

Pilot Development Southwest d/b/a Hacienda de Salud-Espanola and Erlinda Garcia. Case 28-CA-12573

June 26, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND BROWNING

On March 29, 1995, Administrative Law Judge William J. Pannier III issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party 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, and conclusions as modified below and to adopt the recommended Order as modified.

1. The Respondent asserts that on May 3, 1994,¹ it discharged certain certified nurses aides, who were employed at the Respondent's nursing home, because they abandoned their posts en masse, thus leaving the Respondent's residents unattended and at risk. After hearing all the evidence, the judge concluded that the Respondent discharged the employees because it knew or suspected that at the time they left their posts they were airing their work-related grievances to a news reporter—activity protected by the Act—and not because of the alleged abandonment. In reaching this conclusion, the judge relied in part on a factual finding that some of the discharged nurses aides were on a scheduled midmorning break while they were speaking with the reporter.

Because the record does not support the judge's finding that some of the certified nurses aides were on a scheduled workbreak, we do not rely on it. After a full review, we nevertheless conclude that the record is replete with other evidence to support the judge's determination that the nurses aides were discharged because they engaged in activity protected by Section 7 of the Act.

Most persuasive in this regard is the testimony of the Respondent's chief executive officer, Alan A. England, who admitted that he had extended a blanket offer to consider the reinstatement at entry-level wages of those nurses aides that were discharged, a point that severely undermines the Respondent's position that the discharges were based solely on the alleged abuse and neglect of residents. As the judge aptly stated, "[I]f Respondent had truly regarded the [nurses aides' departure from work] as rising to the level of patient ne-

glect and abuse . . . then it seems illogical that it would have even considered rehiring any one of them." Furthermore, it was the Respondent, and not the nurses aides, that compounded the risk to the residents by abruptly terminating those employees without fully investigating the reasons for their brief departure and before any significant alternative provisions could be made for the residents' safety and security. Finally, it is notable that the Respondent based its discharge of two other nurses aides on the same grounds of abandonment despite the fact that those aides were not even on duty at the time of the meeting with the reporter. For these and other reasons stated in the judge's decision, we adopt his conclusion that the Respondent violated Section 8(a)(1) of the Act by terminating the nurses aides.²

2. We further adopt the judge's conclusion that the Respondent independently violated Section 8(a)(1) of the Act by notifying New Mexico Rehabilitation, Inc. that Charging Party Erlinda Garcia would not be permitted to work on its premises for that firm, but we shall modify the judge's remedy.

The judge found that on May 1 Garcia notified the Respondent that on or about May 14 she would be leaving the Respondent's employ to begin working for New Mexico Rehabilitation, Inc., a company whose employees performed services on the Respondent's premises. After the Respondent unlawfully discharged Garcia on May 3, the judge found that the Respondent again violated the Act when it advised New Mexico Rehabilitation, Inc. that it could not employ Garcia on the Respondent's premises.

In order "to restore, so far as possible, the status quo that would have obtained but for the wrongful act," *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 265 (1969), we shall modify the judge's backpay remedy to make clear that Respondent's obligation to make Garcia whole has two components. First, for the period of May 3 to 14, the Respondent shall make Garcia whole for any loss of earnings and other benefits suffered as the result of her discharge from Respondent's employ. Second, beginning May 14, the Respondent shall make Garcia whole for any loss of earnings and other benefits suffered as a result of the Respondent's precluding her from working for New Mexico Rehabilitation, Inc.

AMENDED REMEDY

Substitute the following for the third paragraph of the remedy section.

² Although the judge did not cite in his decision *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), it is clear his opinion achieved the analytical objectives established in that case. See also *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enfd.* 705 F.2d 799 (6th Cir. 1982).

¹ All subsequent dates are in 1994.

“It shall also be ordered to make each of the above-named employees whole for any losses of pay and benefits she/he may have suffered because of the unlawful terminations of May 3, 1994, and to make Erlinda Garcia whole for any losses of pay and benefits she may have suffered because of the unlawful preclusion by the Respondent of her employment with New Mexico Rehabilitation, Inc., which was scheduled to begin on May 14, 1994, with backpay to be computed on a quarterly basis, making deductions for interim earnings, *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest to be paid on the amounts owing as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).”

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Pilot Development Southwest d/b/a Hacienda de Salud-Espanola, Espanola, New Mexico, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

“(a) Offer Erlinda Garcia, Mary Romero, Lorenzo Pino, Ronald Trujillo, Joe Ocana, Rosemary Vialpando, Efren Moya, Mary Muniz, Teresa Coffeen, Mary Rose Martinez-Gonzales, and Sarah Vences immediate and full reinstatement to the positions of CNA from which they were discharged on May 3, 1994, dismissing, if necessary, anyone who may have been hired or assigned to any of those positions or, if any of those positions no longer exists, to a substantially equivalent position, without prejudice to seniority or any other rights and privileges, and further, make whole those employees for any loss of pay and benefits suffered as the result of those discriminatory acts, and further, make whole Erlinda Garcia for any loss of pay and benefits suffered as the result of her preclusion from employment with New Mexico Rehabilitation, Inc., and, in addition, provide appropriate training for Teresa Coffeen and an opportunity for her to become licensed as a CNA, in the manner set forth in the amended remedy section of the decision.”

