

**Sue D. Gensemer and Charline J. Sandel, a Partnership d/b/a Apex Cleaning Service and Ceveriano Hernandez Santiago.** Case 21-CA-27650

August 30, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

On May 15, 1991, Administrative Law Judge George Christensen issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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,<sup>1</sup> and conclusions<sup>2</sup> and to adopt the recommended Order.<sup>3</sup>

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Sue D. Gensemer and Charline J. Sandel, a Partnership d/b/a Apex Cleaning Service, Huntington Beach, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

<sup>1</sup>The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup>We agree with the judge's conclusion that the employees in this case reasonably believed that they had been discharged under an application of the standard set forth in *Ridgeway Trucking Co.*, 243 NLRB 1048 (1979), enf'd. 622 F.2d 1222 (5th Cir. 1980). In this regard, see *Brunswick Hospital Center*, 265 NLRB 803, 810 (1982), in which the Board affirmed the following statement in the judge's decision:

In determining whether or not a striker has been discharged, the events must be viewed through the striker's eyes and not as the employer would have viewed them. The test to be used is whether the acts reasonably led the strikers to believe they were discharged. If those acts created a climate of ambiguity and confusion which reasonably caused strikers to believe that they had been discharged or, at the very least, that their employment status was questionable because of their strike activity, the burden of the results of that ambiguity must fall on the employer. [Citations omitted.]

Id. at 810.

<sup>3</sup>The judge's notice to employees inadvertently omitted the expunction language included in his recommended Order. We have issued a new notice including the expunction language.

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 discharge our employees for ceasing work or refraining from work to exercise their right under Section 7 of the Act to pressure us to consider their complaints over their wages and/or their hours and/or their working conditions and to seek adjustment of those complaints.

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

WE WILL offer Leticia Castillo, Jose Alberto Seguro Coria, Miguel Filomeo Cortez Vidal, Raymunda Guzman, Guillermo Guzman, Julia Hernandez, Sonia Hernandez, Irene Luna, Santiago Mendoza Guzman, Victor Perez Rosas, Martin Sandoval, and Juan Manuel Soto 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 notify Leticia Castillo, Jose Alberto Seguro Coria, Miguel Filomeo Cortez Vidal, Raymunda Guzman, Guillermo Guzman, Julia Hernandez, Sonia Hernandez, Irene Luna, Santiago Mendoza Guzman, Victor Perez Rosas, Martin Sandoval, and Juan Manuel Soto that we have removed from our files any reference to their discharge and that their discharges will not be used against them in any way.

SUE D. GENSEMER AND CHARLINE J.  
SANDEL, A PARTNERSHIP D/B/A APEX  
CLEANING SERVICE

*Thomas A. Lenz and Jean Libby, Esqs*, the General Counsel.  
*Camille A. Goulet, Esq. (Berman & Clark)*, of Santa Monica, California, for the Respondent.

## DECISION

## STATEMENT OF THE CASE

GEORGE CHRISTENSEN, Administrative Law Judge. On November 15 and 16, (1990),<sup>1</sup> I conducted a hearing at Los Angeles, California, to try issues raised by a complaint issued on August 30 based on a charge filed by Ceveriano Hernandez Santiago (Santiago) on August 2.

The complaint alleged and the answer thereto admitted at all pertinent times Sue D. Gensemer (Gensemer) and Charline J. Sandel (Sandel) were owner-partners operating a janitorial service under the name Apex Cleaning Service (Apex) out of their home in Huntington Beach, California, providing cleaning services to commercial buildings in the area.

The complaint further alleged and the answer thereto denied Apex discharged its entire work force, consisting of three supervisors and 12 cleaners in their crews, on July 18; that Apex discharged the 12 cleaners<sup>2</sup> for engaging in concerted activities protected by the Act; that Apex failed or refused to reinstate the 12 cleaners after July 18; and that Apex thereby violated Section 8(a)(1) of the National Labor Relations Act (Act). In its defense Apex asserted the 12 cleaners voluntarily quit its employment on July 18 and never requested reinstatement thereafter.

