

Union Camp Corporation and Doris E. Parker. Case
5-CA-13973

30 April 1984

ORDER GRANTING MOTION AND
DISMISSING COMPLAINT

BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS

On 30 December 1982 Administrative Law Judge Karl H. Buschmann issued the attached decision in the above-entitled proceeding in which he found that the Respondent violated Section 8(a)(1) of the Act by discharging the Charging Party. The Respondent filed exceptions and a supporting brief.

On 5 April 1984 counsel for the General Counsel filed a Motion to Dismiss Complaint in light of the Board's decision in *Meyers Industries*, 268 NLRB 493 (1984). Neither the Respondent nor the Charging Party has filed a response to the motion.

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

The Board has considered the matter and, in the absence of any opposition thereto, the Board grants the motion.

ORDER

It is ordered that the complaint issued by the Regional Director 25 June 1982 is dismissed.

DECISION

KARL H. BUSCHMANN, Administrative Law Judge. This case arose upon a charge filed by Doris E. Parker (Parker) on December 31, 1981. The complaint which issued on June 25, 1982, alleges in substance that the Respondent, Union Camp Corporation, located in Franklin, Virginia, violated Section 8(a)(1) of the National Labor Relations Act (the Act) when it discharged Parker, a part-time employee, for filing an unemployment compensation claim in which she claimed to be available and searching for employment.

Respondent, in its answer filed July 2, 1982, denied the commission of any unfair labor practice. Respondent also alleged in its answer that Parker was removed from spare status because the conditions of eligibility for unemployment compensation conflicted with company requirements for employees in spare status positions.

A hearing was held on October 13, 1982, in Norfolk, Virginia. Both parties filed briefs on November 29, 1982. Based on the entire record in this case, I make the following

FINDINGS OF FACT

The Respondent, Union Camp Corporation in Franklin, Virginia, manufactures and sells paper. The manufacturing operation consists of processing logs and wood

chips into pulp, and then converting the pulp to paper. The paper is sold to customers in rolls or in sheets. The Bleach Division of the Company is responsible for the manufacture of paper. There is also a Building Products Division and a Woodland Division. Approximately 1800 persons are employed in the Bleach Division and about 1200 are in hourly jobs.

Respondent's plant operates 24 hours a day, 7 days a week, with four shifts. Therefore, in addition to regular full-time employees, Respondent employs "part-time spare employees" as chip samplers and paper testers. These part-time paper testers and chip samplers worked both on a scheduled and an "on call" basis. Spare testers were scheduled to work to fill in for anticipated absences among full-time testers or to perform overtime work to be done. In addition, if a full-time tester failed to report for work or became ill on the job, a spare would be called to work. Because spares often had to work unscheduled hours, Respondent required that all spares be "on call" or be available for work on short notice.

In October and November 1981, Respondent employed 24 full-time paper testers. Twenty of those were employed as paper testers and four as head paper testers. Respondent had six manufacturing machines, each of which required one paper tester per shift. Respondent also employed about five spare paper testers at this time, including the Charging Party, Parker.

Parker had been employed by Respondent since October 1978, initially as an on-call spare chip sampler and then for about 2 years as a spare on-call paper tester. Parker was a spare paper tester when she was terminated and removed from spare status by Respondent in December 1981. From January 1 through November 1, 1981, Parker earned about \$11,000, a substantial portion of which was earned from unscheduled on-call assignments. There had been no major complaints concerning Parker's availability. She was considered to have a "good record."

During prior periods when Parker had not worked, either scheduled or on call, for a week or more, she had filed for and received unemployment compensation benefits. Parker filed her original unemployment compensation claim at the suggestion of Joseph King around January 1980. King was the division manager of Industrial Community Relations for Respondent. Parker had filed for unemployment compensation benefits eight or nine times between January 1, 1980, and November 1, 1981.

On November 4, 1981, John D. Mumford, resident manager of Respondent's Franklin Bleach Division, informed all employees that there would be a shutdown of one paper machine beginning the following Sunday (November 8, 1981) and lasting into the first week in December (G.C. Exh. 3). Parker received the memorandum on Friday November 6, 1981, when the foreman, Lonnie Jernigan, brought it into the workroom and told the paper testers to read it. Jernigan said some full-time paper testers would be placed on other jobs but the spares would not be working. When the schedule for the next week was posted, on November 6, 1981, Parker was not scheduled to receive any work.

On Monday, November 9, 1981, Parker filed a claim for unemployment compensation benefits in the Suffolk Virginia Employment Commission Office. At that time, Parker was given a claimant questionnaire (G.C. Exh. 10) and told to fill it out showing where and when she had searched for work. She also received an application identification card (G.C. Exh. 11), and picked up a pamphlet entitled "Unemployment Insurance Programs in Virginia" (G.C. Exh. 12). Each of these documents explained that an applicant for unemployment compensation benefits must be actively seeking work and be available, ready, and willing to accept suitable work.

