

Skyline Lodge, Inc. d/b/a Edward's Restaurant & Lounge and Phyllis Delaney and Brenda Lackey and Karen Watts. Cases 9-CA-28122-1, 9-CA-28122-2, and 9-CA-28122-3

January 9, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT
AND RAUDABAUGH

On July 30, 1991, Administrative Law Judge Michael O. Miller issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs in opposition to the Respondent's exceptions.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and

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

Contrary to the Respondent's assertions, this is not a "dual motive case." The evidence is clear and uncontradicted that Bradford, the Respondent's corporate food and beverage director, directed Boucher, Respondent's manager, to discharge Delaney because she was "a disruptive force in the workforce," a reference to her protected concerted activities. Boucher not only told Delaney this, but added that she was also being fired for going over his head to Bradford, itself a protected concerted activity in this context. But, even if this were a "dual motive case," we find that the General Counsel has clearly established a prima facie case that Delaney was discharged for unlawful reasons and therefore the burden shifts to the Respondent to prove that it would have discharged Delaney even in the absence of her protected concerted activity. There is no evidence in the record to support the Respondent's contentions that Delaney was discharged for engaging in a yelling match on November 19, 1990, or that she disparaged Boucher to the Respondent's customers. Even if those incidents did occur, neither Bradford nor Boucher testified that these were the reasons for Delaney's discharge. Therefore, we find that the Respondent has failed to carry its burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), of proving by a preponderance of the evidence that Delaney's discharge would have occurred even in the absence of her protected concerted activity.

orders that the Respondent, Skyline Lodge, Inc., d/b/a Edward's Restaurant & Lounge, Cincinnati, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

James Schwartz, Esq., for the General Counsel.

Robert F. Staun, of Cincinnati, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was tried in Cincinnati, Ohio, on May 13 and 14, 1991, based on unfair labor practice charges filed on December 13, 17, and 18, 1990, by Phyllis Delaney, Brenda Lackey, and Karen Watts, respectively, and a complaint issued by the Acting Regional Director of Region 9 of the National Labor Relations Board (the Board) on January 25, 1991. The complaint alleges that Skyline Lodge, Inc., d/b/a Edward's Restaurant & Lounge (Respondent) coerced and discriminatorily discharged the charging parties because they had engaged in protected concerted activities in violation of Section 8(a)(1) of the National Labor Relations Act (the Act). Respondent's timely filed answer denies the commission of any unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the General Counsel's brief, I make the following

FINDINGS OF FACT

I. THE EMPLOYER'S BUSINESS

Respondent, a corporation with offices and places of business in the Cincinnati, Ohio area, is engaged in the operation of motels and public restaurants, providing food, beverages and lodging, with a facility located in Harrison, Ohio. In the course and conduct of its business operations at its Ohio facilities, it annually derives gross revenues in excess of \$500,000 and purchases and receives products, goods, and materials directly from points outside the State of Ohio which are valued in excess of \$5000.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent operates four restaurants in the Cincinnati area; the events in this case took place at one of them, Edward's Restaurant & Lounge. Edward's provides both a la carte fine dining and banquet services. One group of servers work breakfast and lunch and a separate group of about seven work the dinner shift, approximately 4:30 to 10 or 11 p.m., depending on the night. On any given night, about four of these servers are on duty. The servers are not represented by a labor organization. The night manager when the relevant events occurred was Peter Boucher.

B. *Protected Concerted Activity*

In early November 1990,¹ Brenda Lackey, Phyllis Delaney, Karen Watts, and Marlene Scheidt, all dinner servers, discussed among themselves certain problems which they perceived in the operation of the restaurant and in the treatment they received. Among their concerns were the alleged unfair distribution of banquet work and other examples of favoritism by the manager, Boucher, improper recording of sales and tips by attributing them to servers who were not present, and lack of support by the bus boys on Sundays. After they had unsuccessfully attempted to present these concerns to Boucher, Lackey suggested that they meet with Gary Bradford, at that time Respondent's corporate food and beverage director.

Delaney called Bradford and they met him at one of the other restaurants. Delaney did most of the talking. She told him that Boucher was not assigning dining room customers or banquet work equitably; the latter was of particular concern to Lackey, who had been promised that she would be trained to serve these functions as well as ala carte dining.² She also complained that he was favoring two other waitresses by permitting them to leave the floor, do less setup work, and by giving them free food and drinks. She told Bradford, additionally, that the bus boys who were supposed to assist them in serving customers were goofing off, particularly on Sundays.

