

M & D Investments d/b/a David's and Louis E. Testa. Case 27-CA-8013

31 July 1984

DECISION AND ORDER

**By CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER**

On 14 April 1983 Administrative Law Judge Roger B. Holmes issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in support of the judge's decision.

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 with this Decision and Order.

The judge found, *inter alia*,² that the Respondent violated Section 8(a)(1) of the Act by discharging employees Louis (Chip) Testa, Calvin Lindley, and Norman Skender Tuesday, 10 August 1982,³ because they had engaged in protected concerted activities. However, the judge also found that the Respondent had decided to terminate these three employees Monday, 9 August, but that this decision was not to be implemented until Friday, 13 August. The judge further found that the Respondent had no knowledge of these employees' protected concerted activities until after the 9 August decision had been reached. He concluded therefore that the Respondent's 9 August decision to discharge Testa, Lindley, and Skender effective 13 August was a lawful one which was unlawfully accelerated to 10 August in response to their protected concerted activities. Accordingly, the judge did not provide for an offer of reinstatement. He also limited the period for calculating backpay to the time between the discharges and 13 August.

The General Counsel excepts to the judge's finding that the Respondent reached a lawful decision to discharge Testa, Lindley, and Skender 9 August.

¹ The General Counsel 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 The judge also found that the Respondent violated Sec. 8(a)(1) of the Act (1) by creating an impression of surveillance of its employees' activities on two occasions; (2) by interrogating Lindley at the time of his discharge; and (3) by telling Lindley that his discharge resulted from his involvement in protected concerted activities. No exceptions were taken to these findings.

³ All dates are 1982 unless noted otherwise.

The General Counsel maintains that the judge erred both in limiting the backpay period and in failing to order the Respondent to offer reinstatement to Testa, Lindley, and Skender. We find merit in the General Counsel's exceptions.

I. THE FACTS

A. Background

As more fully detailed in the judge's decision, the following chronology of events preceded the Respondent's alleged decision to terminate Testa, Lindley, and Skender 9 August and the implementation of that decision 10 August.

On Sunday, 8 August, several of the Respondent's employees held an informal meeting at the Respondent's bar. Testa and Lindley attended this meeting. The employees discussed their working conditions and related grievances. Specifically, the employees discussed the scheduling of work assignments, the Respondent's door policy, and management's inaccessibility for the airing of grievances. At the conclusion of this meeting the employees selected Testa, the most senior employee, to speak with management on their behalf about these issues.⁴

B. Events Pertaining to Testa

After the close of business 8 August (in the early morning hours of Monday, 9 August) Testa entered the Respondent's office and spoke with Manager Rob Lamont. It is undisputed that Testa did so at the bidding of his fellow employees. Testa credibly testified that his purpose in approaching Lamont was "to get things on a more level deal, more level with all of us."⁵ Testa attempted to discuss the matter of employees' work schedules with Lamont.⁶ Lamont told Testa that he was not in the mood to discuss it at that time.

Subsequently, around noon on 9 August, Testa telephoned the Respondent's general manager, Jim McNulty, and asked to meet with him that afternoon. Testa arrived at McNulty's office at approximately 1 p.m. and again attempted to press the employees' complaints regarding work schedules. When McNulty commented that he "was always complaining," Testa responded, "it is not just me complaining. We have a lot of employees and they

⁴ Skender testified that in a phone conversation Sunday, 8 August, Testa told him that "everyone was complaining about management and it was time we should get together and discuss it."

⁵ We note Lamont's characterization of this meeting as "the culmination of the problems I was having with everybody."

⁶ Regarding work assignments the record indicates that Lamont departed from the former management's practice of rotating the work stations on the work schedule to allow employees an opportunity to work the "money shifts."

are complaining about ongoing problems here, management's inaccessibility." McNulty concluded the discussion by advising Testa to speak with Lamont again.

Following his meeting with Testa, McNulty conferred with Lamont. McNulty testified that:

. . . it started out with the main conversation about Chip [Testa] being a problem and it was at that time that I told Lamont that I wanted Chip [Testa] terminated, and then we expanded the conversation to other people we were having trouble with, specifically Lindley and Skender, and I was beginning to feel like I had been Mr. Nice Guy too long and giving everybody their chances and everything, and I needed to clean house, and I made the decision that the three of them would be terminated the end of the week.

The Respondent, however, did not wait until the week's end to effect Testa's discharge. Rather, reports of an employees' meeting⁷ scheduled for 2 p.m. on Tuesday at Testa's house prompted the Respondent to advance his discharge. Thus at 2:15 p.m. on Tuesday Lamont telephoned Testa at home and informed him that his services were no longer needed. Lamont acknowledged that it was his intention to fire Testa while the employees' meeting was in progress.

C. Events Pertaining to Lindley and Skender

In addition to Testa, McNulty claimed to have decided on 9 August to discharge Lindley and Skender. As in the case of Testa these discharges were not to be effected until 13 August. However, these discharges were also advanced.

The record shows that in the early morning hours of 10 August Lamont and Shellock received reports of the employees' meeting scheduled for that afternoon at Testa's house. About 3:30 a.m. Puckett arrived at the Respondent's facility to give Lindley a ride home. Since he lived in the same apartment building Lamont accompanied them. During the ride Lamont remarked that he had "heard of the clique and your name was mentioned." When Lindley asked what he meant

⁷ After his conversation with McNulty Testa met with Lindley and others and expressed his opinion that "we are getting nowhere." Thereupon the group decided to hold a meeting the following afternoon at Testa's house. Testa was to contact other employees about the meeting. Later that afternoon Testa telephoned Skender to inform him of the group's decision to meet the next day.

We note that the Respondent's assistant manager Shellock acknowledged that he drew a connection between Testa's complaints about the way in which the club was being run and this meeting.

Lamont replied, "never mind, you will find out soon enough."⁸

At 11 p.m. on 10 August Lindley reported to work as a doorman. About midnight Shellock approached Lindley and asked him to come to the office. Upon their arrival in the office Shellock told Lindley that his services were no longer needed. He informed Lindley that the reason for his discharge was Lindley's involvement in the "mutiny party."⁹ To Lindley's comment that he did not attend the meeting, Shellock replied that

. . . he had heard otherwise through feelers that they had out, and due to what he heard from these feelers that [Lindley] was involved in the meeting and that was what led to the decision to terminate [him].

Shortly after he had discharged Lindley, Shellock approached Skender and asked him to come to the office.¹⁰ Once inside the office Shellock informed Skender that his services were no longer needed. When Skender asked the reason for his discharge Shellock answered, "You are well aware of why." Skender credibly testified that when he returned to the bar Lamont told him "that he had bragged about how well I had done the night before [9 August] to Jim McNulty and I f— it up when I got involved with Chip [Testa]."

When Lindley returned to the Respondent's facility 12 August to pick up his paycheck, he encountered Lamont. Lindley credibly testified as to the following conversation between himself and Lamont:

He [Lamont] said, "After all I have done for you that, you know, some of the things you said about me," and I told him that I didn't understand that, that I had not said anything about him and I didn't understand why all this was happening and what was going on. He said "Calvin, *you got involved with Chip [Testa].* [Emphasis added.]

II. ANALYSIS

A. The Discharge of Employee Testa

The foregoing credited record evidence establishes not only that Testa was engaged in protected concerted activity but also that the Respondent had knowledge thereof at the time of its decision to

⁸ Stuart testified that when Lamont, his roommate, came home after work on the evening of 9 August he told Stuart he was aware of the planned meeting.

⁹ As set forth more fully in the judge's decision, Shellock proceeded to interrogate Lindley regarding the planned employees' meeting. The judge found that in so doing Shellock also created an impression of surveillance.

¹⁰ This took place approximately 12:30 a.m. on 11 August.

discharge him.¹¹ At the urging of his fellow employees Testa met with Lamont and then McNulty. With each Testa addressed himself to the same issues discussed by the employees at their meeting. Specifically, Testa spoke to Lamont about the employees' schedules and to McNulty about employees' schedules and management's inaccessibility. More important, McNulty's charge that he was always complaining elicited from Testa a definite disavowal that he was engaged in individual griping. Testa's response that "it is not just me complaining" could not have been more explicit. Furthermore, Testa then asserted that "we have a lot of employees and *they* are complaining."¹² (Emphasis added.) This assertion simultaneously reinforced his disavowal of individual griping and underscored the concertedness of his action. Consequently, the circumstances of McNulty's decision permit but one conclusion: The Respondent decided to discharge Testa because of his protected concerted activities. McNulty's reference to Testa as a "problem" clearly alludes to the latter's complaining. The record demonstrates that Testa's complaining was inextricably intertwined with his protected concerted activities. Although the Respondent characterized Testa as a discontent, it cited no incident other than Testa's encounters with Lamont and McNulty which account for its 9 August decision. That Testa was discharged because of his protected concerted activity finds further support in the timing and abruptness of the Respondent's decision¹³ and its animus toward its employees' protected concerted activities. The Respondent chose to effect its 9 August decision by *intentionally* telephoning and discharging Testa at the time of the scheduled employees' meeting. We thus conclude that the Respondent possessed knowledge of the concerted nature of Testa's activities and that these activities triggered the Respondent's 9 August decision to discharge him. Accordingly, we find that McNulty's 9 August decision to discharge Testa and its subsequent implementation violated Section 8(a)(1) of the Act.¹⁴

B. The Discharges of Employees Lindley and Skender

We find in the Respondent's discharge of Lindley and Skender—also on 10 August—further evi-

dence of the animus toward its employees' protected concerted activities manifested in its discharge of Testa.

