

Needell and McGlone, P.C. and Sharon Hashemi.
Case 22-CA-18057

May 28, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On January 27, 1993, Administrative Law Judge James F. Morton issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a motion to strike a portion of 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,¹ brief, and motion and has decided to affirm the judge's rulings,² findings,³ and conclusions and to adopt the recommended Order as modified.

¹In support of its Exception I, the Respondent argues that the Charging Party should be denied backpay because the General Counsel presented no evidence regarding proof of monetary loss suffered by her because of her discharge. We disagree. A make-whole order is undertaken "in order to return the unlawfully discharged employee to the status quo that would have existed absent the unfair labor practice. The particulars of that status quo determination, e.g., offsets from backpay, if any, or, where appropriate, identification of a 'substantially equivalent' position, generally are not litigated in the original proceeding on the merits." *Dean General Contractors*, 285 NLRB 573 (1987). Rather, these issues are typically resolved in the compliance stage, and therefore, a fully litigated record on this issue at this point is not warranted.

²G.C. Exh. 4, a letter submitted by the Respondent in response to the discriminatee's unemployment compensation claim and quoted in part by the judge, was identified, authenticated, and acknowledged as accurate by the principals of Respondent at the hearing, but the exhibit was apparently inadvertently not formally moved into evidence. However, as the substance of the exhibit was subjected to testimonial direct and cross-examination, and as none of the parties have excepted to this inadvertent omission, we are admitting the exhibit into the record at this time. See *Electrical Workers IBEW Local 1579 (CIMCO)*, 311 NLRB 26 at fn. 4 (1993).

The General Counsel has moved to strike a portion of Respondent's Exception D because it references matters contained in Respondent Needell's pretrial affidavit (G.C. Exh. 5—not formally moved or admitted into evidence) that were neither presented in testimony nor subjected to cross-examination in the hearing. Because General Counsel 5, even if admitted into evidence in its entirety, would not affect the outcome of this case, we find it unnecessary to rule on the motion to strike.

³The 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. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Needell and McGlone, P.C., Trenton, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

I. Substitute the following for paragraph 1(b).

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

Stephen J. Holroyd, Esq., for the General Counsel.

Charles J. Casale, Jr., Esq., of Trenton, New Jersey, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. The complaint alleges that Needell and McGlone, P.C. (the Respondent) has engaged in an unfair labor practices within the meaning of Section 8(a)(1) of the National Labor Relations Act (the Act) by having discharged its employee, Sharon Hashemi, because of her concerted activities with other employees in complaining about the distribution of work and the enforcement of work rules. The Respondent denies that Hashemi engaged in activities protected by the Act and asserts that she was discharged because she had violated a rule against looking at confidential material.

I heard this case in Newark, New Jersey, on July 15, 1992. Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a professional corporation of the State of New Jersey, engaged in the practice of law. The pleadings established that, in its operations annually, it meets the Board's standard for asserting its jurisdiction in this case.

II. THE ALLEGED UNLAWFUL DISCHARGE

All the events discussed below took place in 1991.

Hashemi was hired by the Respondent on January 14 to perform various clerical functions and to assist the secretaries employed by the Respondent. She and two of the secretaries, Alice Nelson and Linda Dubinski, regularly had lunch together. They discussed what they perceived to be preferential treatment accorded by the Respondent's office manager to a third secretary, Rose Giancarlo, in allowing her to come to work late and in not asking her to help them out with the workload when she was caught up with her work.

At a meeting in June between the Respondent's two principals, Stanley Needell and Patricia McGlone, and the clerical staff, the matter of Alice Nelson's having been "written up for being tardy" came up. Hashemi told the principals that Nelson should not have been written up inasmuch as

Giancarlo had not been written up for being late. Hashemi was told that the matter of Nelson's being disciplined was none of her concern.

Sometime afterwards, Giancarlo complained to Needell and McGlone as to the way that Hashemi, Nelson, and Dubinski were acting towards her. The Respondent decided to discharge Hashemi then because of "the dissension among the employee that she was creating." Its newly hired office manager, Karen Tattory, suggested that, instead of discharging Hashemi, she should be moved to another floor to replace another secretary who was scheduled to retire.

Before that move took place, however, Hashemi was discharged under the circumstances discussed below.

On July 24, Hashemi, Nelson, and Dubinski talked, while having lunch, about the heavier workloads they were carrying as compared to Giancarlo's. Later that afternoon, Hashemi complained to Office Manager Tattory that "she didn't think that [Giancarlo] pitched in and helped out the other girls." Hashemi also told Tattory that she and the other secretaries had seen Giancarlo's timesheets and that these sheets showed that Giancarlo was reporting times "other than what she came in" and that she "wasn't penalized."

Tattory testified for the Respondent that, right after that conversation, she told McGlone and Needell that she had changed her mind and that Hashemi should be discharged instead of moved to another floor. Tattory was then asked by the Respondent's counsel if she also mentioned to McGlone and Needell "the time sheets" and she responded in the affirmative.

On the next day, Hashemi met with McGlone, Needell, and Tattory. Hashemi testified that Needell told her then that she was a good worker but that he was sorry to have to let her go because she was "being a spokesperson and a ringleader for other secretaries and trying to alienate them from another secretary." She testified further that Needell also told her he hoped that she would not repeat that mistake while assuring her that he would give her a good reference.

The Respondent's contention is that Hashemi was discharged solely because she looked at confidential documents, i.e., the timesheets of Giancarlo.

As to the discharge interview on July 25, Needell and also McGlone testified thereon. Tattory's testimony related to other events; she did not relate as to what was said at that meeting.