Scheidt complained that another server was permitted to ring up sales under her number when she was not there.³ She testified, without contradiction, that a dinner check was improperly rung up on her number and she was accused of failing to ring up properly and taking someone else's tip money. Lackey, too, was concerned that her number could be improperly used. It would be difficult to do when both servers were working, she acknowledged, and an experienced server would have an idea of her gross sales at the end of a week when she signed for her paycheck. However, it was conceivable for one server to use another's number when the second server was not working.

Bradford promised to look into their concerns and directed them not to discuss these matters until he had a chance to do so. Thereafter, he claims, he was unable to substantiate their complaints except for the bus boy issue. With respect to Scheidt's concerns, he testified that under their cash register system, it would be very difficult, if not impossible, for a server and cashier to use another's number. The incident to which Scheidt referred, he said, was merely a training exercise when the sales figures were not actually recorded.

In the course of looking into the complaints, Bradford heard that Delaney was continuing to discuss these problems with other employees. He heard this, he said, from kitchen help, the day supervisor and a customer. Delaney denied discussing these complaints with any customers. There is no

¹ All dates herein are 1990 unless otherwise specified.

² Banquet servers have less customer contact and receive a flat 15 percent of the food and beverage charges, sometimes earning as much in a few hours of work as they would in an entire evening in the dining room, where the tips are paid by the individual diners.

³ If done, this would place the tax liability for gratuities upon the server whose number was used rather than upon the server who had earned those tips.

evidence that she was ever reprimanded or ordered not to discuss such matters with, or in the presence of, customers.

On November 19, Bradford called a second meeting. He went through the various complaints, stating that he could find no support for them; he said that he wanted them to stop. Bradford said that he was tired of the divisions and of servers telling customers that Boucher and other servers were bad. Pointing at each individual, he then asked each server whether she was interested in working at Edward's. All replied affirmatively. However, Delaney qualified her reply, saying, "Yes, but I don't think things are fair." She persisted in discussing her complaints.

Delaney continued talking after the meeting ended; as she was walking out the door, Bradford heard her say that the issues were not resolved and were not going to end there. She said something to the effect that she was "going to get to the bottom of it." Bradford believed, from this, that the problem was going to continue. Without any proof to their allegations, he stated, "I couldn't let it go on."

Section 8(a)(1) protects employees who act concertedly with regard to wages, hour and other terms and conditions of their employment. The evidence here is clear and uncontradicted. These employees acted together to: (1) protest the distribution of work; (2) the support they were receiving from the bus boys and other servers; (3) perceived cheating in regard to the recording of their sales and tips; and (4) generally, the quality and fairness of their supervision. These matters directly affected their earnings and the amount of work required of them. This concerted activity was therefore for their mutual aid and protection with respect to wages and other conditions of employment. It clearly came under the Act's protection. Management could not dictate when it would end and it is irrelevant some of their complaints may have been without merit. See *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 344-345 (1938); *Spinoza, Inc.*, 199 NLRB 525 (1972).

C. *Phyllis Delaney's Discharge*

Following this meeting, Bradford directed Boucher to discharge Delaney as soon as possible because, he said, she was "a disruptive force in the work force . . . [and he] felt that she was not going to let these matters drop. There was no proof." Bradford admitted that he believed that Delaney was the leader of the faction because she had done most of the talking. Boucher agreed with Bradford that Delaney was a disruptive force.

In both a telephone conversation and in person, Boucher told Delaney that she was being discharged; he said that they were coming into the busy season and they could not have a disruptive force like her in the work force, Boucher had heard, he claimed, that she was complaining about him not being fair to some servers. He also told her, according to Delaney's uncontradicted testimony, that she was being fired for going over his head to Bradford.⁴

This is one of those rare cases where the conclusion flows from undisputed events; neither a legal nor a factual determination is required. Delaney was engaged in protected concerted activity. Respondent perceived this as being disrupt-

⁴ General Counsel alleged these statements as independently violative of Sec. 8(a)(1). I agree. Such statements, made to one who is still an employee, with the likelihood that she would tell others, clearly interfere with the right of employees to engage in concerted activity.

tive, believed that she would continue with this activity unless removed from the work force and work place, and admittedly discharged her because of her activity and the threat that she would continue it. Her discharge violated Section 8(a)(1) of the Act and I so find.