The issues created by the foregoing are whether:

1. The 12 cleaners voluntarily quit their employment;
2. If not, were they discharged;
3. If so, did Apex discharge the 12 cleaners for engaging in concerted activities protected by the Act, thereby violating Section 8(a)(1) of the Act;
4. If so, does their failure to request reinstatement subsequent to their discharges bar their reinstatement and reimbursement for lost wages.

Counsel were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, argue, and file briefs. Counsel for the General Counsel argued orally prior to the close of the hearing and Apex submitted a posthearing brief.

Based on my review of the entire record, observation of the witnesses, perusal of the oral argument, the brief and research, I enter the following

FINDINGS OF FACT<sup>3</sup>

## I. JURISDICTION

The complaint alleged, the answer thereto admitted, and I find at all pertinent times Apex was an employer engaged in commerce in a business affecting commerce within the meaning of Section 2 of the Act.

<sup>1</sup>Read 1990 after further date references omitting the year.

<sup>2</sup>The General Counsel seeks no relief under the Act on behalf of the three supervisors.

<sup>3</sup>While every apparent or nonapparent conflict in the evidence has not been specifically resolved below, my findings are based upon my examination of the entire record, my observation of the witnesses' demeanor while testifying and my evaluation of the reliability of their testimony; therefore any testimony in the record which is inconsistent with my findings is hereby discredited.

## II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

Immediately prior to the events which triggered the cessation of their employment on July 18, Santiago, Porfirio Priego Solis (Solis), and Irma Hernandez Carballo (Carballo) were employed by Apex to supervise the work of cleaners Leticia Castillo (Castillo), Jose Alberto Seguro Coria (Coria), Miguel Filomeo Cortez Vidal (Vidal), Raymunda Guzman (R. Guzman), Guillermo Guzman (G. Guzman), Julia Hernandez (J. Hernandez), Sonia Hernandez (Hernandez), Irene Luna (Luna), Santiago Mendoza Guzman (S. Guzman), Victor Perez Rosas (Rosas), Martin Sandoval (Sandoval), and Juan Manuel Soto (Soto).

The entire work force had little or no command of the English language and communicated in the Spanish language: the two owner-partners had a limited command of the Spanish language and had to try to communicate with the work force in what was termed "broken Spanish" (Gensemer with somewhat more success than Sandel) with considerable difficulty.

The three supervisors were paid bimonthly salaries; the 12 cleaners were paid a daily wage of between \$34 and \$38 a day;<sup>4</sup> the workshifts started at 6 p.m. and ended at a time which is in controversy, as well as whether the cleaners and supervisors received any breaks or meal times off work during the workshifts.<sup>5</sup> The workweek was Monday through Friday.

The supervisors were required to pick up and transport the cleaners in their crews to their initial jobs (unless the cleaners had other means of transportation to the initial jobsite) and from job to job in either their autos or (in one case) an auto supplied by Apex. The supervisors were given a car allowance, over and above their salaries. Equipment and material were furnished by Apex to the supervisors for accomplishing the work assigned to their crews.

The three supervisors went to the partners' office/residence prior to the start of the workshift each day to pick up keys to the buildings they were assigned to clean and secure equipment and supplies. The supervisors went to the initial jobsites and began cleaning activities with their crews, thereafter going from jobsite to jobsite and cleaning buildings on routes laid out by Gensemer until all the buildings they were assigned to clean were serviced. The three supervisors then returned the keys to the partners' office/residence.

For some time, prior to July 18, the cleaners had been discussing their dissatisfaction with their wages and working conditions among themselves and with their supervisors. In a general meeting of the cleaners and the supervisors about a week prior to July 18, all present agreed they were receiving too little pay for too much work and should join in demanding the partners increase their wages and alleviate their working conditions.

The evening of July 18, Santiago's crew began work at his initial worksite, the Coast Optical building in Huntington Beach, at about 6 p.m. Shortly after the crew commenced

<sup>4</sup>At \$34, the starting wage, approximately the current minimum wage of \$4.25 per hour, presuming an 8-hour workday.