Parker sought another job as required by the Virginia Employment Commission (VEC). On November 27, 1981, a determination was made that Parker was entitled to unemployment benefits for the period of November 8-21, 1981 (G.C. Exh. 6). During this period, Parker was never either scheduled or called for work by Respondent; nor did she find another job. Between November 23 and December 12, 1981, Parker worked several times on on-call assignments, and her name was on the schedule for work for the week of December 13, 1981.

Respondent received Parker's unemployment claim form which required that the Company, as former employer, answer some questions regarding this former employee's claim for unemployment compensation (G.C. Exh. 5). Joseph P. King answered this form on Respondent's behalf on November 12, 1981. In the space for remarks, King wrote:

Employed on a call basis since 10-11-78 and has not been terminated. By accepting the condition imposed; i.e., being available for work on short notice, the employee cannot be otherwise employed and, therefore, cannot meet qualifications for unemployment compensation [G.C. Exh. 5].

Respondent also received a copy of VEC's determination awarding unemployment compensation benefits to Parker. The determination stated:

You have worked for this employer on an on-call basis since 1978. Due to lack of work, you did not perform any services during the period 11-8-81 thru 11-21-81.

An unemployed individual is one who during any week performs no services and with respect to which no wages are payable, or in any week of less than full-time work if the wages payable are less than the week benefit amount.

In view of the above, you were unemployed during the period 11-8-81 thru 11-21-81 and entitled to benefits. [G.C. Exh. 6.]

Respondent filed an appeal from VEC's determination on December 8, 1981, stating that Parker:

... has agreed to be available to work on very short notice. This, in our view, means that she cannot be involved in other work or be seeking other work. Because of this, we do not feel that she would be eligible to draw unemployment during the

periods when she is not actually working. [G.C. Exh. 7].

Immediately following this letter of appeal, Respondent's Joseph King spoke with a deputy Virginia employment commissioner who confirmed that Parker had been asked about her availability for other employment and had "satisfied the Commission that she was in fact seeking other employment." Based on this confirmation, Respondent notified Parker that she was "removed from spare status" and thereby terminated in a letter dated December 14, 1981 (G.C. Exh. 2). The letter was read to Parker over the phone that same day. Respondent then withdrew its appeal of the award determination in a letter dated December 15, 1981 (G.C. Exh. 8), thereby allowing Parker to receive the 2 weeks of benefits previously awarded.

In response to her termination and removal from spare status, Parker filed an unfair labor practice charge alleging that Respondent terminated her in violation of Section 8(a)(1) of the Act. Parker alleged further that by discharging her Respondent interfered with her Section 7 right to seek unemployment compensation benefits and this interference was not supported by a sufficient business justification.

Respondent defends its action on three grounds. First, it contends that Parker's filing for unemployment compensation did not constitute a protected concerted activity within the meaning of Section 7. Respondent's second contention is that Parker was discharged for her violation of an established requirement for continued employment as a spare employee and not for any discriminatory reasons. Finally, Respondent argues that, even if Parker's filing for unemployment benefits were a protected activity within the meaning of Section 7, its action was justified on the basis of a substantial and legitimate business justification.

Analysis

Respondent's three-pronged defense requires an examination of: (1) whether or not the filing for unemployment compensation benefits constitutes a protected concerted activity within the meaning of Section 7 of the Act; (2) Respondent's practice of discharging of spare employees under its on-call rule; and (3) the sufficiency of Respondent's business justification for its rule.

Respondent argues first that Parker's action in filing for unemployment benefits did not amount to a "concerted activity for the purpose of collective bargaining or other mutual aid or protection" within the meaning of Section 7 of the Act. The fact that Parker and all spare employees were not members of the bargaining unit and not covered by the collective-bargaining agreement is emphasized by Respondent as further proof of lack of Section 7 standing.

Spare testers, like Parker, are clearly "employees within the meaning of the Act." Indeed, they qualify for company benefits once they worked in excess of 1000 hours in a 12-month period; moreover, Respondent attempted to keep all spare testers employed above the 1000-hour minimum so that they qualified for benefits.

Once they replace a full-time tester, the spare employee is considered the tester and is paid the contractual rate of a full-time paper tester. The testimony established that Parker and all other spare testers worked an average of 1100 to 1200 hours in 1981. Nevertheless, sometimes these employees were not scheduled or called for work for extended periods of time. On such occasions, they qualified for unemployment benefits under the Virginia system. Since all spare testers were similarly situated, worked under similar circumstances, and submitted claims for unemployment benefits for the same reasons arising out of the nature of their part-time jobs, it cannot be gainsaid that their act of filing unemployment claims constituted a concerted activity. The only aspect of individual action may have been one of timing, namely, that these employees, although similarly situated, qualified for the benefits at different times.