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

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

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

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 interfere with, restrain, or coerce you for temporarily ceasing work to protest terms and conditions of employment, or for engaging in other concerted activity for mutual aid or protection.

WE WILL NOT report as patient neglect or abuse to the New Mexico Department of Health Licensing and Certification Bureau, or to any other agency, activity by you that is protected by the National Labor Relations Act.

WE WILL NOT bar from our premises, as employees of another employer, employees whom we have discharged for a motive unlawful under 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 Erlinda Garcia, Mary Romero, Lorenzo Pino, Ronald Trujillo, Joe Ocana, Rosemary Vialpando, Efren Moya, Mary Muniz, Teresa Coffeen, Mary Rose Martinez-Gonzales, and Sarah Vences immediate and full reinstatement to the positions of certified nurses aides from which they were discharged on May 3, 1994, dismissing, if necessary, anyone who may have been hired or assigned to any of those positions or, if any of those positions no longer exists, to substantially equivalent positions, without prejudice to seniority or any other rights and privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits suffered as a result of our unlawful acts, including making whole Erlinda Garcia for any loss of pay and benefits suffered as a result of her preclusion from employment with New Mexico Rehabilitation, Inc., less any net interim earnings, plus interest, and WE WILL provide appropriate training for Teresa Coffeen and an opportunity for her to become licensed as a certified nurses aide, which we prevented her from doing prior to her discharge.

WE WILL notify each of them that we have removed from our files any reference to their discharges and that the discharges will not be used against them in any way.

WE WILL notify the New Mexico Department of Health Licensing and Certification Bureau that the above-named employees were engaged in activity protected by the National Labor Relations Act on May 3, 1994, and WE WILL make all reasonable efforts to have

that agency remove from its records and files all references to our report about that activity and the proceedings arising as a result of it, and WE WILL inform those employees in writing of the actions that we have taken to accomplish those objectives.

WE WILL notify New Mexico Rehabilitation, Inc. that we have no objection to the employment of Erlinda Garcia on our Espanola premises, should that firm choose to hire her and employ her at that location, and WE WILL inform Garcia in writing that this has been done.

PILOT DEVELOPMENT SOUTHWEST D/B/A
HACIENDA DE SALUD-ESPANOLA

Richard C. Auslander, for the General Counsel.

Craig B. Fretwell, Esq. (*Northern New Mexico Legal Services*), of Las Vegas, New Mexico, for the Charging Party.

Rita G. Siegel and, with her on brief, *Peter J. Adang*, of Albuquerque, New Mexico, appearing for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge. I heard this case in Espanola, New Mexico, on January 31, 1995. On July 13, 1994,¹ the Regional Director for Region 28 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing, based upon an unfair labor practice charge filed on June 3, and amended on July 7, alleging violations of Section 8(a)(1) of the National Labor Relations Act (the Act). All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based upon the entire record, upon the briefs that were filed, and upon my observation of the demeanor of the witnesses, I enter the following

FINDINGS OF FACT

I. INTRODUCTION

The answer to complaint admits that 11 employees, classified as certified nurses aides (CNAs)—Erlinda Garcia, Mary Romero, Lorenzo Pino, Ronald Trujillo, Joe Ocana, Rosemary Vialpando, Efren Moya, Mary Muniz, Teresa Coffeen, Mary Rose Martinez-Gonzales, and Sarah Vences—were discharged on May 3 by Pilot Development Southwest d/b/a Hacienda de Salud-Espanola (Respondent). It is a New Mexico corporation, with an office and place of business in Espanola, New Mexico, where it engages in operation of a licensed long term health care facility.² In addition, the complaint alleges that, on that same date, Respondent notified the

¹ Unless stated otherwise, all dates occurred during 1994.

² In its answer to complaint, Respondent admits the allegation that in the course and conduct of those operations during the 12-month period ending June 3, it derived gross revenues in excess of \$1 million and further admits the allegations that at all material times it has been an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act and a health care institution within the meaning of Sec. 2(14) of the Act.

New Mexico State Department of Health Licensing and Certification Bureau that the 11 employees had abused and/or neglected patients. Respondent denied that allegation, but, in its answer, “affirmatively states that it notified the New Mexico Department of Health Licensing and Certification Bureau, as required by state law and its provider agreement, that the Certified Nurse Aides on the day shift had walked off the job.”