In addition to Testa, the Respondent also claims to have decided on 9 August to discharge Lindley and Skender.¹⁵ The Respondent offered a number of reasons for reaching that decision which the judge basically accepted.¹⁶ Thus, although he found that the Respondent's actual discharge of Lindley and Skender on 10 August violated Section 8(a)(1), the judge concluded that those discharges constituted only an unlawful acceleration of the 9 August lawful decision to discharge them on 13 August. We disagree. We have carefully examined the Respondent's proffered reasons for deciding to discharge Lindley and Skender and find them unconvincing.¹⁷

At the hearing McNulty provided three reasons for his 9 August decision to terminate Lindley: (1) complaints that Lindley was slow; (2) Lindley's involvement in a fight; and (3) the presence of an undamaged person in the Respondent's facility at a time when Lindley was working as doorman. We first note that the fight, which occurred on Lindley's third or fourth day on the job, and the incident involving the minor both took place in June and are actions for which the Respondent had already admonished Lindley. Second, the record reveals no additional infractions by Lindley. On the contrary, Lindley's record since June discloses steady advancement in job assignment. On 16 July Lindley was promoted from doorman to bar back.¹⁸ By the end of July the Respondent promoted him to bartender at its beer bar.¹⁹ Finally, we note that the Respondent introduced no work logs or other documentary evidence to substantiate McNulty's vague reference to complaints about Lindley's slowness. Moreover, McNulty's unsubstantiated charge flies in the face of Lindley's promotion as well as credited testimony that in late July Lamont told Lindley "that he had been doing a very good job, that he [Lamont] was satisfied with his work."

McNulty also offered three reasons for including Skender in his 9 August decision: (1) Skender's

¹¹ As in the case of Testa, the discharges were not to be effected until 13 August.

¹² The judge failed to subject the proffered reasons to any type of analysis or critical examination; rather he simply accepted the Respondent's assertion that a decision had been made 9 August.

¹³ That the Board need not treat self-serving assertions as conclusive, even if not contradicted by any direct evidence in the record, is well established. *NLRB v. Pacific Grinding Wheel Co.*, 527 F.2d 1343 (9th Cir. 1978).

¹⁴ A bar back is in charge of stocking the bars, keeping the glasses clean, and keeping up stocks during the night.

¹⁵ Lindley was later assigned to work the door only because of a foot injury.

¹¹ *Ronald Moran Cadillac*, 202 NLRB 1017 (1973); *Steak & Ale Restaurant*, 263 NLRB 107 (1982), *affd.* 709 F.2d 1508 (6th Cir. 1983); *Central Freight Lines*, 267 NLRB 1082 (1983). (Chairman Dotson dissenting in part on other grounds). See *Meyers Industries*, 268 NLRB 493 (1984).

¹² We note that Shellock acknowledged without specifying a date that Testa had complained that not only he but also other people as well were not receiving the hours they believed were proper.

¹³ *Bentley Hedges Travel Service*, 263 NLRB 1408 (1982).

¹⁴ *Ronald Moran Cadillac*, *supra*; *Ajax Paving Industries*, 261 NLRB 695 (1983), *affd.* 713 F.2d 1214 (6th Cir. 1983); *Steak & Ale Restaurant*, *supra*; *Esco Elevators*, 267 NLRB 728 (1983); *Central Freight Lines*, *supra*.

quitting on one occasion; (2) his assumption that Skender often worked under the influence of alcohol; and (3) his observations of Skender giving away free drinks. We first note that Skender's quitting, which occurred in June, did not trigger any disciplinary action by the Respondent. Rather, McNulty called Skender the next day, told him that he was a good worker whom he did not want to lose, and asked him to work that night.²⁰ Second, neither McNulty's assumption that Skender worked while under the influence nor his several observations of Skender giving away drinks are substantiated by work logs, records of related disciplinary action, or other documentary evidence.²¹ Indeed McNulty testified that he had never suspended Skender for being intoxicated. Third, as in the case of Lindley, the record discloses no misconduct by Skender immediately preceding McNulty's 9 August decision. Instead the record establishes that Skender was a competent employee who steadily progressed in job responsibility. Skender started working for the Respondent in October 1981. He was promoted in April to daytime bartender and in May the Respondent began to schedule him on the night shift. During this period Skender was sometimes scheduled as a bar back. Beginning in June the Respondent scheduled him only as a bartender.²² Finally, we note that Lamont's remark to Skender in late July that he was doing well is consistent with Skender's past job performance.

The inherent implausibility of McNulty's proffered reasons undermines his claim to have decided 9 August to discharge Lindley and Skender. McNulty's failure to communicate these proffered reasons to his subordinates or they, in turn, to Lindley and Skender at the time of their discharges further detracts from McNulty's claim.²³ Indeed, against this background the overwhelming preponderance of the evidence militates against McNulty's claim to have made such a decision.

²⁰ We note that Skender quit because he was unhappy with his work schedule. This same issue was discussed by the employees at their 8 August meeting and addressed by Testa in his meetings with Lamont and McNulty. See fn. 6, above.

²¹ Skender did testify that on one occasion prior to his discharge he was spoken to by Lamont for giving away a free drink to a customer. We note that this incident involved a Coca-Cola and took place about 1 month prior to Skender's discharge. Skender explained at the trial that the Respondent's policy was to allow employees to purchase alcoholic drinks at a discount and to have nonalcoholic beverages free of charge.

²² Skender did work as a doorman on one or two occasions in June and July.

²³ We note that the Respondent introduced no documentary evidence, such as logs or minutes of the Lamont-McNulty meeting, to corroborate its claim. In McNulty's own version of his meeting with Lamont, there is no mention of these proffered reasons. See sec. I.B, supra. Sherlock was unaware of any decision having been made 9 August, let alone the reasons therefor.

The circumstances surrounding the discharges of both Lindley and Skender belie the Respondent's claim to have made a decision to do so 9 August. First, when he informed Sherlock on Tuesday, 10 August, that he was going to discharge Testa later that day, Lamont made no mention of Lindley or Skender. Second, Sherlock testified that, when he discharged Lindley and Skender per order of Lamont, he was not aware that such action was predetermined. In fact Sherlock testified that the employees' meeting prompted the discharges. Third, during the actual discharge and immediately thereafter Sherlock and Lamont provided Lindley and Skender with only one reason for their discharges—their association with Testa, knowledge of which the Respondent itself admits was not acquired until 10 August. Finally, we note that at the time of the discharges the Respondent made no mention of the reasons proffered by McNulty at trial or that the discharges had previously been decided on.

Lamont's and McNulty's own actions also buttress our conclusion that the Respondent made no decision on 9 August to discharge Lindley or Skender. Lamont and McNulty never relayed such a decision to Sherlock although both apparently did inform him of the decision to discharge Testa, which decision they allegedly made at the same time. Similarly, Troiano testified that on 9 August McNulty told him that "[Testa] wouldn't be with us at the end of the week and said there would be other charges also." Again there was no mention of Lindley or Skender. Further, Lamont told Skender after his discharge that he had bragged to McNulty the previous night (9 August) regarding Skender's performance.²⁴ Such action is inconsistent with McNulty's claim that he and Lamont had reached a final decision to discharge Skender just hours before.

As in the case of Testa, the record discloses only one reason for the discharge of Lindley and Skender: the Respondent's knowledge of their involvement in the 10 August employees' meeting. Further, the record offers no support for the Respondent's claim to have reached a lawful decision to discharge them on 9 August. The inherent implausibility of the proffered reasons for that decision reduces the Respondent's claim to no more than a self-serving assertion which the weight of the evidence compels us to reject.²⁵ Therefore we

²⁴ See sec. II.A, above.

²⁵ As noted above, the Board is not bound to treat self-serving declarations as conclusive even when credited by the administrative law judge. Rather, we are free to consider all the circumstances of the case and draw our own inferences, giving such declarations the weight we deem

Continued

can only conclude that the Respondent's decision to discharge Lindley and Skender was made subsequent to the time of, and as a response to, its having acquired knowledge of the employees' meeting and that the discharges of Lindley and Skender flowing from such a decision were in violation of Section 8(a)(1) of the Act. We shall modify the judge's remedy and recommended Order accordingly.

Conclusion

In light of our findings above, we conclude that the judge erred in limiting his backpay order to the 4-day period of 10 through 13 August. The judge's own findings, on which we have relied, negate his conclusion that the Respondent lacked knowledge of the concerted nature of Testa's activities until after deciding to discharge him.²⁶ This flaw in the judge's analysis of his findings renders untenable his derivative conclusions regarding the discharges of Lindley and Skender. Accordingly, we shall modify his remedy and recommended Order to require the Respondent to offer Testa, Lindley, and Skender reinstatement and to make them whole for losses caused by the Respondent's discharge of them.

REMEDY

Having found that the Respondent unlawfully discharged employees for having engaged in protected concerted activities and that those discharges were decided on only after the Respondent had knowledge of their involvement in such activities, and having found that the Respondent engaged in further unlawful conduct by interrogating an employee and creating an impression of surveillance, we shall order it to cease and desist therefrom, and to take certain affirmative action which we find will effectuate the purposes of the Act.

