylvan Manor Health Care Center, Respondent herein, its officers, agents, successors, and assigns, shall pay to Jacquelyn Davis \$8,206.20 with interest thereon as set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).