The complaint alleges that the discharges, as well as the notification to the State Bureau, had been motivated by the discharged employees’ concerted activities protected under the Act and, also, to discourage employees from engaging in such activities or other concerted activities for the purposes of collective bargaining or other mutual aid or protection. As to the statutorily protected activity forming the basis for the unlawful motivation allegations, the complaint alleges that nine of the employees concertedly left their work areas on May 3 to conduct a meeting regarding their dissatisfaction with Respondent’s changes in hours and in other employment terms and conditions. It further alleges that the two remaining employees—Martinez-Gonzales and Vences—withheld their services on that same day because of their dissatisfaction with those changes.

Respondent denies that its foregoing actions had resulted from the motives alleged by the General Counsel. Instead, in its answer it “states that it terminated the employment of [nine of] the employees . . . because they abandoned the patients in their care, in violation of state law.” As to Martinez-Gonzales and Vences, the answer asserts that their terminations occurred “because they failed to show up for work and failed to call prior to their shift to notify Respondent of their absence, in clear violation of Respondent’s ‘no call, no show’ policy.” In short, contends Respondent, its actions had been taken “solely to protect the health, safety and well being of the patients in its charge.”

In addition, it is undisputed that one of the alleged discriminatees, Erlinda Garcia, had given notice on May 1 that she would be quitting her employment with Respondent effective on or about May 14 to work for New Mexico Rehabilitation, Inc. (Rehabilitation). It had a contract with Respondent whereby some of its employees performed work on Respondent’s premises. Respondent admits that on May 3 it notified Rehabilitation that Garcia would not be permitted on Respondent’s premises to work for Rehabilitation. The complaint alleges that the notification to Rehabilitation had been the product of the same alleged unlawful motives as Garcia’s and the other dischargees’ termination, but Respondent contends that it merely did not want to employ on its premises an employee whom it had terminated previously.

II. STATEMENT OF FACTS

As stated in subsection A, *supra*, Respondent operates a licensed long term care health facility in Espanola. From 1987 until approximately October 1994, management of that facility had been provided by Quality Health Systems, a management company not named as a respondent in this proceeding. From his office in Albuquerque, the chief executive officer of Quality Health Systems, Alan A. England, had been responsible for overall management of Respondent at all times material to this proceeding. Onsite management was supplied by an administrator, Scott A. Nelson, and by a director of nursing, Barbara Pacheco. Respondent admits that, at all ma-

terial times, Nelson and Pacheco had each been a statutory supervisor and its agent.

During April and May, Respondent's patient or resident population had numbered approximately 100 persons, about 95 percent of whom were Medicare recipients. The physical condition of approximately 50 of them was such that each one required constant supervision or total care. The others needed less constant, or only general, assistance and supervision. Meal, attire, bathing, and related services were provided to those patients primarily by CNAs employed by Respondent, apparently with nurses providing all directly medical-related services.

By the beginning of May, dissatisfaction had arisen among those CNAs. For example, Mary Rose Martinez-Gonzales testified that she had applied for a vacation. But when she spoke about that subject with Pacheco at that time, Pacheco had replied that while the vacation had been approved by the home office, Pacheco was not sure that she would approve it due to staff shortages. In light of that shortage, added Pacheco all CNAs were going to have to work an extra shift each week and that shift would have to be an evening one. Moreover, Pacheco stated that CNAs should not be expecting any raises. On May 1, while in her office, Pacheco also mentioned to a few other CNAs that they would not be allowed to take their vacations.

In fact, CNA staffing appears to have been an ongoing difficulty for Respondent, which is located northwest of Santa Fe, New Mexico. Although England testified that the number of CNAs employed there had always been appropriate, he conceded that there had never been a large pool of CNAs available to work in Espanola and, moreover, that temporary agencies had been unable to continuously supply CNAs on a routine basis. Indeed, Teresa Coffeen testified that while she had been hired by Pacheco as a CNA and had performed the same duties as CNAs since December 12, 1993, she had never participated in classroom or hands-on instruction as a CNA and, further, had never taken a state certification examination to be a CNA. Instead, Pacheco, apparently desperate for CNAs, had simply hired Coffeen, with a promise that CNA classes would be provided later to her, and had prepared "a copy of the certificate, with a number and [Coffeen's] name on it." When classes later became available, however, Pacheco told Coffeen not to take them because "it would raise suspicion among the other aides, wondering why [Coffeen] was taking the classes when, yet, I should have been certified."

At meetings conducted on May 2 with some of the CNAs and on May 3 with the remaining CNAs, Pacheco announced the same messages that she earlier had communicated: that there would be no raises and, moreover, that the staff shortage would necessitate withholding approval of vacations and would oblige each CNA to work an extra shift, during the evenings, each week. Any CNA who failed to report for that extra shift, warned Pacheco, would be terminated automatically.

Those announcements upset the CNAs. A few had anticipated vacations requested previously. Some had young children. Due to the need to care for them, an extra shift during the evening was viewed as a hardship. Some asked Pacheco if personnel could be secured from an employment agency, but she did not answer those questions.