The Respondent will be required to offer Louis E. Testa, Calvin Lindley, and Norman Skender full and immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and to make them whole for any loss of

appropriate. See *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *NLRB v. Pacific Grinding Wheel Co.*, supra; and *Brooks Cameras*, 250 NLRB 820 (1980), enf. in relevant part 691 F.2d 912 (9th Cir. 1982). In the instant case we find the Respondent's self-serving claim to have made a prior lawful decision to terminate Lindley and Skender not worthy of acceptance. Its proffered reasons for making that decision lack substance and the record evidence offers no support that such a decision was made.

²⁶ By emphasizing when the Respondent learned of the 10 August employees' meeting, the judge inadvertently overlooked his findings regarding Testa's encounters with Lamont and McNulty which established the Respondent's knowledge of the concerted nature of his activities at the predecision stage.

earnings or benefits they may have suffered by reason of their discharges, such earnings to be computed in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

ORDER

The National Labor Relations Board orders that the Respondent, M & D Investments d/b/a David's, Denver, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees for engaging in protected concerted activity.

(b) Telling an employee that he was being terminated from employment because of his involvement in protected concerted activities.

(c) Interrogating employees concerning the activities of employees' concertedly seeking to discuss or to improve their working conditions.

(d) Conveying to its employees the impression that it is engaging in surveillance of their protected concerted activities.

(e) 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. Take the following affirmative action which will effectuate the policies of the Act.

(a) Make whole Louis E. Testa, Calvin Lindley, and Norman Skender for any loss of pay or other benefits they may have suffered by reason of their discharges in the manner set forth in the section of this Decision entitled "Remedy."

(b) Offer Louis E. Testa, Calvin Lindley, and Norman Skender immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(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) Expunge from its files any reference to the unlawful discharges of Louis E. Testa, Calvin Lindley, and Norman Skender, and notify each one of them in writing that this has been done and that evidence of these unlawful discharges will not be

used as a basis for future personnel activities against them.

(e) Post at its Denver, Colorado facility copies of the attached notice marked "Appendix."²⁷ Copies of the notice, on forms provided by the Regional Director for Region 27, 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.

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

²⁷ 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."

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.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT terminate employees from employment because they have engaged in protected concerted activities under the National Labor Relations Act.

WE WILL NOT interrogate employees concerning the activities of employees in concertedly seeking to discuss or improve their working conditions.

WE WILL NOT give our employees the impression that we are engaging in the surveillance of their protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exer-

cise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Louis E. Testa, Calvin Lindley, and Norman Skender immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL expunge from our files any references to the unlawful discharges of Louis E. Testa, Calvin Lindley, and Norman Skender and WE WILL notify them that this has been done and that evidence of these unlawful discharges will not be used as a basis for future personnel actions against them.

M & D INVESTMENTS D/B/A
DAVID'S

DECISION

ROGER B. HOLMES, Administrative Law Judge. The unfair labor practice charge in this case was filed on August 16, 1982, by Louis E. Testa. The General Counsel's complaint was issued on September 9, 1982, against M & D Investments d/b/a David's. The General Counsel alleges that the Respondent has engaged in conduct which violates Section 8(a)(1) of the Act. In summary, the General Counsel alleges in his complaint that the employer terminated on August 10, 1982, Louis E. Testa, Norman Skender, and Calvin Lindley because they had engaged in protected concerted activities. The General Counsel further alleges in his complaint that on August 10, 1982, the employer interrogated an employee about his protected concerted activities; created the impression of surveillance of such activities; and told an employee that he had been terminated because he was involved in such protected concerted activities. In the answer to the complaint allegations, the Respondent denies the commission of the alleged unfair labor practices.

The trial in this proceeding was held on January 27 and 28, 1983, at Denver, Colorado. The time for the filing of posttrial briefs was extended to March 7, 1983. Both the counsel for the General Counsel and the attorney for the Respondent submitted posttrial briefs. On March 9, 1983, a motion was received from counsel for the General Counsel who asked that his corrected brief be substituted for the brief which he originally had filed. In the absence of any objection, the General Counsel's motion is granted.

In his posttrial brief, counsel for the General Counsel also made two motions to correct the transcript of the proceedings. At footnote 11 on page 7 of his brief, and at the footnote 12 on page 7 of his brief, the motions are set forth. In the absence of any objection, both motions are granted. The corrections are at line 5 on page 160 of volume 1 of the transcript, which should read "mutiny

party," and at line 4 on page 117 of volume 1 of the transcript, which should read "with Chip." In addition, commas and other punctuation have been added to some of the material quoted herein for clarity.

FINDINGS OF FACT

I. JURISDICTION

The jurisdiction of the Board over the business operations of the Employer is not an issue in this proceeding. The Employer operates a nightclub and discotheque in Denver, Colorado. The Employer's operations meet the Board's discretionary and statutory jurisdictional standards for asserting the Board's jurisdiction over retail business enterprises.

II. THE WITNESSES AND CREDIBILITY RESOLUTIONS

Nine persons were called as witnesses to testify at the trial in this proceeding. In alphabetical order by their last names, they are: Robert C. Lamont, who is the manager of the Respondent's business; Calvin Lindley, who is one of the three alleged discriminatees in this proceeding; James McNulty, who had been the general manager and vice president of the Respondent since May 11, 1982; Douglas Puckett, who formerly worked on a casual basis from May 1982 to August 1982 at the employer's facility; Mark Shellock, who has been the assistant manager of the employer since August 6, 1982; Norman Skender, who is one of the three alleged discriminatees in this proceeding; Wade R. Stuart, who was an employee of the Respondent at the time of the trial; Louis E. Testa, who is the Charging Party and who is one of the three alleged discriminatees in this proceeding, and whose nickname is "Chip"; and Paul Troiano, who was an employee of the Respondent at the time of the trial.

After observing and listening to the witnesses while they testified at the trial, I have based the findings of fact to be set forth herein on portions of the testimony from each one of the nine witnesses.

In determining which portions of the testimony from the witnesses are credible, accurate, and reliable, I have given consideration to their demeanor while they testified; the probabilities of the differing versions of certain events related by the witnesses under the circumstances presented here; the fact that witnesses viewed the events as they occurred from different perspectives and from different employment positions, which may have had an effect on their different recollections of these past events when the witnesses were called on to describe those events at the time of the trial; and the fact that certain witnesses corroborated a version of the events given by other witnesses, although understandably not in identical words or phrases, in view of the passage of time.

Perhaps, an example will serve as an illustration, although this example of a conflict in the testimony is not all-inclusive insofar as the criteria mentioned above are concerned. However, for example, there is a conflict between Troiano and Lindley regarding a remark which Troiano said Lindley made to him when the Denver police found an underage person at the Employer's facility. According to Troiano's version, Lindley told him there was less money to be made working as a doorman

at the door to the club; that he preferred to work in the job known as a "bar-back;" and if he did not do a good job as a doorman, the employer would keep him bar-backing. (Bar-back works as a helper to a bartender and shares in a portion of the bartender's tips.) Lindley specifically denied the remarks attributed to him by Troiano. I credit Lindley's denial of the statement particularly when Troiano's position "as a quasi-management person" is considered along with the other factors referred to in the preceding paragraph. Troiano previously had served as an interim manager at the employer's facility and, even afterwards, he often acted as an intermediary between the employees and management. In these circumstances, Lindley's denial of having made such a statement to a person in Troiano's position seems more probable because the import of the statement, if it had been made, would have been to inform an intermediary to management that Lindley purposefully was failing to perform his assigned duties as a doorman with the expectation that the employer would give him the more lucrative job of bar-back. Thus, it appears to be less probable that Lindley would have made such a statement in those circumstances to Troiano.

With the criteria mentioned earlier in this section in mind, I will set forth the credited accounts in the sections to follow. While I have considered the differing versions and other portions of each witness' testimony not set forth herein, the findings of fact are limited to the credited facts. (See, for example, *Krispy Kreme Doughnut Corp.*, 245 NLRB 1053 (1979), and *ABC Specialty Foods*, 234 NLRB 475 (1978).)

An additional comment should be made regarding the testimony given during the General Counsel's rebuttal case by the Charging Party, Testa, who is also one of the three alleged discriminatees in the case. The Board's holding in *Unga Painting Corp.*, 237 NLRB 1306 (1978), furnished guidance in observing the sequestration rule which was in effect during the time of the trial. In accordance with the *Unga* guidelines, I adhere to the ruling which permitted Testa to testify, over timely objection, during the General Counsel's case, notwithstanding Testa's presence in the hearing room during most of the trial.

Finally, it should be noted at the outset that the employer's facility was open until midnight on Sunday nights and until 2 a.m. on other nights of the week. Thus, if an event occurred after the facility had closed, the event actually took place in the early morning hours of the following day. It is understandable that sometimes a witness would refer to an event as occurring during a particular evening when, on reflection, it appears that the event occurred after midnight, and, thus, technically the next day. To avoid any misunderstanding, the foregoing comments are not made in any sense to be critical of the witnesses, because it seems to be an ordinary expression to refer to things that happened on a certain night or evening. The foregoing observation is simply to state that I have not discredited any testimony on the foregoing basis, and further to explain why I have set forth the facts on certain dates. The timing of certain of the events is significant in this proceeding and, thus, I

have attempted to place the events in the sequence, in which I believe they occurred, based on the descriptions given by the witnesses.