D. Karen Watts' Termination

Karen Watts was hired on October 3 and generally worked the dinner shift. When she was hired, she made it clear to Boucher that she was required her to pick up her children at 3 p.m. and could not be in the restaurant before 4. Watts is Delaney's sister.

On the day after Delaney was terminated (alleged in the complaint as November 21), a 3 p.m. meeting was scheduled by the payroll department to clarify tip procedures for the servers. Terry Hartzell, the day supervisor, was directed to inform them.

According to Watts, when Hartzell called, she protested that Boucher knew that she could not come in before 4 p.m. Hartzell replied that she would be there, or else. Hartzell said that she was fired and should not report the next day if she did not attend. Watts did not come in and considered herself terminated.

A week later, according to Watts, Boucher called to ask that she come in to sign her pay slip. He asked why she had not come in. When Watts replied that she had been fired, he told her that she knew she could have come in and worked. She asked whether the conditions which they had protested would change and he hung up on her.

Hartzell and Boucher tell a different story. Hartzell testified that she reluctantly called Watts to inform her of the meeting, knowing that Watts' sister had been terminated only the day before. She was relieved when Watts indicated that she would attend. Subsequently, the meeting was cancelled because an insufficient number were available to attend and Hartzell left word at Watts' home.

After she had failed to show up for some days, Boucher claimed, he called Watts and asked whether she still wanted to work. She told him that she believed that she had been fired and described her conversation with Hartzell. Boucher replied that he could not believe that Hartzell told her this and, when Watts said that she wanted to work, worked out a schedule for her. Before she reported back, however, she told him that she had changed her mind, because of her sister's discharge. Boucher, who considered her one of his better servers, wished Watts well.

Both Boucher and Hartzell presented credible demeanors. Boucher, in particular, was candid about his termination of Delaney. That termination, although for a patently unlawful reason, was done openly, with no effort to conceal Respondent's motivation. Given the lack of subterfuge in Delaney's discharge, it is unlikely that Boucher would have stooped to a subterfuge, such as Watts' testimony would indicate, to eliminate Watts, her sister.

Accordingly, I find that General Counsel has failed to sustain his burden of proof with respect to the discharge of Karen Watts and I shall recommend dismissal of that allegation.

E. Brenda Lackey's Termination

Brenda Lackey started at Edward's in September. Prior to that time, she had 20 years, off and on, of restaurant experi-

ence. However, it had been 17 years since she had served in fine dining. Boucher considered her a good server, but not one of the stronger ones who were capable of handling more patrons and tables at a single time. Lackey did not dispute this assessment, which is corroborated by her gross sales figures, even those before the protected activity.

Guests are assigned to waitresses by the hostess or the manager. According to her testimony, Lackey had been getting 15 to 20 guests per night prior to the November meetings. After those meetings, she claimed that she would have as few as four or five and that her tip earnings dropped from as much as \$60 per night to as little as \$7 or \$8. Additionally, she was still assigned little or no banquet work. Finally, on Saturday night, December 15, in frustration over the lack of earnings, she checked out early and quit.

Marlene Scheidt saw Lackey leaving and heard Boucher ask the cashier where she was going. When told that she was leaving, Scheidt claimed, Boucher said, "Good riddance . . . I'm glad that she is going." Boucher allegedly told Scheidt that he was going to take Lackey "down little by little until she got the message and quit." When Scheidt asked why he didn't just fire Lackey, Boucher stated that he "knew Phyllis' game plan" and "didn't want to make their case." He claimed to have a little black book which told him what he could or could not do with respect to firing someone or getting them to quit.

According to Scheidt, the tally sheet showed that Lackey had only eight customers between their starting time and when she left at about 9:30. Before she left, Lackey registered upset at her lack of earnings and said that she could not "stick around." One waitress, Shellie, allegedly had 46 customers that evening, Scheidt had served 21, and 2 servers hired that month had 15 and 11, respectively.

Boucher denied that the conversation attributed to him by Scheidt occurred. As he testified, Scheidt told him that he better not discharge Lackey because Lackey would think that she, Scheidt, was part of it and would get her.⁵ He also denied reducing Lackey's work in order to force her to quit. In assigning customers, he said, he tried to be fair but had to consider the guests' needs ahead of the servers.