After the May 3 meeting, which had been conducted early that morning, the CNAs who were working discussed Pacheco's announcements. Coffeen testified that some CNAs "mentioned trying to talk to Barbara and Scott prior to this, and that no one had answers for them, Scott was never in his office, if even in the facility, and we couldn't . . . communicate with Barbara." They decided, testified Coffeen, that "we needed to find someone to hear us and listen to us, so we decided to call a reporter and maybe somehow try to negotiate or get Barbara's and Scott's—Nelson's attention, to maybe try to talk to us." Her testimony in that respect was encompassed by a stipulation that, if called to testify concerning events on May 2 and 3, the other CNAs would testify in the same manner as, *inter alia*, Coffeen.

According to Coffeen and Erlinda Garcia, the other CNA whose testimony was encompassed by the above-mentioned stipulation, the reporter from the *Rio Grande Sun*, whom the employees had contacted, showed up at Respondent's facility that same morning. At that time some of the CNAs were on their break. Those CNAs, joined by the others who were then not scheduled for break, walked out to the parking lot to speak with him. Coffeen and Garcia testified that they described their complaints about Respondent to the reporter. In that respect, Coffeen specified "the underpay, the overworked, understaffed. Our main concern was because we were understaffed, we couldn't do our jobs right." Similarly, Garcia identified, as a complaint voiced to the reporter, "the shortage of help."

As the CNAs' conversation with the reporter progressed, testified Coffeen, "Scott Nelson drove up and the reporter asked to talk to him, and he refused and went into the building." After that, Pacheco came out of the facility and asked the CNAs "to come back in." When they continued speaking to the reporter, Pacheco returned to the facility and, then, the police arrived. One officer went into the facility with Pacheco, who had come out when the police had arrived. Two other officers remained with the CNAs in the parking lot. The first officer then came out and informed the CNAs that they had been terminated. When the CNAs asked for a reason, Coffeen testified, the officer replied "because we had walked off our posts."

Two at a time, escorted by a police officer, the CNAs were allowed to retrieve their personal belongings from Respondent's facility and were instructed to move their vehicles from the facility's premises. Two of the alleged discriminatees—Martinez-Gonzales and Sarah Vences—had not been at work that morning. When they learned what had occurred, they decided to support their coworkers and refused to report for work on their next scheduled shifts. As a result, both were terminated by Respondent. In that connection, Martinez-Gonzales testified that she had spoken by telephone with Pacheco on May 3 and, during that conversation, "I just told her I had joined the other CNAs." According to Martinez-Gonzales, Pacheco responded, "'Well, are you actually—then, actually, you are terminating yourself,' she goes."

In point of fact, Garcia—then classified as a CNA, but who had been working for Respondent as a restorative aide—had earlier given 2 weeks' notice of intention to quit employment with Respondent. Her intent was to commence working with Rehabilitation, providing services to Respondent's patients inside of the Espanola facility. Following Gar-

cia's May 3 termination, England testified, Respondent informed Rehabilitation "that we had no problem with her being employed with them, but she could not work in [Respondent's] building." In view of that situation, Rehabilitation informed Garcia that she could not work for it, because Respondent would not allow her to work in its facility.

In connection with those terminations, Respondent took two additional actions. First, it notified the New Mexico Department of Health Licensing and Certification Bureau of what had occurred. Secondly, it challenged the discharges' claims for benefits under the Unemployment Compensation Law. As to the latter, it was concluded ultimately that each one had engaged in misconduct, by leaving a duty station without permission, thereby leaving patients without adequate care. Yet, as to the former, although the Bureau determined that the names of seven discharged CNAs should be placed on an abuse registry, that determination was reversed after a hearing by the Department of Health. As a result of that hearing, a hearing officer's report issued, adopted by the secretary for that department, in which it was concluded:

D. The State[']s witnesses testified that patients were not abused or neglected while the appellants were with the reporter.

E. The State Investigative Team in their write up of the three complaints concluded all were unsubstantiated. Accordingly, I find that there was no harm resulting from the appellants['] actions.

III. DISCUSSION

Respondent does not contest the fact that, on May 3, the 11 CNAs had engaged in concerted activity. The nine who were at work that morning went as a group to meet with the reporter. Martinez-Gonzales and Sarah Vences were not working at the time. But they later refused to report for work, both to demonstrate their support for the discharged CNAs and for the protest they had been trying to make about employment terms.

Nor does Respondent challenge the proposition that, standing alone, the CNAs had engaged in activity protected by Section 7 of the Act in voicing their complaints to the reporter. Approximately three of them had been on break. There is no evidence that Respondent had a rule prohibiting Espanola employees from leaving the facility and going out to the parking lot while on break. As to those who were working, and who ceased work to go to the parking lot with the CNAs who were on break, they were unrepresented and it has long been settled that unrepresented employees enjoy a statutory right to temporarily cease working to protest terms and conditions of employment. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962).