<sup>5</sup>Three supervisors and two cleaners testified they worked 12-hour shifts with no breaks and no overtime pay; the owner-partners testified the workshifts ended at varying times between 1 and 3 a.m., with time off during workshifts for breaks, and on one occasion overtime was paid.

work, Santiago left the building to go to his auto. As he came out of the building, Solis, Carballo, and their crews arrived and Solis suggested to Santiago the three crews proceeded to the partners' home and office to present to the partners the employees' complaint they were required to perform too much work for too little pay and to request a pay raise and less onerous work requirements. Santiago responded favorably to the suggestion, went back into the building and requested his crew join the other two crews outside the building. In the ensuing discussion all three supervisors and all 12 cleaners discussed Solis' suggestion and agreed to proceed to the partners' home and office to present to the partners their complaint and requests. There was neither a discussion of nor decision about what the employees would do if the partners failed or refused to address or resolve their complaint and requests. Santiago locked the door to the Coast Optical building, reset the alarm system, the three crews entered autos, and proceeded towards the partners' home and office. As their autos were leaving, Gensemer arrived in her auto and, perceiving the crews were departing in their autos, swung about and followed the auto Santiago was driving to her home and office.

When Gensemer arrived at her home and office and parked her auto behind the auto driven by Santiago, she hurried inside her home and office to stop Sandel before she left in her auto. Gensemer caught Sandel as she was pulling out of the garage, told her there was something amiss and requested she park her auto and come back inside the house. While Sandel was complying with Gensemer's request, Gensemer went to the front of the house where the employees had assembled and asked what was going on.

Solis advised her the employees thought they were receiving too little pay for their work and wanted more money. Santiago echoed Solis' remarks. Gensemer responded with a request the employees go to work. Receiving either no or a negative response, Gensemer addressed her request to Carballo,<sup>6</sup> though in incorrect Spanish. Solis intervened, telling Carballo not to respond to Gensemer's request, to retain a solid front supporting the group's complaint and requests.

Gensemer demanded Solis surrender to her the keys to the buildings he was scheduled to service that evening. Solis initially held back but then surrendered the keys. Santiago and Carballo surrendered their keys without opposition. Sometime during these exchanges, an unidentified employee shouted in English the partners were cheap.

When Sandel came out of the house and asked Gensemer what was happening, Gensemer told her the employees thought the partners were cheap and didn't want to work for them. Sandel reentered the house and began recruiting for the employees.

Gensemer demanded and secured the Apex materials and equipment in the supervisors' personal autos and told the employees to leave the partners' premises or she would summon the police.

The employees complied with Gensemer's demand and dispersed.

When the employees subsequently requested and received their final paychecks, they were neither offered reinstatement

nor did they request reinstatement. The employees have not been offered reinstatement subsequently.

Prior to the close of the hearing the General Counsel stated if the partners had any doubt about the 12 cleaners' desire to have their jobs back, he was making an unconditional offer on their behalf to return to work. Counsel for Apex rejected the offer on the ground the 12 were replaced, there were no openings, and there were questions regarding the ability of some of the cleaners to meet Apex's work requirements in view of disability claims they filed subsequent to the July 18 cessation of their employment.

Solis and Santiago conceded they were denied unemployment compensation by the state agency administering unemployment claims and the agency. A copy of the agency's ruling in the case of Santiago (identified as "C. Hernandez" in the ruling) stated his claim was rejected because "you quit your last employment because you were dissatisfied with the wage you were receiving." On the accompanying application, in the portion filled out by Apex, Sandel stated "quit without notice" and Santiago unequivocally denied he entered cross marks opposite the blocks labelled "Voluntary Quit" and "Voluntarily quit."