A. The Events Prior to August 8, 1982

The employer's facility had been open for business for about 4 years at the time of the trial. By May 11, 1982, the owner of the business had dismissed the former management at the facility, and at that time, McNulty became the general manager and the vice president of the Employer's business operations.

According to McNulty, the persons who worked as the manager and the assistant manager under him were given the authority to hire employees, but they were not given the authority to fire employees. McNulty explained at the trial, "That was my ultimate responsibility. They certainly had the authority to bring recommendations to me, but the final decision with firing anybody was mine." McNulty said that his policy was in effect during the entire time that he had been the general manager and vice president at the facility.

B. Events Pertaining to Testa

Testa began working for the employer on December 19, 1980. He was suspended from work on one occasion by the former management at the facility.

After McNulty became the general manager and the vice president at the Employer's facility, McNulty formed the opinion that Testa had been "a problem employee" under the prior management. McNulty learned that Testa had been warned by the former management for serving drinks to customers after hours; subsequently he was suspended from work for that reason, and that Testa had been fired from his previous job with another employer. According to Testa, McNulty telephoned him at the time that McNulty became general manager and informed him that the owner had fired the previous management team. McNulty said that he was taking over as the new general manager, and he asked if there would be a problem for Testa to work with him since Testa had worked for a year and a half with the previous managers. Testa told him that he did not see any problem.

A couple of weeks later, Testa momentarily left his work station at the employer's facility in order to get a drink at the front bar. Testa testified, "I was on my way to my station when Mr. McNulty tapped me on the back and told me angrily to get back to my station and never leave it again, so I did."

During the first month that McNulty was general manager, McNulty and Testa had another telephone conversation. During that conversation, McNulty informed Testa that he had complaints from customers about Testa's service at the bar and specifically about Testa's talking. Testa testified, "He discussed with me the fact that, like I testified, that he wanted me to talk less on the bar." Around the middle of June 1982, Testa asked McNulty if he was improving insofar as not being as talkative at the bar. McNulty told Testa that he was doing better, but that Testa could still use some improvement.

Lamont was selected by McNulty to be a manager at the Employer's facility. Previously, Lamont had worked as a bartender for the Employer, and even after being named the manager, Lamont continued to perform bartending duties. At the time that McNulty made Lamont a manager, they discussed "certain problem employees." Lamont indicated at the trial that Testa and Skender were among the persons they discussed at that time. In the opinion of Lamont, Testa was "a constant chronic complainer." Lamont also stated at the trial, "He was constantly looking out for himself. That was all his complaints were about was about himself, his schedule, his performance. Mr. Testa was one of the complainers about other employees also." Lamont also expressed the opinion that Testa "was not a good performer" in his job.

In the opinion of Testa, "Rob Lamont began taking over most of the money stations," rather than rotating the work stations, as the previous manager had done. About the end of May or the first part of June 1982, Lamont and Testa had a conversation at the bar with regard to the work stations. Testa asked Lamont why Lamont was taking all of the "money shifts." Lamont replied that he had spoken with the owner, who said that Lamont deserved to have the best shifts because Lamont was the manager, and he worked the hardest.

In the opinion of McNulty, there was "constant complaining" by Testa with regard to other employees at the employer's facility, and also that Testa complained to him about Lamont's scheduling. McNulty testified, "it was usually the same conversation over and over again, which was that I needed everybody to get along and to work together, and he was constantly having problems with just about everybody that worked there, and I wanted him to make an effort to try to get along."

Testa acknowledged at the trial that he had made complaints to McNulty about a couple of employees at the employer's facility. He also acknowledged that he had discussed Lindley with McNulty and that, in his view, Lindley did not have any experience and was slow. However, in Testa's opinion, he did not view the foregoing as making a complaint regarding Lindley. Testa said, "I wouldn't call it complaining. It was conversation. Let's say we pointed out to each other, we were in agreement." Testa also acknowledged that he went to McNulty and had a conversation with him with regard to Steve Mason, and that Testa was unhappy with Mason's performance. At the trial, Testa explained, "We worked the same bar together."

About the end of June 1982, the employer terminated employee George Leonard. Within a couple of days after Leonard was fired, Testa told McNulty that he felt that Leonard's termination could have been handled differently. According to Testa, McNulty acknowledged to him "that he thought it was handled improperly." Testa also stated at the trial that he had a conversation with McNulty with regard to Stuart and Troiano. According to Testa, both McNulty and Lamont had told him that Stuart and Troiano were "the fault of George's firing." (The reference is to George Leonard.) Testa said that Stuart and Troiano denied having anything to do with

Leonard's termination, so Testa had another conversation with McNulty because Testa was "confused about who was telling the truth."

At the trial, Testa said that McNulty did not warn him about his making complaints to McNulty regarding employees of the Employer, or about Testa's attitude. Testa said that they did have conversations about Testa's performance as a bartender. Testa testified, "He told me it was improving."

According to Troiano, for the 9 months that Troiano served as assistant manager at the employer's facility, and for the 2 months that Troiano served as the manager, Testa made "constant complaints about the schedule and that he was being scheduled unfairly."

On a number of occasions as a regular customer of the Employer's facility, Puckett observed Testa while Testa was working as a bartender. In Puckett's opinion, Testa had "always been very fast and very good as a bartender."

Shellock became assistant manager at the employer's facility on August 6, 1982. At that time, he met with McNulty and Lamont to discuss the employees and the problems at the employer's facility. He recalled at the trial that the names of Testa, Skender, and Lindley were mentioned during that discussion. In Shellock's opinion, he concluded from the discussion that "they had more wrong going for them than they had right, when I was first hired." He also stated, "Mr. Testa was singled out in particular as a problem. The others were not brought up as major problems, but as things that we could see working with. Mr. Testa was brought up as someone that would probably be worked out of the picture very soon."

C. Events Pertaining to Skender

Skender began working for the employer on October 28, 1981. His first job with the employer was in the position of bar-back. Skender described the duties of a bar-back as follows: "We are in charge of stocking all the bars, keeping the glasses clean, making sure that everything is stacked up during the night." Around April 1982, Skender became a bartender during the day shift in addition to working at times as a bar-back.

Sometime in May 1982, the employer began to schedule Skender to work sometimes on the night shift as a bartender at the Employer's facility, as well as sometimes working on the day shift as a bartender. Skender said at the trial that the night shift was preferable to him because there was more money to be earned from tips during the night shift. In June 1982, the employer assigned Skender to work as a bartender, rather than sometimes working as a bar-back. On one or two occasions in June and July 1982, Skender also worked as a doorman.

Around June 21, 1982, Skender quit his job with the Employer based on Skender's belief that he was not being scheduled fairly. Skender had been scheduled to work that evening at the Employer's facility. At the trial, he acknowledged that he had been drinking at the bar during that afternoon before he walked out and quit his job.

The next day McNulty telephoned Skender. Skender testified, "He expressed that he wished that I had talked

about it with him; that I was good worker, and he didn't want to lose me, and asked me if I would come back and work my shift that night." Skender acknowledged at the trial that McNulty had been upset with him for not showing up to work his scheduled shift the previous evening. Skender agreed to return to work for the employer, and he continued to work thereafter until his termination in August 1982.

Skender acknowledged at the trial that he was counseled on one occasion about his giving away a free drink to a customer while he was working as a bartender at the Employer's facility. Skender estimated that the incident occurred about a month prior to his termination by the Employer. He explained at the trial that Lamont told him, after his shift had ended on that particular day, that Lamont had observed Skender give away a drink. Lamont told Skender that he did not want that to happen again. Skender informed Lamont that the drink involved was a Coca-Cola. However, Lamont again stated that he did not want to see that done again. At the trial, Skender said that thereafter he did not give away any free drinks. He explained at the trial that the Employer had a policy whereby employees could buy complimentary drinks at a discount price, and they could have nonalcoholic beverages free of charge.

In the opinion of Lamont, Skender paid too much attention to his friends who were customers at the bar, and that Skender neglected other customers. Lamont also was of the opinion that Skender's performance was impaired by alcohol or some other substance because Lamont was "having to repeat myself two and three and sometimes four times to get a point across." Sometime in July 1982, Lamont arranged Skender's schedule so that they would be working together on busy nights in order that Lamont "could give him some pointers and give him some tips on how to service a bar." At the trial, Lamont recalled that he discussed with McNulty many times prior to August 9, 1982, the problems which Lamont felt he had with Skender and with other employees. Lamont expressed his view at the trial regarding McNulty, "Jim has a tendency to overlook a lot of things, which I can see to a point, but you reach a point where there was no hope in certain individuals, but, yes, it was discussed many times."

Puckett recalled an occasion in July 1982 when he overheard Lamont tell Skender "that he was doing very well after he had been observing him for quite some time." Puckett said that he had seen Lamont watching Skender at work at the bar for about 2 weeks.

D. Events Pertaining to Lindley

Lindley began working for the Employer about the first week of June 1982. Lamont was the one who hired Lindley. At the trial, Lamont explained, "Well, I basically hired him out of friendship because he was a friend of mine, and he needed a job, and I just basically put him to work to get him some money because he had just moved up here from Houston, and after a month it was obvious that it was mistake because, well, he told us that he had previous experience in bars, but he was too slow. His performance was very sluggish and slow." At the

trial, Lamont acknowledged that Lindley's "sluggishness" was in performing bar-back duties, which Lindley was not performing at the time of his termination due to an injury to his foot.