To be sure, the ordinary situation involves employees ceasing work to protest about employment terms directly to their employer. Yet, as set forth in section II, there was testimony that, during the May 2 and 3 meetings—when changes were announced in vacation allowance, shift and raises—some of the CNAs had questioned why Respondent could not avoid those changes by securing personnel from employment agencies. Their questions went unanswered; they were simply ignored by Pacheco. Moreover, CNAs had attempted previously to speak with both Pacheco and Nelson about working conditions. Those attempts however, had been unsuccessful.

Nelson was rarely available. The CNAs had been unable to establish a dialogue with Pacheco concerning employment terms. As a result, they turned to calling a reporter to "maybe somehow try to negotiate or get Barbara's or Scott's—Nelson's attention, to maybe try to talk to us." Consequently, the CNAs were speaking to the reporter as a means for being able to communicate directly with Respondent's officials about employment terms.

The fact that such an approach is unconventional does not strip it of protection otherwise extended to employee activity under Section 7 of the Act. Workshifts, vacations, and raises are each encompassed by the general phrase "hours, and other terms and conditions of employment," within the meaning of Section 8(d) of the Act. Employees' dissatisfaction with such employment terms, or with their employer's changes in them, gives rise to "a controversy concerning terms, tenure or conditions of employment," thereby creating a "labor dispute" within the meaning of Section 2(9) of the Act. As a general proposition, Section 7 of the Act protects employee communications to the public directly related to an ongoing labor dispute, so long as those communications are "a part of and related to the ongoing labor dispute." *Allied Aviation Service Co. of New Jersey*, 248 NLRB 229, 231 (1980), *enfd.* 636 F.2d 1210 (3d Cir. 1980). Employees do not "lose their protection under the 'mutual aid or protection' clause [of Section 7 of the Act] when they seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978).

More specifically, the protection of Section 7 of the Act encompasses employee communications about labor disputes with newspaper reporters. *Roure Bertrand Dupont*, 271 NLRB 443 *fn.* 1 (1984). See also *Automobile Club of Michigan v. NLRB*, 610 F.2d 438 (6th Cir. 1979); *Community Hospital of Roanoke Valley v. NLRB*, 538 F.2d 607, 610 (4th Cir. 1976). Obviously, that protection is not so broad that it embraces employee communications disparaging the employer's reputation or the quality of its product, nor maliciously motivated employee communications. But, Respondent does not contend that any of the CNAs' communications to the reporter constituted disparagement or had been motivated by malice toward it. To be sure, the CNAs' comments, if published, undoubtedly would have left Respondent with an uncomfortable public image. Still, "activity that is otherwise proper does not lose its protected status simply because [it is] prejudicial to the employer." *NLRB v. Circle Bindery*, 536 F.2d 447, 452 (1st Cir. 1976).

Nor is that protection lost merely because one or more of the CNAs may have voiced the protest in terms of staffing shortages and its effects on patient care. After all, those shortages had been what Pacheco had told the CNAs were the reason for the vacation approval suspension and the added weekly evening shift—the employment changes which most immediately gave rise to the CNAs' dissatisfaction. "In the health care field patient welfare and working conditions are often 'inextricably intertwined.'" *Misericordia Hospital Medical Center v. NLRB*, 623 F.2d 808, 813 (2d Cir. 1980). *NLRB v. Parr Lance Ambulance Service*, 723 F.2d 575, 578 (7th Cir. 1983).

Nor can it be said that Martinez-Gonzales and Vences' activity had not enjoyed the protection of Section 7 of the Act.

To the extent that they refused to report in support of the other CNAs' protest about working conditions, those two CNAs' withholding of services enjoyed the same statutory protection as that of their coworkers. To the extent that Martinez-Gonzales and Vences had been protesting the discharges of those other nine CNAs, their purpose is no less protected by Section 7 of the Act. Even assuming arguendo that those nine terminations had been lawful ones, "employees who go on strike to protest a lawful discharge enjoy statutory protection as economic strikers." *NLRB v. John Swift Co.*, 277 F.2d 641, 646 (7th Cir. 1960). Obviously, a termination for striking violates the Act.

It is axiomatic that an employer cannot be found to have effected an unlawfully motivated discharge without some showing of knowledge—or, at least, suspicion, *Henning & Cheadle v. NLRB*, 522 F.2d 1050, 1052 (7th Cir. 1975)—that employees had been engaging in activity protected by the Act. When he testified, England, the official who claimed to have made the May 3 decision to terminate the CNAs, seemed to be trying to imply, at least, that he had no knowledge of why the CNAs had gone to the parking lot, although careful review of the record of his testimony reveals that he never firmly denied having possessed such knowledge.