An identical ruling was issued by the agency to Carballo (identified as "I.C. Hernandez" in the ruling) and Solis (identified as "P P Solis" in the ruling). Their applications and Apex's comments thereon were not introduced into evidence. There was no evidence any of the three were afforded a hearing before an impartial representative of the agency or the agency official who rejected the three applications considered the issue of whether the three ceased work in support of their crews and their effort to secure improved wages and working conditions, or whether the rejecting agency official rejected the applications solely on the basis of Apex's representations and, in any event, there was no evidence the 12 cleaners, who are the persons seeking relief in this case, were accorded like treatment by the agency.

## B. Analysis and Conclusions

### 1. The alleged quit

Any failure or refusal by a group of employees to perform assigned work is a "voluntary quit."

Section 7 of the Act, however, grants employees the right to "engage in . . . concerted activities for the purpose of . . . mutual aid or protection" and it is hornbook law employees who quit work in exercise of that right do not lose their status as employees when and while exercising that right.

Insofar as the rulings of the state unemployment agency vis-a-vis the three supervisors are concerned, in the absence of the factors recited in the last two paragraphs of my recitation of the facts in this case, I find those determinations have no bearing on my determination of whether the 12 cleaners retained employee status and were not voluntary quits within the meaning of the Act.

The evidence establishes the 12 cleaners had no plan or intention to quit Apex's employ when they either ceased work or refrained from commencing work on July 18 and did so in a concerted effort to pressure the partners to consider and adjust their complaint over their wages and hours.

I therefore find and conclude at all pertinent times, including July 18 and times subsequent, the 12 cleaners retained

<sup>6</sup>Carballo was the only supervisor who had not spoken in support of the employees' requests and had been informed by the partners she was scheduled to receive a salary increase earlier that evening.

their status as "employees" of Apex within the meaning of the Act and were not voluntary quits within the meaning of the Act.

## 2. The alleged discharge

As the Board stated in *Ridgeway Trucking Co.*, 243 NLRB 1048 (1979), and has restated in subsequent cases:

The test for determining whether [an employer's] statements constitute an unlawful discharge depends on whether they would reasonably lead the employees to believe they had been discharged and the fact of discharge does not depend on the use of formal words of firing. . . . It is sufficient if the words or actions of the employer would logically lead a prudent person to believe his tenure has been terminated.

In this case, after failing to address the employees' complaint and requested adjustment thereof, Gensemer engaged in an angry exchange with Solis, seized the keys which would enable the employees to perform any work for Apex, and ordered them off the premises under threat of arrest if they failed to comply.

This conduct amply supports a conclusion the 12 cleaners reasonably believed they had been discharged, as the employees who testified and their supervisors stated, and I so find and conclude.<sup>7</sup>

## 3. Protected concerted activities

Under Section 8(a)(1) of the Act, it is an unfair labor practice for an employer to discharge employees for exercising a right guaranteed in Section 7 of the Act. As noted above, one of those rights is the right to engage in concerted activities for the purpose of mutual aid or protection, which by definition includes the right to cease or refrain from work for the purpose of pressuring an employer to consider and adjust a complaint over wages and/or hours and/or working conditions.

I have entered findings and conclusions the 12 cleaners were discharged and that they were discharged for ceasing or refraining from work to pressure the Apex partners to consider and adjust their complaints over their wages and hours, an engagement in concerted activities in exercise of the of the 12 cleaners guaranteed by Section 7 of the Act.

I therefore further find and conclude Apex discharged the 12 cleaners on July 18 for engaging in concerted activities protected by Section 7 the Act, thereby violating Section 8(a)(1) of the Act.

## 4. Reinstatement and backpay

I have entered findings Apex did not offer reinstatement to the 12 cleaners at any time after their July 18 discharge. The 12 cleaners did not directly request reinstatement thereafter, but did so indirectly through the filing of the charge which led to this proceeding and the General Counsel's advice to Apex on November 16 the 12 cleaners desired reinstatement, which was rejected by Apex.