According to Lamont, he discussed Lindley's performance with McNulty, and it was decided at that time that Lamont was not longer going to hire anyone whom he knew, or any of his friends, "because I didn't want the same thing happening again."

Early in June 1982, Lindley began working as a doorman at the Employer's door where the identification of a customer is checked before the customer is permitted to enter the bar area. About the third or fourth day after Lindley began working as a doorman for the Employer, Lindley and a customer had an altercation. Some other customers in the bar complained to Lindley that the customer in question was causing problems by his conduct. Lindley spoke with that customer who, in turn, asked to speak with someone in management. In Lindley's opinion, the customer was belligerent towards McNulty, so Lindley escorted the customer out the door. Lindley testified, "Well, we went through the door, and I took him to the gate outside the door and proceeded to give him a little shove out the gate, and when I did, he spun around and slugged me in the face." Lindley continued, "As a reaction, I stepped outside the gate after him."

Afterwards, McNulty spoke with Lindley and told him that by Lindley's going off the Employer's premises, McNulty could not protect Lindley. McNulty told Lindley that it was very important that he try to control incidents like that. Lindley said there were no similar incidents thereafter.

One evening about the middle of June 1982, Lindley reported to work at 9 p.m. as scheduled. About 10:30 p.m., Denver policemen arrived at the Employer's facility, and they found that a minor was present in the bar. At the trial, Lindley explained that the Employer's facility had opened at 12 noon that day, and that he had not allowed the minor to enter the bar after he came on duty as the doorman. Lindley testified, "He was already in the bar when I came on."

After the policemen had left the Employer's facility, Lamont and Lindley had a discussion. Lindley testified:

He just asked me if I had let the guy in, the minor, in the bar. I said no, he must have already been in the bar when I came on to work. He asked me if I had come into the bar and checked ID's of the people that were there. I said no, I was not aware that I was responsible for that.

Q. Did Mr. Lamont say that that was the procedure?

A. Well, he said that I was responsible for it, but I was not aware of it. I had only been working the door a week or so at the most.

At the trial, Lindley acknowledged that he was aware that the Employer's facility had been placed on probation earlier as a result of admitting underage persons to the Employer's bar, and he was aware that the bar could be closed if the probation terms were violated. He further acknowledged that it was stressed to him that it was

important for the employer's door policies to be observed.

As a result of the Denver police finding a minor in the Employer's bar, Lamont recommended to McNulty that Lindley be fired that same night. However, according to Lamont, McNulty told him that they should "give him another chance." At the trial, Lamont said that he did not have the authority to fire employees without the approval of McNulty. Lamont acknowledged at the trial that bartenders are the employees who have the ultimate responsibility for checking the identification of their customers, "but when you are busy, a lot of time you overlook it, and you depend on the doorman."

Within the next week, McNulty spoke with Lindley in the office and informed Lindley that management had made the decision to have two employees at the door at all times. Lindley further testified, "so he called me up to the office to tell me that the reason that I was being kept on the door was not as punishment for what had happened, but it was just due to the decision until they could hire a second doorman, and that is where they needed me."

Subsequently, when Lindley worked as a doorman, he began checking the identification of customers who were already in the Employer's facility. Lindley received no further reprimands from management with regard to his checking of customer's identification.

On July 16, 1982, Lindley began working as a bar-back for the Employer on 4 nights a week, and he continued to work as a doorman at the Employer's facility on 2 nights a week. On one occasion about the last week in July 1982, Lindley acknowledged that Lamont told him about areas in which Lindley needed to improve as a bar-back.

By the end of July 1982, Lindley was assigned to work at the beer bar on 3 nights a week, while he continued to work at the door on 2 nights a week. Lindley earned more money while he worked at the beer bar than he did while he worked as a bar-back. On July 30, 1982, Lindley sustained an injury to his foot which necessitated his use of crutches. Thereafter, he worked at the Employer's door as a doorman and as a bartender at the beer bar.

During the occasions when Puckett worked the coat check job at the Employer's facility, and Lindley worked as the doorman, Puckett observed that Lindley checked the identification papers of customers who sought to enter the Employer's premises. Puckett stated with regard to Lindley, "He checked everybody's ID. Everybody that came through the door had to present an ID or they were not allowed in the bar."

During the occasions when Troiano worked as a bartender and Lindley worked as a bar-back, Troiano formed the opinion that Lindley's performance "was lackluster, and he was slow, and seemed unorganized behind the bar." According to Troiano, he received complaints about Lindley from other employees, and Troiano himself complained to management regarding Lindley. Nevertheless, Lindley testified that Troiano shared his tips with him, when Lindley worked with

Troiano as a bar-back, and that Troiano never told him of any dissatisfaction with his performance.

On a Sunday evening prior to the time in July 1982, when Lindley injured his foot, Puckett assisted Lindley in counting money after the bar had closed. On that occasion, according to Puckett, Lamont "came up and commented to Calvin that he had been doing a very good job, that he was satisfied with his work."

F. Other Events

According to McNulty, he has not followed any specific policy as general manager with regard to giving reprimands, suspensions from work, or probations to employees of the Employer. He has examined each case individually. He acknowledged at the trial that he might suspend an employee for an offense, while he might just talk to another employee who had committed the same offense. McNulty said that he had fired employees other than Testa, Skender, and Lindley without first suspending them from work, or putting those employees on probation. He estimated that he had fired eight or nine employees, including the three persons involved in this proceeding, during his tenure as general manager for the Employer.

According to Lamont, the Employer has not had a formal system of oral warnings, written warnings, or performance evaluations. Lamont attributed the foregoing to the small size of the Employer's operation. He said that problems were discussed verbally with employees.

In July 1982, the Employer suspended bartender Wade Stuart from work for a week because he was unable to perform his job by the end of the shift. Upon his return to work, Stuart was placed on probation for a month. During that period of being on probation, the Employer terminated Stuart about the first of August because he reported to work 2 hours late. Also during that first week in August 1982, the Employer terminated John Bird, who was an assistant manager and who was being trained in the bar-back position.

At the time of the trial, Bill Bishop was still employed by the Employer as a bartender. Since McNulty became the general manager at the Employer's facility, Bishop has been suspended from work on two occasions. About the first part of July 1982, Bishop was suspended for 1 week for being drunk on duty. When he returned to work, Bishop was told not to drink behind the bar for a period of time. According to McNulty, in December 1982, the Employer suspended Bishop for a second time for a week because he was drunk on duty and for "shouting obscenities and so forth at Rob Lamont."

On a Thursday in mid-July 1982, Lamont and Troiano had a verbal dispute about 2:30 or 3 a.m. after the bar had closed. The conversation took place in the presence of the other employees. In Testa's opinion, the argument between Lamont and Troiano was "about who was supposed to be in charge." In Testa's opinion, the argument was, at times, a loud argument between the two persons, and vulgar language was used. Troiano was not suspended from work or fired by the Employer as a result of that incident.

Introduced into evidence as General Counsel's Exhibit 3 was a copy of the work schedule for the period of time

between Saturday, July 31, 1982, and Friday, August 6, 1982.

G. The Events on Sunday, August 8, 1982

Certain employees of the Employer had a discussion at the bar at the Employer's facility on Sunday, August 8, 1982. The discussion was an informal one with some employees coming by while the group was talking. Among the employees who were present were: Testa, Lindley, Puckett, and Stuart, who have been identified earlier herein as witnesses. However, other employees were present at times also.

Puckett described the subject of the discussion as being, "just working conditions, grievances about working conditions mostly." Puckett further described the areas of discussion among the employees on that occasion as being, "Scheduling; the door policy or some interference with the door policy; inaccessibility of the management to air these grievances; just general dissatisfaction with some of the policies." Puckett recalled at the trial that Testa told the group of employees that he was going to try to talk with Lamont that evening about the things which the employees had discussed.

With regard to the discussion among the employees on that occasion, Testa testified, "We had discussed our ongoing problems with management's inaccessibility; their attitude against the employees; scheduling problems; store policy problems." Testa said that he was the one who was selected to talk with management about these matters because of his seniority at the facility. Testa stated, "They were hoping that with my seniority, I might be able to contact management on our behalf."

Later that evening, Testa and Skender had a telephone conversation during which the possibility of having an employees' meeting was discussed. According to Skender, Testa "was just saying that everyone was complaining about management, and it was time that we should get together and discuss it."

H. The Events on Monday, August 9, 1982

As indicated in section 2, the employer's facility closes at 12 midnight on Sundays and at 2 a.m. on other days of the week. After the facility closes to the public, the employees are supposed to count the money which they have handled during their shift and turn in the money to the person in charge. While some of the witnesses had sharply conflicting views as to whether employees of the Employer were permitted to speak with management personnel after closing time, I find that the weight of the evidence from the witnesses is that the Employer did not have any general prohibition against employees talking to management at that time.

While the witnesses usually referred to a conversation between Lamont and Testa as having occurred on Sunday night August 8, 1982, on reflection, it appears that the conversation took place after midnight and, thus, technically on Monday, August 9, 1982. As explained in section 2, that observation is not made in a critical sense, but simply to attempt to keep the events in the time sequence in which they appear to have occurred.