Respondent has cited several cases where certain actions by employees were held by the Board not to be entitled to Section 7 protection. None of the cases cited involved the filing of an unemployment compensation claim. In the only decision dealing with the precise issue here, the Board stated explicitly:

It has long been recognized that this Board is required to administer the Act with careful accommodation to the statutory scheme as a whole. It is equally well settled that the matter of unemployment compensation benefits arises out of the employment relationship . . . and is one aspect of the national labor policy. Clearly Bramlett's dispute with Respondent over her entitlement to unemployment benefits would be a matter of common interest to other employees, since they might find themselves faced with a situation similar to hers in the future. Thus, by refusing to withdraw her claim . . . Bramlett refused to allow Self to deny her and, by way of example, the other employees access to the State's unemployment compensation appeals procedure. [*Self Cycle & Marine Distributor Co.*, 237 NLRB 75 (1978).]

The Board's decision in *Self Cycle* clearly holds that an employee's act of filing for unemployment benefits constitutes protected concerted activity and seems, therefore, dispositive of the issue. See also *Ohio Brass Co.*, 261 NLRB 137 (1982); *Krispy Kreme Doughnut Corp.*, 245 NLRB 1053 (1979), enf. denied 635 F.2d 304 (4th Cir. 1980). I accordingly find that Parker's claim for unemployment benefits under the circumstances here constitutes concerted activity protected by Section 7 of the Act.

The General Counsel, however, has not alleged that Parker's discharge was prompted by the mere act of filing her claim. Rather, the requirement, ancillary to a claim for unemployment benefits that an applicant actively seek employment, provided the basis for the discharge. This, according to Respondent, did not involve any retaliatory or discriminatory motive but merely a legitimate business justification, i.e., that a spare employee be available at any time and exclusively work for Respondent. This argument, in effect, assumes that Re-

spondent's conduct was not inherently destructive of important employee rights, and that, in any case, it had shown a substantial business justification for its conduct. *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967).

The record shows that both assumptions are incorrect. Without a representation to VEC that an applicant is actively seeking employment, the individual is automatically disqualified for benefits. In short, a spare tester for Respondent who is unemployed for an extended period of time and otherwise qualified for unemployment benefits would be prohibited from claiming such benefits because of Respondent's prohibition against VEC's mandate that most applicants actively seek employment during the unemployment stage. Clearly, an employer who enforces this prohibition and discharges an employee who has made such a representation in connection with his claim has obviously destructively interfered with the right of such an individual and other employees, similarly situated, to file for and obtain unemployment benefits.

Moreover, under the circumstances of this case, Respondent has failed to demonstrate that its interference with Parker's protected concerted activity was justified by a legitimate business reason. The record did not establish precisely Respondent's policy dealing with the availability of spare testers. Testimony shows that the rule had never been reduced to writing and when it was stated orally it was explained in various ways.

The only clear requirement seemed to be that spare paper testers had to be *available* for work on short notice, or as stated by Respondent in its brief (p. 23), "ready availability." This requirement understandably would preclude a spare tester from having other employment or activities which would conflict with their availability for on-call work. This was communicated both orally to employees and in writing to the Virginia Employment Commission. However, it was not clearly established why spare testers should also be precluded from merely *seeking* other employment. Indeed, Respondent's references to the rule only once mentioned the prohibition against "seeking other employment." And this reference only appeared in Respondent's communications with the VEC, or *after* Parker had filed the unemployment claim. Since the rule had never been reduced to writing and had not explicitly been formulated to preclude spare employees from seeking other employment, it cannot be argued that Parker was terminated for cause. Parker and Respondent's representatives testified that she had previously applied for and received unemployment compensation. Respondent had the same rules in effect then, and the VEC's requirement that applicants for benefits had to seek work had also been in existence before.

Prior to this incident, Respondent had reprimanded spare employees only after several incidents of actual unavailability when called for work. But in those incidents the employees were not terminated even after they had been unavailable. For example, one spare actually had another job, yet she was only warned that this was a problem. She was finally given the opportunity to select one of her two jobs. Another employee was also allowed to find her own solution after being unavailable on sever-

al occasions because she had been dating. In neither instance was the unavailable spare tester terminated or forced to resign.

Parker was not only available but actually reported for work on very short notice on several occasions after she had filed her unemployment claim and, as required, had begun looking for work. Respondent admitted that during the disputed period of November 8 thru December 15, 1981, he had no problems with Parker's availability for on-call work. The facts belie Respondent's contention that an employee who is seeking other work has become "unavailable." It was also admitted that Parker's activities of seeking work had no effect whatsoever on Respondent's operations during the crucial period of November 8-21, 1981. It is clear, therefore, that Respondent's business justification was anything but substantial. Accordingly, I have no difficulty in finding that Respondent violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Union Camp Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By terminating Doris E. Parker because she had certified that she was seeking work in connection with her claim for unemployment compensation, Respondent interfered with her rights protected by Section 7 of the Act and engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a)(1) of the Act.

REMEDY

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

Respondent, having unlawfully discharged Parker, must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of discharge to the date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[Recommended Order omitted from publication.]