The Board consistently has held it is incumbent upon the employer who has committed an unfair labor practice by discharging employees for engaging in concerted activities pro-

ted by the Act to offer reinstatement to those employees and to reimburse those employees for any wage and other losses they may have suffered between the dates they were discharged and the dates they are reinstated and that the employees are under no duty to request reinstatement prior to their receipt of the Employer's reinstatement offer.<sup>8</sup>

I therefore reject any contention the 12 cleaners are not entitled to reinstatement and reimbursement for their wage and other losses between July 18 and the date they are reinstated by virtue of their failure to address a direct request to Apex for reinstatement following their July 18 unlawful discharges.

## CONCLUSIONS OF LAW

1. At all pertinent times Apex was an employer engaged in commerce in a business affecting commerce within the meaning of Section 2 of the Act.

2. At all pertinent times Sue D. Gensemer and Charline J. Sandel were the owners, supervisors, and agents of Apex acting on its behalf within the meaning of Section 2 of the Act.

3. Gensemer and Sandel, d/b/a Apex, violated Section 8(a)(1) of the Act by discharging Castillo, Coria, Vidal, R. Guzman, G. Guzman, J. Hernandez, S. Hernandez, Luna, S. Guzman, Rosas, Sandoval, and Soto for exercising their right under Section 7 of the Act to engage in concerted activity for the purpose of their mutual aid and protection.

4. The aforesaid unfair labor practices affected commerce as defined in Section 2 of the Act.

## THE REMEDY

Having found Apex engaged in unfair labor practices, I recommend Apex be directed to cease and desist therefrom and take affirmative action designed to effectuate the purposes of the Act.

Having found Apex unlawfully discharged Castillo, Coria, Vidal, R. Guzman, G. Guzman, J. Hernandez, S. Hernandez, Luna, S. Guzman, Rosas, Sandoval, and Soto, I recommend Apex be ordered to reinstate those 12 employees to their former positions, if necessary terminating the services of any employees hired to replace them, and make them whole for any loss of earnings and benefits they suffered as a result of their unlawful discharges, less any interim earnings, with the sums due and interest thereon calculated in the manner set out in *F. W. Woolworth Co.*, 90 NLRB 280 (1950), *Florida Steel Corp.*, 231 NLRB 651 (1977), and *Isis Plumbing Co.*, 138 NLRB 716 (1962). I also recommend Apex be ordered to expunge from its records and files any reference to the discharges of the 12 employees named above and they be notified in writing, both in English and Spanish, that this has been done and evidence relating to their unlawful discharges shall not be used against them. I further recommend that the notice attached hereto be prepared and posted both in English and Spanish.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>9</sup>

<sup>8</sup>*Seminole Mfg. Co.*, 272 NLRB 365 (1984); *Modern Iron Works*, 281 NLRB 1119 (1986).

<sup>9</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>7</sup>Cf. *Champ Corp.*, 291 NLRB 803 (1988).

## ORDER

The Respondent, Sue D. Gensemer and Charline J. Sandel, a Partnership d/b/a Apex Cleaning Service, Huntington Beach, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging its or their employees for exercising their right under Section 7 of the Act to cease working or to refrain from working for the purpose of securing consideration and adjustment of their complaint and requests for adjustment concerning their rates of pay, wages, hours, and working conditions.

(b) Interfering with, restraining, or coercing its or their employees for engaging in any like or related activities protected by the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Castillo, Coria, Vidal, R. Guzman, G. Guzman, J. Hernandez, S. Hernandez, Luna, S. Guzman, Rosas, Sandoval, and Soto immediate and full reinstatement to their former positions, if necessary terminating employees hired to replace them, with full seniority and all other rights and privileges restored, and make them whole for any loss of earnings or other benefits they may have suffered by virtue of the unlawful discrimination against them in the manner set out in the remedy section of this decision.

(b) Expunge from its or their records and files any reference to the discharges of the 12 employees named above and notify them in writing, in both English and Spanish, this

has been done and evidence relating to their unlawful discharges shall not be used against them in the future.

(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 determine the payments which will make whole the 12 employees named above for the discrimination practiced against them.

(d) Post at its facilities at Huntington Beach, California, and all other locations where notices to employees are customarily posted copies of the attached notice, in Spanish and English, marked "Appendix."<sup>10</sup> Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

<sup>10</sup>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."