After the Employer's facility had closed at midnight on Sunday, August 8, 1982, and, thus, in the early morning hours of Monday, August 9, 1982, Lamont and Testa had a brief conversation in the upstairs office on the second floor of the Employer's facility. In accordance with the closing procedure, Testa brought the money he had handled during his shift to the office. At that time, Testa asked Lamont about the owner's decision that Lamont should get the best work shifts because he was the manager, and also because Lamont worked the hardest. (See sec. 3 regarding the earlier conversation between Lamont and Testa on that subject.) Testa's desire was to "get things on a more level deal, more level with all of us." According to Testa, Lamont "did tell me that he was not in the mood to discuss it at that time." Testa added, "He just suggested that I talk with him another time." Testa also testified, "I just made the comment that I tried to approach him a couple times, and he never seemed to be in the mood to talk." As to whether Testa also told Lamont on that occasion that Testa would not talk to Lamont on Testa's own time, Testa acknowledged at the trial, "There is a possibility that I might have said that."

Troiano recalled at the trial that he overheard "a loud discussion" between Lamont and Testa on that occasion. Troiano also recalled hearing Testa complain to Lamont about his schedule, and he recalled that Lamont told Testa that he was tired, and he was not going to discuss it at that time.

Around noon on August 9, 1982, Testa telephoned McNulty at his office. Testa asked if he could come to the Employer's facility and talk with McNulty. McNulty inquired if they could discuss the matter over the telephone, but Testa said he would prefer not to do so.

Around 1 p.m. on August 9, 1982, Testa arrived at McNulty's office. Just McNulty and Testa were present during their conversation. Testa first brought up the work schedule assignments and the replies he had received from Lamont with regard to the owner's desires. McNulty told Testa that he was always complaining. Testa replied that the Employer had a lot of employees, and "they are complaining about ongoing problems here, management's inaccessibility." According to Testa, McNulty told Testa that Shellock "had told him of a fight or hollering episode between Lamont and me the night before." Testa further testified, "I told Mr. McNulty that we had a discussion, but it was not a hollering discussion." McNulty then told Testa to talk with Lamont again. McNulty said that he would like to see the problem resolved between Lamont and Testa, and he expressed his hope that Lamont and Testa could get along with each other. At the trial, Testa specifically denied that he had asked that Lamont be fired.

Following his conversation with Testa, McNulty next talked with Lamont during the early afternoon of Monday, August 9, 1982. McNulty testified:

Well, it started out with the main conversation about Chip being a problem, and it was at that time that I told Lamont that I wanted Chip terminated, and then we expanded the conversation to other people we were having trouble with, specifically

Lindley and Skender, and I was beginning to feel like I had been Mr. Nice Guy too long and giving everybody their chances and everything, and I needed to clean house, and I made the decision that the three of them would be terminated the end of the week.

To clarify what was said earlier about payroll, I made that decision because I do the payroll on Thursday, and we have a machine which sends the payroll to Boston, and the payroll is sent express mail to me. It is handed out on Tuesday. I have it in my possession either that Saturday or Sunday. I would have had my checks there, and I would have given it to him on Sunday because express mail does come in on Sundays.

In McNulty's view, that timing of the events should have furnished the paychecks to the three employees within 72 hours of their termination by the Employer. In addition, the Employer's work schedule begins on Saturdays and ends on Fridays.

According to McNulty, at the time he made the decision to terminate Testa, Skender and Lindley, he had no knowledge about an employees' meeting. While McNulty had stated earlier in his affidavit, which he had given on August 31, 1982, that the date of his decision was August 10, 1982, he stated at the trial, "I was mistaken on the date." McNulty said the decision was made during the day after the conversation between Lamont and Testa.

At the trial, McNulty said that his reasons for deciding on August 9, 1982, to terminate Lindley were: (1) complaints McNulty had received from others to the effect that Lindley was slow and not able to keep up with his work; (2) the incident which McNulty believed occurred because Lindley "got into an unnecessary fight which I witnessed with a customer in the middle of 13th Street, and it even tied up traffic for a few minutes, and it was a situation where he went out after the customer"; and (3) the incident when the Denver police entered the bar and discovered an underage person there at a time when Lindley was working as a doorman, and when the Employer's facility was still on probation as a result of an earlier incident under the previous management. In connection with McNulty's last two reasons for terminating Lindley, see also the notation made by McNulty on the daily business logs at the time of the incidents, which were introduced into evidence as Respondent's Exhibits 1 and 2.

At the trial, McNulty said that his reasons for deciding on August 9, 1982, to terminate Skender were: (1) Skender's quitting his employment in June 1982 just before he was scheduled to start his work shift at the Employer's facility; (2) McNulty's belief that there were several occasions when Skender was on duty at the bar under the influence of alcohol; and (3) McNulty's observations on several occasions that Skender had given away free drinks to his friends. In connection with the first reason advanced by McNulty, see Respondent's Exhibits 3 and 4, which are copies of the daily logs with notations on them pertaining to Skender.

On August 9, 1982, McNulty and Troiano had a conversation in the office with regard to Testa. According

to Troiano, "He told me that Chip wouldn't be with us at the end of the week and said there would be other changes also." Troiano added, "The reason was that everyone had had enough of his attitude and the incident the night before had just pushed it over the edge." Troiano appeared to be certain that the conversation in question occurred on August 9, 1982. (See Vol. 2, Tr. 77-78. G.C. Exh. 2, which indicates that Troiano worked on August 9, but not on August 10, 1982.)

During the afternoon of August 9, 1982, and subsequent to his conversation with McNulty, Testa met with some other employees of the Employer at the Employer's facility. Testa identified those employees as being Stuart, Lindley, and Puckett. Testa advised the employees of his conversation with McNulty that afternoon, and he expressed to them his opinion "that we were getting nowhere. I was certainly getting nowhere." The employees then discussed the possibility of having a meeting of the Employer's employees. It was decided to hold a meeting of the employees at 2 p.m. on Tuesday, August 10, 1982, at Testa's house. Testa was supposed to telephone Skender regarding the meeting, and Testa was supposed to talk with some of the other employees that evening at the Employer's facility. At the trial, Testa acknowledged that the employees also discussed telephoning the owner of the Employer's business "to see if he could help us," but Testa denied that the purpose of such a telephone call would be to try to persuade the owner to fire both McNulty and Lamont.

That same afternoon Testa did telephone Skender and informed Skender that there was going to be a meeting of employees at his house at 2 p.m. the next day. According to Skender, Testa told him that there were "approximately eight people involved that were going to be there." Of those eight persons who were expected to attend the meeting at Testa's house, the only ones who were terminated by the employer were Testa, Skender and Lindley.

Testa worked at the Employer's facility that evening. He said that Lamont and McNulty also worked that evening. Testa said that he did not have any problems with Lamont on that occasion. Skender came on duty as a bartender at station two at the Employer's facility at 11 o'clock that evening. Lamont was working as a bartender at station one. Skender testified, "The only thing he said was that I was working that shift with him so he could see how well I did behind that bar." Skender said that Lamont made no comment to him with regard to how well he worked that evening. In Skender's opinion, he did not have any problems in serving customers on that occasion.

1. The Events on Tuesday, August 10, 1982

According to Skender, on August 10, 1982, there were one general manager, one manager, one assistant manager, and approximately 15 employees working for the Employer in the positions of bartender, bar-back, doorman, disc jockey, light technician, and cleaning employees.

After the bar had closed early Tuesday morning on August 10, 1982, Lamont was informed of the meeting which was scheduled to be held at Testa's house that afternoon. Lamont testified:

I found out about it after I had gone up to the office. Mark had already known about it, and Mark was told by Jim Zaring, our doorman, because Jim had come back upstairs and said something about it to the effect that, "I am not going to some mutiny meeting," or something to that effect, but it was our doorman who informed us that night.

Puckett did not work at the Employer's facility during the evening of August 9, 1982. However, about 3:30 a.m. on August 10, 1982, Puckett arrived at the Employer's facility in order to give Lindley a ride home. Since Lamont lived in the same apartment building, he joined them in the same vehicle that morning. Puckett testified:

Q. And so yourself, Calvin Lindley and Rob Lamont were in the car together?

A. Yes, sir.

Q. And was there any discussion on the way home?

A. Rob made the comment to us, he said, "I have heard of the claue and your name was mentioned." I was driving and Calvin was sitting in the middle and Rob was sitting next to the door.

I believe he was speaking to both of us or to Calvin. Calvin said, "What do you mean you have heard about the claue?" He said, "Never mind, you will find out soon enough," and that was the end of the discussion. I don't think another word was said the rest of the way home.

About 10:30 a.m. or 11 a.m. on August 10, 1982, was when McNulty first learned about the employees' meeting which was scheduled to be held later that day at Testa's house. At the trial, McNulty testified, "I found out about the meeting from Rob Lamont and Mark Sherlock. I came into work the morning of the meeting and was informed by them. They told me at that point that they had been informed that night before by Jim Zaring, and that was the first I heard of it when they told me about it." McNulty acknowledged that he knew of the employees' meeting prior to the time that Testa was terminated.

McNulty also was aware of the meeting before employees Bishop, Zaring and Gropi informed McNulty that Testa had called them and asked them to come to a meeting at his house.

During the morning of August 10, 1982, Testa received two telephone calls. One telephone call was from John Bird, who formerly was one of the assistant managers at the Employer's facility. The other call was from Wade Stuart and Doug Puckett. According to Testa, Stuart told him "that Rob Lamont was on to the meeting, and was real angry about it, and was going to take action, was going to take action against us and maybe we should postpone the meeting, or what should we do."