During direct examination, England testified that, while in his Albuquerque office during the morning of May 3, he had received a telephone call from Pacheco. She reported, he testified, "that the nursing assistants were in the parking lot and that she didn't know what to do, basically." It had been during that same conversation, testified England, that he had instructed Pacheco to ask the CNAs "to come back to work; if they refused to come back to work or basically stated they would not come back to work, to advise them that they were no longer employed, to leave the property; if they refused to leave the property, to call the Police Department and have them removed from the property." Nevertheless, although England claimed that he had never experienced a situation such as the one on May 3 in his 20-some odd years in long-term care, he denied that Pacheco had told him "why [the CNAs] were in the parking lot[.]"

England did not advance that testimony convincingly and, on its face, it is inherently incredible that an official faced with so extraordinary a situation, would not have asked, and ascertained, the reason for the employees' presence in that location. That becomes an even more natural reaction in view of England's instructions to Pacheco to tell the CNAs "they were no longer employed" if they refused to return to Respondent's facility. By directing Pacheco to terminate the CNAs, if they refused to return from the parking lot, he would be stripping the facility of all CNAs who were working that day. Of course, he testified that he also had instructed Pacheco, during that same telephone conversation, "to pull all available nursing personnel as far as the RNs and LPNs that were working, also the office personnel, and anyone else that she could call in, to go to the floor to take care of the residents." Although a logical procedure, it is one that is extraordinary. And it is simply illogical to conclude that an employer would go to those extremes without first ascertaining the intentions of the CNAs, including their reason for having congregated in the parking lot. That is, without first ascertaining what their problem was.

Not only was England's assertion that he had not been told why the CNAs were in the parking lot not credible, but sev-

eral factors show affirmatively that Respondent had a basis for, at least, suspecting that their presence there was connected to their dissatisfaction with the employment changes announced by Pacheco. First, their presence in the parking lot followed shortly after Pacheco conducted meetings during which she had announced those changes. From the questions to her by some CNAs, it should have been obvious that there was CNA-dissatisfaction with her announced changes. Second, Coffeen testified credibly that discussions by CNAs about that dissatisfaction had been conducted so openly that morning that the nursing staff had become aware that the CNAs were upset over Pacheco's announced changes.

The most obvious indicator to Respondent, that the CNAs were in the parking lot in connection with the employment changes announced by Pacheco, occurred while they had been speaking with the reporter. As set forth in section II, Coffeen testified that "Scott Nelson drove up, and the reporter asked to talk to him, and he refused and went into the building." Respondent represented that it had been unable to present Pacheco as a witness because it could not locate her. But it made no similar representation as to Nelson. Nevertheless, he never was called as a witness, leaving Coffeen's testimony uncontradicted.

There is no evidence as to exactly what the reporter had said to Nelson—no evidence that he expressly had told Nelson that his presence was connected with the CNAs' complaints about their working conditions. Still, the record is devoid of any evidence that would naturally have suggested to Nelson some other reason for the CNAs to be meeting with a reporter, as well as for the reporter to seek to speak with Nelson. And the proximity of that meeting to Pacheco's announced changes, as well as to the CNAs' openly expressed dissatisfaction with them, certainly gives rise to an inference that Nelson would likely have known, or at least suspected, that the parking lot meeting was connected to the CNAs' dissatisfaction with those announced changes, as opposed to some other subject.

Noteworthy was England's apparent attempt to avoid such an inference—to provide a defense that Nelson could not have known of the CNA meeting with the reporter before the discharge decision had been made. After his first telephone conversation with Pacheco on May 3, testified England, she had again called him, "shortly thereafter," and had assertedly reported that "she had achieved" the actions which he had instructed her to take during their earlier telephone conversation. According to England, she also said "that she had contacted Mr. Nelson, who was at home, and he was on his way in." If so, that would mean that Nelson had not arrived at the facility until after the discharge decision had been made and the instruction to tell the employees "they were no longer employed," if they did not return to work, had been "achieved." Yet, that secondhand description of what had occurred in Espanola that morning does not correspond to firsthand accounts of events that had taken place there during the morning of May 3.

As set forth in section II, *supra*, Coffeen testified that Nelson had arrived at Respondent's facility before Pacheco came out and asked the CNAs "to come back in." Further, contrary to England's secondhand account of what had supposedly been "achieved," there is no evidence that, when she had done so, Pacheco also had told the employees that "they were no longer employed" if they did not return to

work. Though Pacheco was not available to Respondent to provide testimony, based upon firsthand knowledge, as to what had occurred at Espanola that morning, so far as the record discloses, Nelson certainly was. Nonetheless, Respondent did not call him to challenge Coffeen's description of the point at which he had arrived that morning at the facility and to deny that he had done so before Pacheco spoke with the CNAs in the parking lot.

I conclude that a preponderance of the credible evidence establishes that Respondent knew, or at least suspected, that the CNAs were meeting with the reporter in connection with their dissatisfaction concerning the recently announced changes in their employment terms. As described in section I, Respondent argues that it had not been that reason which had motivated it to discharge the CNAs on May 3. Rather, it contends, those discharges, as well as its notice to the New Mexico Department of Health Licensing and Certification Bureau, had been motivated by its concern about the adverse impact on patient care caused by the CNAs leaving the facility, even if only temporarily.