McGlone testified in a conclusory manner as to what transpired at that meeting. She testified that Hashemi was told then that she was discharged because "she had gone through records and that we can't put up with that." Needell testified that he explained fully to Hashemi that he could not countenance an employee going through records which are confidential, and that, although a decision had been made to solve the problem by moving her upstairs, she now had to be let go because she could not be trusted in that she had gone through confidential records. According to Needell, Hashemi's primary concern then was getting a good recommendation; he related that he told her that, if she would "just say the words that [she] won't do that sort of thing again," she would get a good recommendation. He did not testify as to what, if anything, she said in response.

As to the testimony offered by the Respondent relative to its office staff being restricted in its access to confidential files, the evidence discloses that the Respondent had never

promulgated any rule or guideline to inform its clerical staff that certain items were off-limits to them. More significantly, the General Counsel presented uncontroverted testimony that the timesheets, referred to above, were left each day alongside legal forms that the entire office staff used routinely and that these sheets were never kept secret.

Also relevant to the issue as to what was said by Needell to Hashemi on July 25 and as to the ultimate merits is certain documentary evidence. Hashemi had filed an unemployment compensation claim after she was discharged. The Respondent submitted a statement of its position as to the claim. In its statement, it related that Hashemi was discharged "because of her continued attempts to manage personnel and creation of dissension among [the] legal secretarial support staff."

I credit Hashemi's account as to the July 25 discharge meeting. It is more probably true than those offered by the Respondent, in the context of the overall circumstances discussed above, including the position statement the Respondent submitted on Hashemi's unemployment compensation claim.

The Respondent's principal contention is that Hashemi's activities, in complaining to the Respondent that Giancarlo was being given preferential treatment to that accorded to the rest of the clerical staff, are not protected by the Act. The evidence in this case establishes that Hashemi had often discussed with two secretaries their concern as to what they perceived to be the special treatment given Giancarlo, that she has spoken out on this matter at a staff meeting held by Needell and by McGlone, and that she again registered a complaint with the office manager on July 24. Her protests were the logical outgrowth of the concerns discussed by her and her coworkers. They are thus concerted activities protected by the Act. See *Mike Yurosek & Son, Inc.*, 306 NLRB 1037 (1992). The credited evidence establishes also that the Respondent discharged her on its belief that she was the ringleader of an employee group which was complaining as to preferential treatment given Giancarlo. Thus, the Respondent discharged her because it believed she was engaged in concerted activities which, by their nature, are protected by the Act. *Yurosek*, supra.

In its brief, the Respondent contends that *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), requires a dismissal of the complaint because there is no evidence that Hashemi ever told McGlone, Needell, or the office manager that she had discussed with her coworkers the matter of preferential treatment given Giancarlo. I have been unable to find, in *City Disposal*, any support for that proposition. The Act does not require that employees keep their employer abreast of their protected activities. Rather, it is well settled that circumstantial evidence of employer knowledge may be entirely valid to support a finding that an employee was discharged because of activities protected by the Act. See, e.g., *Abbey's Transportation Services*, 284 NLRB 698, 701 (1987).

In view of Hashemi's activities, in conjunction with her two coworkers as to their working conditions, the clear evidence of the Respondent's knowledge thereof, the animus thereto, the timing of her discharge in relation to her protest to the office manager on July 24 and the credited testimony as to the July 25 meeting, I find that the General Counsel has established a prima facie case that the Respondent discharged Hashemi for unlawful reasons.

Under *Wright Line*, 251 NLRB 1083 (1980), the burden then devolved on the Respondent to prove that it would have, absent her protected activities, still discharged Hashemi, for a nondiscriminatory reason. I have already rejected its contention that she was discharged for violating a rule as to access to confidential documents. The Respondent has not met its *Wright Line* burden. I thus find that, in discharging Hashemi, the Respondent has interfered with, restrained, and coerced its employees as to their rights protected by Section 7 of the Act. *Trayco of S.C.*, 297 NLRB 630 (1990), and cases discussed therein.

CONCLUSIONS OF LAW

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

2. Respondent, by discharging its employee Sharon Hashemi, on July 25, 1991, engaged in conduct violative of Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practice affected commerce within the meaning of Section 2(6) of the Act.

THE REMEDY

Having found that the Respondent has engaged in an unfair labor practice, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent has illegally discharged its employee in violation of the Act, I shall order the Respondent to offer Sharon Hashemi immediate and full reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges. I further order the Respondent to make her whole for any loss of earnings she may have suffered as a result of the discrimination against her and that the Respondent remove from its records any reference to her discharge and to notify her in writing that the Respondent's unlawful conduct will not be used as a basis for further personnel action. Backpay shall be computed as described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹

ORDER

The Respondent, Needell and McGlone P.C., of Trenton, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging its employees because of their protected activities under the Act.

¹ 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.

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

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

(a) Offer Sharon Hashemi 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 this decision.

(b) Remove from its files any reference to her unlawful discharge and notify her 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 office in Trenton, New Jersey, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 22, 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.

² 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.

WE WILL NOT discharge any of our employees for discussing, among themselves, problems relating to conditions of work.

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 Sharon Hashemi immediate and full reinstatement to her job and WE WILL make her whole, with interest, for any wages and benefits she lost as a result of our having unlawfully discharged her.

WE WILL remove from our files all references to her discharge and WE WILL notify her in writing that this has been

done and that her discharge shall not be used against her in any way.

NEEDELL AND MCGLONE, P.C.