Respondent's payroll records, which appear to be genuine, fail to support Lackey's claims as to what her sales and tips had been or even as to when she quit. Thus, with no substantial changes in the number of hours she worked from pay period to pay period, both her gross sales and declared tip earnings⁶ stayed essentially consistent throughout her employment. Her sales, per pay period, ranged from a low of \$934 to a high of \$1304. For her last pay period, they were \$1214. The two pay periods preceding the last one were her lowest in sales, although not in tips declared. Her sales for the last few nights of her employment were consistent with, or better than, her sales on earlier nights.

According to the timecards, Lackey left work on Saturday, December 15, at 9:46 p.m.; however, she returned and

⁵ Noting Scheidt's animosity toward Boucher and the improbability of Boucher admitting his motivation to Scheidt, who was included in the faction which brought its complaints to Bradford, I must credit Boucher. Accordingly, I shall recommend that General Counsel's allegation that Boucher's statements to Scheidt independently violated Sec. 8(a)(1) be dismissed.

⁶ The servers declare a set percentage of their gross sales as tips for IRS purposes.

worked on Sunday and Tuesday.⁷ Those same records show that Shellie James worked far more hours per pay period than did Lackey; she also had substantially higher daily gross sales and correspondingly greater tip earnings.⁸ Boucher testified that she was one of his best servers.

Given the apparently genuine payroll records and the animosity toward Boucher which was apparent from Scheidt's testimony and demeanor, I cannot credit either Lackey or Scheidt with respect to the circumstances of Lackey's termination. Lackey may well have perceived that she was being short-changed in the assignment of customers as a result of her participation in the protected concerted activity. The evidence, however, indicates that while she may always have been assigned fewer guests and banquets than other servers deemed stronger by Boucher, that situation did not change after November 19.⁹

Moreover, Lackey returned to work on the Sunday and Tuesday following December 15, and had fairly decent sales on both days (\$155 on Sunday and \$324 on Tuesday). Both her returning on those days and her sales figures on them tend to negate any contention that her working conditions had been made so intolerable that she was coerced into quitting and was thereby constructively discharged. I shall, therefore, recommend that this allegation be dismissed.

CONCLUSIONS OF LAW

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

2. By discharging Phyllis Delaney because she engaged in protected concerted activities, and by telling her that she was being discharged because she had engaged in such activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

3. Respondent has not, in any other manner alleged in the complaint, violated the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged an employee, it must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

⁷I cannot accept Lackey's supposition that both her time cards and her sales and tip records were falsified to indicate that she worked on those days. On cross-examination, Lackey had admitted that she worked on December 18 and attempted to explain away the substantial sales and tips. It was not until she was recalled on rebuttal, after Scheidt testified, that Lackey claimed that her last day had been December 15.

⁸The same records indicate that James worked many more banquets, some of which appear to have been very lucrative.

⁹Shellie and Delaney worked the most banquets. Lackey worked at least one after November 19 (R. Exh. 2(f), banquet sales for the pay period beginning November 29).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁰

ORDER

The Respondent, Skyline Lodge, Inc., d/b/a Edward's Restaurant & Lounge, Harrison, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging any employee because of his or her protected concerted activities.

(b) Telling any employees that they or anyone else has been or will be discharged for engaging in activities protected by the National Labor Relations Board.

(c) 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 necessary to effectuate the policies of the Act.

(a) Offer Phyllis Delaney immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharge and notify Phyllis Delaney in writing that this has been done and that the discharge will not be used against her in any way.

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

(d) Post at its restaurant in Harrison, Ohio, copies of the attached notice marked "Appendix."¹¹ Copies of the notice, on forms provided by the Regional Director for Region 9, 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

¹⁰If 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.

¹¹If 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 discharge or otherwise discriminate against any of you for engaging in concerted activities protected by the National Labor Relations Act.

WE WILL NOT tell any of our employees that they are or will be discharged for engaging in activities protected by the National Labor Relations Act.

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

WE WILL offer Phyllis Delaney immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed and WE WILL make her whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL notify Phyllis Delaney that we have removed from our files any reference to her discharge and that the discharge will not be used against her in any way.

SKYLINE LODGE, INC., D/B/A EDWARD'S RESTAURANT LOUNGE