That is an emotion-laden contention, as I am sure has not escaped Respondent. It raises the specter of injury, perhaps death, of senior and infirm persons, individuals whom public policy especially seeks to protect. Still, in the circumstances presented here, that contention appears to partake more of using the conditions of those patients as pawns to divert attention from, and to conceal, Respondent's actual unlawful motive, than as a genuine concern which had truly motivated its decision to discharge the CNAs on May 3.

First, the most obvious evidence supporting that conclusion is that not all of the CNAs had been working at the time of the parking lot meeting with the reporter. Some were on break. Since there is no evidence that Respondent required employees on break to remain inside the Espanola facility, on call, it hardly has been shown that those CNAs somehow abandoned patients by going to the parking lot during their break. Yet, Respondent lumped them with CNAs who had not been on break and fired the lot, all for the same purported reason.

Similarly, Martinez-Gonzales and Vences had not even been working that morning. But they were also portrayed by Respondent as having abandoned patients. True, they did not report for work later that day, as scheduled. Yet, as pointed out in section II, Respondent has experienced an ongoing history of staff shortages at Espanola. But there is no evidence that it usually followed a rule or policy of automatically terminating CNAs, or any other personnel, for a single failure to report for work as scheduled. Indeed, during her meetings on May 2 and 3, Pacheco warned that CNAs would be automatically terminated for failure to report for the newly added evening shift. The fact that she made a special point of announcing that penalty is, itself, some evidence that Respondent had not followed a similar course, in the past, every time a CNA failed to report as scheduled. Certainly, had that been Respondent's normal policy—of firing employees for failing to report when scheduled to do so—England likely would have so testified. He did not.

Second, despite the generalized portrayal of helpless senior and infirm patients thoughtlessly abandoned by CNAs on May 3, the simple fact is that there is no evidence that the CNAs had crassly neglected to provide care for patients by going to the parking lot that morning. That was the conclu-

sion specifically reached as a result of proceedings conducted by the state agency charged with evaluating claims of patient neglect and abuse: "The State[']s witnesses testified that patients were not abused or neglected while the [CNAs] were with the reporter." In this proceeding, Respondent has shown not a single instance where a patient had been deprived of medical care—essential or otherwise—during the time that the CNAs had been in the parking lot. Indeed, by abruptly terminating them, Respondent created the very situation—lack of CNA services to patients—that it now castigates the CNAs for causing, at least until alternative personnel could be located and put in place at the facility.

In that regard, the evidence is not disputed that after patients are returned to their rooms, or to other locations in the facility, following breakfast, they are helped to take showers by the CNAs. Aside from Coffeen's testimony that she had been "charting the consumption of food" by patients, there is no evidence whatsoever that the CNAs had any other function to perform on May 3 when they met with the reporter. In fact, uncontested is the testimony that it is during that particular point in the workday that some CNAs usually take their breaks. As a result, the only consequence of meeting with the reporter had been that delays occurred in charting food and in aiding patients to take showers.

There is no evidence that a few minutes delay in showering adversely affected patients. Indeed, given the ongoing shortage of Espanola staff, it seems likely that showers were not ordinarily taken by patients at the same precise times each day—that there was some variance in the exact times when each patient took his/her daily shower. In these circumstances, it is not surprising that the Secretary of the Department of Health agreed that there had been no abuse or neglect while the CNAs had been meeting with the reporter. Moreover, it is difficult to ascertain how Respondent's officials, particularly England, could have genuinely believed that there had been any abuse or neglect.

Third, this is not a situation where the CNAs had stealthily left the facility, without anyone knowing about it, to meet with the reporter. The credible evidence shows that, as they left the facility, the CNAs had walked past two nursing stations and, also, the secretary's office. Two or three nurses had been present at one of the nursing stations and one of them, Toni Nelson, had been informed expressly that the CNAs were leaving the facility. In addition, the secretary had been told, according to Coffeen, "That we were going out to speak to a reporter." Apparently, it had been that secretary, or perhaps one of the nurses, who had told Pacheco that the CNAs had gone to the parking lot, since she had to obtain that information somehow in order to relate to England, during their first telephone conversation that morning, that the CNAs were in the parking lot.

Fourth, there is no evidence that the CNAs were leaving, or planning to leave, work for the remainder of the day. Garcia testified credibly that, after speaking with the reporter, "we were planning on going back to and continuing our duties." The secretary had been told expressly that the CNAs were "going to speak to a reporter," not that they were walking out for the remainder of the day.