About 12:30 p.m. on August 10, 1982, Skender arrived at Testa's house. Other than Testa and an electrician, who was performing work at the house, no one else was there. Skender stayed only about a half hour as a result of Testa's informing him that Testa had received a call

from John Bird, who had told him that management had found out about the meeting. Skender then left.

About 2:15 or 2:30 p.m. on August 10, 1982, Lamont telephoned Testa at his house. Lamont told Testa that his services were no longer required, and, in other words, Testa was fired. At the trial, Lamont acknowledged that it was his intention to fire Testa during the employees' meeting at Testa's house. During Lamont's cross-examination, the following occurred:

Q. Wasn't it your intention to fire Mr. Testa during the employee meeting at his house?

A. That morning we decided to fire Chip that afternoon, yes. By that time we had known about the employees' meeting, we knew what time it was going to be, and it was my intention to fire him that day, yes.

Q. During that meeting?

A. Yes.

Nevertheless, Lamont stated that the original decision to fire Testa at the end of the week had already been made by McNulty on Monday, August 9, 1982.

Lindley reported to work at 11 p.m. on August 10, 1982, at the Employer's facility. He worked as a doorman on that occasion, and he said that he checked everyone's identification as they entered the bar that night. Another employee, who was identified by his first name of Eric, also worked at the door with Lindley.

About midnight, Shellock approached Lindley at the door and asked him to accompany Shellock to the office. Lindley did so. Just those two persons were present in the office during their conversation. Lindley testified:

Q. What was said at that time in the office?

A. He first apologized to me for making me climb the stairs to the office on crutches, and then he said he was sorry to inform me that my services were no longer needed at the club, and then he asked me if I knew why I was being terminated. I replied, "No, not unless it was due to an incident that happened downstairs just a few minutes before he asked me up in the office." He said it had nothing to do with this, that it was my involvement and quote, mutiny party.

Q. What was the incident that you referred to that had happened downstairs?

A. There were approximately 12 women that walked into the door, and they had proper ID's and proper dress so I let them in.

Q. What type of ID's did they have?

A. They had state issued driver's licenses, and most of them had second picture ID's you know, work ID's or insurance cards, or some sort of ID's.

Q. Did you tell Mr. Shellock that you were not directly involved in the meeting?

A. I told him that I did not attend the meeting.

Q. Did Mr. Shellock have a comment to your statement that you did not attend the meeting?

A. He said that he had heard otherwise through feelers that they had out, and due to what he heard from these feelers that I was involved in the meet-

ing, and that was what led to the decision to terminate me.

At the trial, Shellock acknowledged that he had told Lindley at the time of his termination that Shellock had heard about the meeting. He stated, "I remember bringing up the subject of a meeting. I believe I also made some reference that I knew what the meeting was about, although I am not sure, but I did bring up a meeting." When Shellock was questioned at the trial as to whether he was trying to get information from Lindley about the meeting, Shellock responded, "That, and I was trying to see if he was going to lie to me." Shellock also later acknowledged at the trial, "I was trying to find out what this meeting was going to be about."

Shellock also acknowledged at the trial that in his pre-trial affidavit he had discussed his conversation with Lindley, and that he had made the statement, "I probably mentioned Mr. Testa's mutiny party."

J. The Events on Wednesday, August 11, 1982

Although Skender was not working at the Employer's facility that evening, Lamont decided to terminate Skender's employment at that time. Skender was at the Employer's facility as a customer. Lamont testified, "No, he was in as a customer. At that point I just decided to go ahead and get it all over with, and I instructed Mark to go ahead and fire Norman. It was probably bad judgment on my part, I admit to that, but I just felt that there was no need to wait until the end of the week, and just went ahead and got it over with. I just wanted it out of my hair." At the trial, Lamont explained that he took the action to terminate the three employees in question because the decision had already been made by McNulty to terminate them later in that week. Lamont said, "It was planned and these people were on their way out."

After Skender had arrived at the Employer's facility about 12:30 a.m. on August 11, 1982, Shellock approached him at the bar and asked him to accompany Shellock to the office. At the office, there was a brief conversation with just those two persons present. Skender testified:

Well, he sat me down and said that my services were no longer needed. I asked him why. He said, "You are well aware of why."

I said, "I don't understand what you are talking about." He said, "Neither did Calvin Lindley." That was the end of the conversation.

Skender returned to the back bar, but then he walked over to station one where Lamont was working. He did so in order to get some cigarettes. According to Skender, Lamont told him "that he had bragged about how well I had done the night before to Jim McNulty, I [expletive deleted] it up when I got involved with Chip." Lamont also told Skender that maybe Skender would learn from this experience.

Testa and Lindley returned to the Employer's bar after their terminations. About 1 a.m. on August 11, 1982, which was after Skender also had been terminated, Shellock ordered Testa and his companions out of the

bar. Testa testified, "I was standing around the bar with several customers and employees, and Mark Shellock walked up to me and in a very obnoxious tone told me point blank in my face to get my [expletive deleted] out of the bar, and to take my slime following with me, that I was not welcome in that bar."

Lamont was the one who had instructed Shellock to remove Testa and the others from the bar. Subsequent to the terminations of the three employees in question, Lamont had discovered some damage in the bathrooms at the Employer's facility and also some graffiti there. Lamont apparently linked or connected in his mind the terminations of Testa, Skender, and Lindley to those acts of vandalism. However, such acts of vandalism and property damage had occurred on other occasions at the Employer's property, and there was no proof that Testa, Skender, or Lindley were in any way responsible for the damage to the Employer's property.

K. The Events on Thursday, August 12, 1982

On August 12, 1982, Lindley went to the Employer's facility in order to pick up his paycheck. When he arrived there, he ordered a drink at the bar, but the bartender refused to serve him. Lindley testified:

Q. Did you have any discussion with anyone from management then?

A. Yes, sir. I told him that I was there to pick up my final pay, so he called upstairs, and Rob Lamont came down to bring me my money.

Q. Did you and Mr. Lamont have any discussion?

A. Yes, sir. I was told by the cocktail bartender that the reason he couldn't serve me was because I and Chip and Norman were being accused of writing graffiti on one of the bathroom walls on the night that we were fired, and we did come back into the bar to have drinks, so when Rob came down, I told him that I was very sorry to hear that it had happened, but I had nothing to do with it, and at that point he said, "I don't want to hear anything out of you."

He said, "After all I have done for you that, you know, some of the things you said about me," and I told him that I didn't understand that, that I had not said anything about him and I didn't understand why all this was happening and what was going on. He said, "Calvin, you got involved with Chip."

Q. Was that the end of the discussion?

A. I took my money and I left.

Conclusions

In considering the foregoing findings of fact, it is helpful to look for guidance to the Board's decision in *Hawthorne Mazda, Inc.*, 251 NLRB 313 (1980). In that case, the Board held at 315:

Section 7 of the Act guarantees employees the right to engage in "concerted activities for the purpose of mutual aid or protection." It is axiomatic that employees who band together for the purpose of presenting grievances to their employer are en-

gaged in protected, concerted activity within the meaning of Section 7.²⁴ It follows that an individual employee's attempt to induce fellow workers to join in a petition regarding a common grievance is protected activity.²⁵ Similarly, an employee engages in protected activity when he presents to the employer grievances on behalf of other employees.²⁶

²⁴ See *NLRB v. Washington Aluminum Company, Inc.*, 370 U.S. 9 (1962).

²⁵ *Owens-Corning Fibreglas Corporation v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969); *Salt River Valley Water Users' Association v. NLRB*, 206 F.2d 325 (9th Cir. 1953).

²⁶ *NLRB v. Guernsey-Muskingum Electric Cooperative, Inc.*, 285 F.2d 8 (6th Cir. 1960); *Hugh H. Wilson Corporation v. NLRB*, 414 F.2d 1345, 1348 (3d Cir. 1969).

While Testa's complaints to management covered more than one subject matter, at least one of those complaints pertained to a subject matter which affected the working conditions of other employees, as well as Testa. Specifically, Testa believed that Lamont, who was the person who prepared the work schedule for the employees, was assigning to himself what Testa described as the "money shifts." In other words, the "money shifts" were those assignments to working stations and working times where an employee would be most likely to earn the most money. For example, station one during the night shift appears to be a desirable assignment because of the opportunity to earn more money than a person would who worked at a different station or during the daytime hours. Testa was of the opinion that the work assignments were not being rotated among the employees, as had been the practice by the former management at the Employer's facility. (See sec. A.) Apparently, Testa desired a return to the former conditions, under which the employees had worked, of rotating work assignments on the work schedule. Testa was not persuaded by the owner's decision to give Lamont those desirable assignments because of Lamont's position as manager and because of Lamont's hard work. That became evident from Testa's renewal of his complaint to management on that subject. (See secs. G and H.) In *W. C. Electrical Co.*, 262 NLRB 557 (1982), the Board held at 558: "It is well settled that activity in protest of the discontinuance of a past practice concerning a term and condition of employment involves a matter of mutual concern. We do not find that this common concern was negated because it coincided with Prager's individual sick pay complaint."

