

Louis Arndt d/b/a Cristy Janitorial Service and
Service Employees International Union Local
22, AFL-CIO. Case 20-CA-17737

31 July 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND DENNIS

On 27 October 1983 Administrative Law Judge Timothy D. Nelson issued the attached decision. The Respondent filed 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 has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.¹

We agree with the judge's finding that employee Gretchen Stevens was engaged in protected concerted activity when she and other employees complained about their wages to the Wage-Hour Division of the United States Department of Labor. In so finding, however, we rely only on the objective standard of concerted activity set forth recently in *Meyers Industries*, 268 NLRB 493, 497 (1984),² where the Board stated, in pertinent part:

In general, to find an employee's activity to be "concerted," we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity. [Footnotes omitted.]

In this case it is clear from the judge's findings that union steward Stevens³ and other employees complained among themselves about late paychecks and perceived wage underpayments and that Stevens and other employees went together to

¹ We note the correct citation of *Flordia Steel Corp.* is 231 NLRB 651 (1977). We shall conform the notice to include an expunction statement to correspond with the judge's recommended Order.

² Member Zimmerman agrees that Stevens was engaged in concerted activity based on objective standards but, in any event, finds that Stevens' complaint to the Labor Department was presumptively concerted on the bases set forth in his dissent in *Meyers*.

³ As the judge noted, the Charging Party Union was the incumbent representative of the employees at the Army Depot when the Respondent took over the janitorial service contract in November 1982. Stevens and another employee had been designated stewards before the takeover.

the Department of Labor to pursue their complaints. Further, at the time of Stevens' discharge, Plant Manager Gerlach asked her about filing charges with the Department of Labor, remarked that Stevens and the other steward were "two of a kind," and stated that Stevens was "probably one of the ones" that went to the Department of Labor. We conclude that Stevens' complaining to the Department of Labor with other employees was concerted activity and that the Respondent discharged her for this activity with full knowledge of its concerted nature, thus violating Section 8(a)(1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Louis Arndt d/b/a Cristy Janitorial Service, Corona, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fire or threaten to fire employees because they file wage underpayment claims on behalf of themselves and their fellow employees with a state or Federal agency.

WE WILL NOT coercively question employees about their involvement in the filing of such wage underpayment claims.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Gretchen Stevens immediate, full, and unconditional reinstatement to her former position, without prejudice to her seniority or other rights and privileges and WE WILL make her whole, with interest, for any losses she may have suffered as a result of her unlawful discharge on 16 February 1983.

WE WILL expunge from our records any reference to Gretchen Stevens' discharge or to her protected conduct which caused us to discharge her.

LOUIS ARNDT D/B/A CRISTY JANITORIAL SERVICE

DECISION

STATEMENT OF THE CASE

TIMOTHY D. NELSON, Administrative Law Judge. I heard this matter in trial at Sacramento, California, on July 6, 1983.¹ It arose when Service Employees International Union, Local 22, AFL-CIO (the Union) filed original and amended unfair labor practice charges against Louis Arndt d/b/a Cristy Janitorial Service (Respondent) with the Regional Director for Region 20 of the National Labor Relations Board (the Board) on, respectively, February 22 and March 28.

On March 29, the Regional Director issued a complaint and notice of hearing alleging in substance that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) when it fired Gretchen Stevens because she engaged in activity protected by the Act, namely, filing charges with a Federal agency over the wages which Respondent was paying her and her fellow employees. The complaint further alleges as independent 8(a)(1) violations that George Gerlach, Respondent's project manager, engaged in related unlawful interrogations and threats to employees about Stevens' protected activities.

Respondent duly answered, including by trial amendments to its original answer.² By these answers, Respondent has narrowed the range of controversy to the question of the lawfulness of its admitted actions in firing Stevens, and the lawfulness of certain undisputed statements made by George Gerlach.

On the essentially undisputed trial record, and considering the posttrial brief filed by the General Counsel (Respondent having filed none), I make these

FINDINGS OF FACT

I. ALLEGED UNFAIR LABOR PRACTICES

A. Background and Overview

Respondent, a California corporation, doing business from offices in Corona, California, provides janitorial services, including at the Sacramento army depot (depot), where this matter arose.³ At all times material until February 28, George Gerlach was the project manager at the depot, directly in charge of the nonsupervisory employees there. Gretchen Stevens, one of those employees, had worked at the depot when a different jani-

torial service had the contract, and she became employed by Respondent when it took over the same work in November 1982.