Thus, Testa's complaints with regard to work assignments were not solely personal complaints, but rather his complaints in that regard were matters which would have affected the wages, hours, and working conditions of other employees as well. Nevertheless, the question of whether protected concerted activities were engaged in here does not rest solely on the nature of Testa's complaints to management. The testimony reveals that certain other employees of the Employer, including Testa, met on August 8 and 9, 1982, and, among other things, discussed their working conditions and made plans to hold an employees' meeting on those matters on August 10, 1982, at Testa's house. (See secs. G and H.)

At the meeting on August 8, 1982, Testa was selected on the basis of his seniority as the employee who would speak with management on behalf of the employees. (See sec. 4 herein.) In this connection, note that Testa attempted to talk with Lamont with regard to the employees' work schedule, and later he tried to talk with McNulty regarding that subject and what Testa described as "management's inaccessibility." (See sec. H.) Then, Testa reported to the group of employees on August 9, 1982, his lack of success in talking with management. That led to the decision to hold a meeting the next day at Testa's house. As described in the findings of fact, that employees' meeting never took place. In its decision in *Datapoint Corp.*, 246 NLRB 234 (1979), the Board stated at 235, "Discussion among employees concerning working conditions is a necessary initial step in concerted activity and to deny protection to this type of discussion because of a lack of fruition in later action would be to nullify the rights guaranteed by Section 7 of the Act."

Based on the evidence of the discussion among the employees regarding their working conditions at the employer's facility; their selection of Testa as the one to speak with management on their behalf, and their action in planning a meeting of employees to further their job interests, I conclude that the employees involved herein were engaged in protected concerted activities. I further conclude that Lamont gained knowledge of the concerted nature of those activities when he was informed of the employees' meeting to be held on August 10, 1982, at Testa's house. Lamont was informed of that fact after the bar had closed during the early morning hours of August 10, 1982. (See sec. I.) McNulty then became aware of the plans for an employees' meeting when he learned about it around 10:30 a.m. or 11 a.m. on August 10, 1982. Thus, Lamont and McNulty were knowledgeable of the concerted nature of the activities prior to the time that Testa, Skender, and Lindley were terminated from employment.

Lamont acknowledged that it was his intention to notify Testa of his termination during the time of the employees' meeting at Testa's house. It will be recalled that Lamont testified, in part, "By that time, we had known about the employees' meeting, we knew what time it was going to be, and it was my intention to fire him that day, yes." (See sec. I.) Thus, I conclude that the real reason for the employer's termination of Testa on August 10, 1982, was the employees' protected concerted activities, and especially the planned meeting at Testa's house that afternoon. I conclude that such conduct violates Section 8(a)(1) of the Act.

With regard to the termination of Lindley, the evidence reveals that Shellock told him at the time of his termination that the reason was Lindley's involvement in the "mutiny party." According to Lindley, Shellock also told him, in part, "that I was involved in the meeting, and that was what led to the decision to terminate me." (See sec. I.) In addition, when Lindley went in to the Employer's facility on August 12, 1982, in order to pick up his paycheck, Lamont told Lindley, "Calvin, you got involved with Chip." (See sec. K.) (Testa's nickname is "Chip." See sec. II herein.) Thus, I conclude that the

real reason for the Employer's termination of Lindley on August 10, 1982, was the employees' protected concerted activities. I further conclude that such conduct violates Section 8(a)(1) of the Act.

With regard to the termination of Skender during the early morning hours of August 11, 1982, Lamont acknowledged that Skender's termination that morning resulted from the terminations of Testa and Lindley earlier that evening. In part, Lamont stated at the trial, "At that point, I just decided to go ahead and get it all over with." (See sec. J.) Note also Shellock's conversation with Skender at the time of his termination and the reference to Lindley. Note also Lamont's comment to Skender that he "got involved with Chip." In these circumstances, and particularly considering the timing and the statements briefly noted above, I conclude that the real reason for the termination of Skender on August 11, 1982, was the employees' protected concerted activities. I further conclude that such conduct violates Section 8(a)(1) of the Act.

Notwithstanding the foregoing conclusions, I also conclude that the evidence shows that the original decision by the Employer to terminate Testa, Skender, and Lindley from employment was made on Monday, August 9, 1982. Thus, the original decision made at that time was to terminate the three employees in question effective on Friday, August 13, 1982. That original decision by McNulty was made prior to the time that McNulty and Lamont acquired knowledge of the employees' meeting to be held on August 10, 1982, at Testa's house. Therefore, although certain employees of the Employer had engaged in protected concerted activities on August 8 and 9, 1982, management was not made aware of those activities until the early morning hours of August 10, 1982, when Lamont was informed about the plans for an employees' meeting. Also, up to that point in time, the Employer was not aware that Testa was acting in concert with other employees with regard to his complaints to Lamont and McNulty.

After Lamont, and then McNulty, gained knowledge on August 10, 1982, of the employees' protected activities, Lamont accelerated the terminations of the three employees in question. As indicated above, I conclude that the real reasons for the actual terminations of Testa, Skender, and Lindley were the employees' protected concerted activities.

Because the employer had already decided to terminate those three employees prior to the time that management knew of the employees' protected concerted activities, I further conclude that the Employer's original decision on August 9, 1982, to terminate those three employees was not unlawful under the Act. In these circumstances, I conclude that the backpay period should be limited to the time between the date of their terminations and Friday, August 13, 1982, which was the date on which the Employer had already decided to make their terminations from employment effective. Because the three employees in question would have been terminated on August 13, 1982, if Lamont had not accelerated their terminations for reasons unlawful under the Act, I further conclude that the three discriminatees are not

entitled to offers of reinstatement to their former positions of employment with the Employer.

Based on the findings of fact set forth in section 6 herein regarding the statements made by Lamont to Lindley and Puckett in the car on August 10, 1982, I conclude that the Employer has created the impression of surveillance of the employees' protected concerted activities by telling the employees that the Employer had heard of the activities and that the name of one of the employees had been mentioned. I conclude that such conduct violates Section 8(a)(1) of the Act. In *American National Stores*, 195 NLRB 127 (1972), the Board held:

We are not here concerned with whether this statement was true, or whether it proved actual surveillance. The significant fact, in our opinion, is whether Copeland's statement had a reasonable tendency to discourage the employees in exercising their statutory rights by creating the impression that he had sources of information about their union activity.¹

¹ *Columbian Carbon Company*, 79 NLRB 62, enf. 177 F.2d 1003 (C.A. 10).

Based on the findings of fact set forth in section 6 herein regarding the statements made by Shellock to Lindley in the office at the Employer's facility on August 10, 1982, I conclude that the Employer told an employee that he was being terminated because of his involvement in protected concerted activities, and that the employer also created the impression of surveillance of such activities by telling an employee that the Employer had its sources and had learned of the employee's involvement in such activities. I conclude that such conduct violates Section 8(a)(1) of the Act. I further conclude that in the same conversation the Employer interrogated an employee about the employees' protected concerted activities. Note Shellock's admission, "I was trying to find out what this meeting was going to be about." With regard to telling an employee that he was terminated because he had engaged in union activities, see the Board's decisions in the following cases: *Kranco, Inc.*, 228 NLRB 319 (1977); *Woody's Truck Stops*, 258 NLRB 705 (1981); and *Major Cab Co.*, 255 NLRB 1338 (1981). It seems logical that the legal principle applied in those cases would be applicable to a situation where an employer tells an employee that he was terminated because of his protected concerted activities.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Respondent had engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by terminating from employment Louis E. Testa, Norman Skender, and Calvin Lindley because employees of the Employer had engaged in protected concerted activities.
3. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by

telling an employee that he was being terminated from employment because of his involvement in protected concerted activities.

4. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by interrogating an employee about the employees' protected concerted activities.

5. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by creating the impression of surveillance of employees' protected concerted activities by telling employees that the Employer had heard of such activities and the name of one of the employees had been mentioned.

6. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by creating the impression of surveillance of employees' protected concerted activities by telling an employee that the employer had its sources and had learned of the employee's involvement in such activities.

7. The unfair labor practice described above affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Since I have found that the Respondent has engaged in certain unfair labor practices within the meaning of Section 8(a)(1) of the Act, I shall recommend to the Board that the Respondent be ordered to cease and desist from engaging in such unfair labor practices.

I shall also recommend to the Board that the Respondent be ordered to take certain affirmative action in order to effectuate the policies of the Act. Such affirmative action will include making whole Louis E. Testa, Norman Skender, and Calvin Lindley for their monetary losses from the date of their terminations from employment until Friday, August 13, 1982, when as concluded herein, the Employer would have terminated those employees in accordance with its original decision made on August 9, 1982. Backpay is to be computed in accordance with the Board's decision in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest on such backpay to be computed in accordance with the Board's decisions in *Isis Plumbing Co.*, 138 NLRB 716 (1962); *Florida Steel Corp.*, 231 NLRB 651 (1977), and *Olympic Medical Corp.*, 250 NLRB 146 (1980).

With regard to the omission of a recommendation that the Respondent be ordered to make offers of reinstatement to the three discriminatees, see the conclusions reached above.

In accordance with the Board's decision in *Sterling Sugars*, 261 NLRB 472 (1982), I shall recommend to the Board that an expunction remedy be included in the remedial order.

Pursuant to the Board's decision in *Hickmott Foods*, 242 NLRB 1357 (1979), I shall recommend to the Board that a narrowly worded cease-and-desist order, as distinguished from a broadly worded one, be imposed in this case.

[Recommended Order omitted from publication.]