Gerlach fired Stevens on February 16, the day after Gerlach had been telephoned by Richard Newton, an agent of the Wage-Hour Division of the United States Department of Labor (DOL), who had called Gerlach to advise that he intended to investigate to determine whether Respondent was paying wages at the depot consistent with the Service Contract Act of 1965. This had followed a period in the preceding month during which Stevens and other employees had complained among themselves about late paychecks and perceived underpayment of wages. Stevens and a fellow employee, Victoria Wesley, had first gone to a State of California agency and had been referred to DOL because of its apparent jurisdiction over Respondent's operations at the depot.⁴ Stevens and nine other of Respondent's employees had journeyed together to the DOL office in Sacramento on a day in late January to pursue their complaints. DOL Agent Newton's preliminary call to Gerlach on February 15 was prompted by that late January visit.⁵

B. What Gerlach Said to Stevens and Others Around the Time He Fired Stevens

It is not clear that Stevens knew that DOL Agent Newton had called Gerlach on February 15 to commence an investigation. She had been absent due to illness for the 3 preceding workdays, and nothing was said to her on the subject when she returned on February 15. When Stevens reported to work on February 16, however, she was fired during a conversation with Gerlach in his office. Stevens described the conversation as follows in her trial testimony:

BY MR. SEAGLE:

Q. Could you please tell us what Mr. Gerlach said to you and what you said to him during that conversation?

A. He asked me to take Victoria's [i.e., Wesley's] W-2 form to her and I asked him why, she was coming back Friday, and he said, "Take it to her and tell her we don't want her back." And I said, "What? Do it yourself. I won't do your dirty work for you." And then he told me I was fired and said that both Vicky and I were two of a kind. And then I asked him, "Why?" And he said because Louis told me to fire you Friday.

Again I asked him, "Why?" And he said, "Well, you don't have a driver's license, do you? You've been driving without a license."

And I said, "What's that got to do with anything?"

¹ All dates are in 1983 unless otherwise indicated.

² Respondent's trial representative, Mark Arndt, had by then become the project manager for Respondent. He is the son of Respondent's owner, Louis Arndt, who made no trial appearance.

³ In the year before the complaint issued, as Respondent admitted, Respondent performed more than \$50,000 worth of services to the United States Army and thus had a substantial impact on the national defense.

⁴ The Union was the incumbent representative and both Stevens and Wesley had been designated as the Union's stewards at the depot before Respondent took over the janitorial service contract in November. Stevens had met with Gerlach and had voiced employees' complaints about late paychecks with him more than once in the period before January.

⁵ The charges of wage underpayments were later found meritorious and, according to Newton, they resulted in backpay to Respondent's employees totaling about \$4000.

And he said, "You have been out several times without calling in," and then he asked me where I had been the previous afternoon, that he had been looking for me and could not find me. And I told him that I was on Depot. And then again he told me to leave. And I asked him about my pay check and he said I would get it within 48 hours.

Q. Do you recall anything else that was said during the conversation?

A. No.

Q. Was anything else said concerning the reasons for your discharge?

A. He asked me if I went to the Labor Commission [sic] and I said I did.

Q. At what point in the conversation did he make that statement?

A. He asked me if I had a driver's license, and I said no. And then he asked me where I had been the previous afternoon. And then he asked me if I had been to the Labor Commission.

Q. Did you then proceed to leave the Sacramento Army Depot after you had been discharged?

A. Yes.

Gerlach was no longer employed by Respondent when the trial took place and he was not called to testify. Respondent called as a witness Dennis Phillips, currently Mark Arndt's "assistant," who was present during the February 16 discharge conversation between Stevens and Gerlach. Phillips' testimony was not materially at variance with that of Stevens and it was substantially corroborative as to a critical portion of the discharge conversation. Thus, Phillips admitted that Gerlach had stated at one point during the conversation: "You are probably one of the ones that went to the Labor Commission." In the absence of any serious testimonial conflict, therefore, I credit the overall substance of Stevens' version, but rely on Phillips' recollection of the words used by Gerlach relating to the "Labor Commission."

After being discharged, Stevens went to Wesley's house and advised Wesley what had happened. A call was then placed to Gerlach during which Wesley first spoke with him and then Stevens took the line. Crediting Stevens' uncontradicted version, she told him: "By the way George, I was not the only one who went to the Labor Commission . . . all of us had gone." Crediting Stevens, Gerlach then surmised that Stevens had "instigated" the DOL charges. Stevens denied this, naming another employee. Gerlach then replied that if he found out that Stevens' statements were true, "everybody will be gone."

On February 18, again crediting Stevens' uncontradicted testimony, Stevens and her husband went to Gerlach's office to get her paycheck. While there, she told Gerlach that she had been mistaken in reporting earlier that all of the employees had gone to the DOL, naming three who had not participated. Gerlach responded that he has asked all of the employees about it and they had each denied being involved, but that if he found out others had been involved, they would be "fired by the end of the month."

Wesley testified in seeming sincerity, and I find, that she had a similar conversation with Gerlach when she returned to work on February 19, following an absence due to illness. On her return she asked Gerlach why he had fired Stevens. Gerlach replied that she had been "late." Evidently not accepting this, Wesley said, "Well, George . . . if you fired one, you should fire all of them because they all went to the Labor Commission." Gerlach asked for the names of those employees and Wesley furnished them. Gerlach met later with Wesley that day and told her that he had asked the other employees about it and they had denied involvement.

C. Evidence Bearing on Respondent's Asserted Defense to Stevens' Discharge

In addition to Phillips, who, as noted above, substantially corroborates critical testimony by Stevens, Respondent called only one witness, Mark Arndt, who testified about his own knowledge of the circumstances surrounding Gerlach's discharge of Stevens. Respondent also introduced an exhibit, a memorandum from Gerlach to employees circulated in the period around February 7, which stated, in substance, that there had been complaints about poor quality work and excessive tardiness and absences among the employees. It declared further that, effective February 14, employees would be placed in a 60-day "probationary period," during which their performance would be reviewed.

Arndt's testimony about Stevens' discharge based on first-hand knowledge was quite limited. It can be summarized in this way: About 4:15 or 4:30 in the afternoon, while he and Gerlach were looking for Stevens, suspecting, but not knowing then that she had left work earlier, Gerlach finally voiced the intention to "get her badge back in the morning," adding, "I'm sick and tired of putting up with this stuff and these people."⁶

Stevens admits leaving work about 3:15 or 3:20 p.m. on February 15.⁷ There is some suggestion in Arndt's testimony that Stevens had left more than 30 minutes early, for he reports that Gerlach began looking for her at 3:30 p.m., and as Arndt believed, the scheduled quitting time was 4 p.m. Stevens credibly testified on rebuttal, however, and I find, that her own work schedule, with Gerlach's specific approval, was from 7 a.m. to 3:30 p.m. at the time of her discharge.

II. ANALYSIS AND CONCLUSIONS

Initially, I conclude that Stevens' actions, with fellow employees, in going to DOL with wage complaints was activity protected by Section 7 of the Act. See generally *University Heights Hospital*, 239 NLRB 290, 292 (1978), and cases cited at fn. 6, and especially, as to DOL Wage-Hour charges, *Triangle Tool*, 226 NLRB 1354, 1357 fn. 5 (1976), cited with approval in *Eastex, Inc. v. NLRB*, 437 U.S. 566 fn. 15 (1978).

⁶ It is probable, and I find, that by this time in the day Gerlach had already received the phone call from DOL agent Newton.

⁷ Stevens credibly testified that she left work early, consistent with a common practice by employees who had completed their chores, and that she had tried earlier, unsuccessfully, to notify Gerlach of her intentions.

The principal question raised by Stevens' discharge is whether it was prompted by her protected activities in going to DOL or by some other, unprotected, job misconduct. I have no hesitation in finding from the timing and content of Gerlach's remarks to Stevens and Wesley on February 16 and in the few days thereafter, that Stevens' perceived role as the instigator of the DOL charges was the motivating cause for her discharge.⁸ Certainly, Gerlach's repeated hostile reference to the DOL charges, with vows to fire any other employees who admitted involvement in them, allows no other inference. And, where Respondent has not brought forward any competent, first-hand testimony about what it is that motivated Gerlach, the key actor, I do not find it even necessary to discuss whether Gerlach possessed other, innocent reasons for firing Stevens.⁹ In this connection, I regard Gerlach's various statements elsewhere to Stevens, to Wesley, and to Mark Arndt suggesting that he was firing Stevens because of her tardiness, and/or her absenteeism, or because she did not have a valid driver's license, as inadequate to sustain Respondent's burden of coming forward with evidence that there existed some nondiscriminatory motivations for Gerlach's actions. And even if some weight might be accorded those out-of-court remarks, I would not find them to be sufficient to meet Respondent's burden under *Wright Line*,¹⁰ of demonstrating that Respondent would have fired Stevens for her alleged shortcomings even if she had never engaged in protected concerted activity.¹¹

The findings above that Gerlach questioned both Stevens and Wesley about the DOL charges and made related discharge threats also warrant the conclusion that Respondent thereby independently violated Section 8(a)(1) of the Act.¹²

⁸ As is discussed within, controlling weight is placed on those non-hearsay features of Gerlach's remarks which amount to admissions of a party-opponent within the meaning of Federal Rules of Evidence, Rule 801(d)(2).

⁹ The General Counsel urges (Br. 6) that I draw an inference adverse to Respondent for its failure to call Gerlach as a witness under circumstances where the record shows that Gerlach was a brother-in-law of Respondent's owner, Louis Arndt, and his whereabouts were known to Respondent. It is certainly true that the failure to call Gerlach made it difficult for Respondent to come forward with any evidence of innocent motivation for Stevens' discharge. But where, as here, Gerlach was no longer in Respondent's supervisory employ when the trial occurred, he would normally be deemed to be no longer within Respondent's control, thereby making it inappropriate to draw such an adverse inference. E.g., *Levingston Shipbuilding Co.*, 249 NLRB 1, 11 (1980), cf. *Martin Luther King, Sr. Nursing Center*, 231 NLRB 15 (1977). I therefore do not find that it adds any weight to the General Counsel's case that Gerlach did not testify; rather, it merely crippled Respondent's defense.

¹⁰ *Wright Line*, 251 NLRB 1083 (1980), enf'd, 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); see also *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), affirming the apportionment of burdens set out in *Wright Line*, supra.

¹¹ The General Counsel argues persuasively (Br. 4-6) that the record affirmatively contradicts these various "innocent" reasons proclaimed elsewhere by Gerlach (or by other of Respondent's agents). Nevertheless, I do not find it necessary or appropriate to address myself to defensive protestations made out of court and for which there is no reliable evidentiary predicate in this record.

¹² Similarly, Gerlach's admissions that he queried other employees on the subject support additional independent 8(a)(1) findings.

CONCLUSIONS OF LAW

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

2. By discharging Gretchen Stevens on February 16, 1983, because she was instrumental in bringing charges before the Wage-Hour Division of the United States Department of Labor that Respondent was unlawfully underpaying its employees, Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed by Section 7 of the Act to act in concert for their mutual aid and protection on the job, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

3. By George Gerlach's questioning of employees about their involvement in the filing of such DOL charges, and by threatening to fire any employees found to be so involved, and by each of said acts, Respondent has similarly interfered with, restrained, and coerced employees in the exercise of rights guaranteed them by Section 7 of the Act.

THE REMEDY

Having found that Respondent violated the Act essentially as alleged, I shall recommend that Respondent be ordered to cease and desist from like and related violations, that it post an appropriate remedial notice to employees, and that it offer immediate and unconditional reinstatement to Gretchen Stevens, making her whole, with interest, for any losses she suffered as a consequence of her unlawful discharge.¹³

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁴

ORDER

The Respondent, Louis Arndt d/b/a Cristy Janitorial Service, Corona, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or threatening to discharge employees because they filed wage underpayment claims on behalf of themselves and fellow employees with a state or Federal agency, or by coercively questioning employees about such claims.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Consistent with the section above captioned "The Remedy," take this affirmative action necessary to effectuate the purposes of the Act:

¹³ All amounts necessary to make Stevens whole shall be computed in accordance with formulas and policies established in *Isis Plumbing Co.*, 138 NLRB 716 (1962), and *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in accordance with the formula set forth in *Florida Steel Corp.*, 231 NLRB 657 (1977).

¹⁴ 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.

(a) Offer immediate, full, and unconditional reinstatement to Gretchen Stevens to her former position, without prejudice to her seniority or other rights and privileges, and make her whole with interest for losses she may have suffered as a consequence of her unlawful discharge on February 16, 1983.

(b) Expunge from its records any references to Gretchen Stevens' discharge or to her protected conduct which caused Respondent to discharge her.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its business offices in Corona, California, copies of the attached notice marked "Appendix."¹⁸

Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

¹⁸ If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."