Finally, and perhaps most significantly, England testified that he had instructed Administrator Nelson, "That if any of the assistants would like to reapply for their positions, that we would consider them on an individual basis." Now, if

Respondent had truly regarded the CNAs' May 3 trip to the parking lot as rising to the level of patient neglect and abuse, as it claimed before the state agencies and now claims, then it seems illogical that it would have even considered rehiring any one of them. Yet, according to England, Respondent had been willing to consider reemploying one or more of the very CNAs whom Respondent was accusing of patient neglect and abuse. Those positions, at least, seem diametrically opposed and England never explained that inconsistency—never explained his willingness to consider reemploying CNAs whom he had purportedly discharged for misconduct so supposedly severe.

I do not credit England's testimony that he terminated the 11 CNAs because he genuinely believed they had engaged in patient neglect and misconduct. I conclude, instead, that Respondent terminated them because it knew, or at least suspected, that they had ceased work to voice a concerted protest about their employment terms and conditions. Moreover, I further conclude that Respondent made its report about their conduct to the New Mexico Department of Health Licensing and Certification Bureau to further retaliate against the CNAs and, possibly also, to fortify its own pretextuous defense to their terminations. Finally, Respondent admits that it told Rehabilitation that it could not employ Garcia on Respondent's premises, as it had planned to do, because Respondent would not permit a discharged employee to work on its premises. Because that discharge had been unlawfully motivated, the bar on allowing Garcia to work on Respondent's premises thereafter constitutes a direct consequence of her unlawfully motivated termination and, accordingly, an independent violation of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

Pilot Development Southwest d/b/a Hacienda de Salud-Espanola committed unfair labor practices affecting commerce, in violation of Section 8(a)(1) of the National Labor Relations Act, by terminating Erlinda Garcia, Mary Romero, Lorenzo Pino, Ronald Trujillo, Joe Ocana, Rosemary Vialpando, Efren Moya, Mary Muniz, Teresa Coffeen, Mary Rose Martinez-Gonzales, and Sarah Vences on May 3, 1994, by reporting the CNAs' concerted protected activity as patient abuse and neglect to the New Mexico Department of Health Licensing and Certification Bureau, and by notifying the New Mexico Rehabilitation, Inc. that Erlinda Garcia would not be permitted to work on its premises for that firm.

REMEDY

Having found that Pilot Development Southwest d/b/a Hacienda de Salud-Espanola engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and, further, that it be ordered to take certain affirmative action to effectuate the policies of the Act. With respect to the latter, it shall be ordered to offer Erlinda Garcia, Mary Romero, Lorenzo Pino, Ronald Trujillo, Joe Ocana, Rosemary Vialpando, Efren Moya, Mary Muniz, Teresa Coffeen, Mary Rose Martinez-Gonzales, and Sarah Vences immediate and full reinstatement, as CNAs, to the positions from which they were terminated on May 3, 1994, dismissing, if necessary, anyone who may have been hired or assigned to perform the work from which each was discharged on that date. If one or more of those positions no

longer exists, it shall be ordered to reinstate those terminated employees to a substantially equivalent position, without prejudice to their seniority or other rights and privileges.

In that regard, as described in section II, Coffeen had not been trained and licensed as a CNA during her employment at the Espanola facility, but had been hired in that position with a promise that she would be allowed to participate in training to become licensed as a CNA. As it turned out, she had not been allowed to do so by the date of her unlawful termination. Obviously, it would not be consistent with public health policy to order reinstatement of an employee to a health care position for which she/he is not qualified and licensed. Almost a year has passed however, since Coffeen's unlawfully motivated termination and, during that interim, she may well have undergone training and become licensed as a CNA. Even if that has not happened, given the circumstances of the promise to her when hired and the fact that her inability to undergo training, and become licensed as, a CNA resulted from a specific choice made by an agent of Pilot Development Southwest d/b/a Hacienda de Salud-Espanola, it seems an appropriate remedial measure to direct it to provide appropriate training for Coffeen and to reinstate her as a CNA if she completes that training and is licensed.

It shall also be ordered to make each of the above-named employees whole for any losses of pay and benefits she/he may have suffered because of the unlawful terminations of May 3, 1994, with backpay to be computed on a quarterly basis, making deductions for interim earnings, *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest to be paid on the amounts owing as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In addition, it shall be ordered to remove from its files any references to the unlawful discharges of those 11 employees. It also shall be ordered to notify the New Mexico Department of Health Licensing and Certification Bureau that those 11 employees' conduct on May 3, 1994, had been activity protected by the National Labor Relations Act and to make all reasonable efforts to have that agency remove from its records and files all references to the report about that activity and the proceedings arising as a result of it. Moreover, it shall be ordered to notify New Mexico Rehabilitation, Inc. that there is no objection to employment on the Espanola premises of Erlinda Garcia, should that firm choose to hire her and employ her at that location. Finally, it shall notify each of those employees, in writing, that the actions set forth in this paragraph have been taken and that their discharges will not be held against them in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondent, Pilot Development Southwest d/b/a Hacienda de Salud-Espanola, Espanola, New Mexico, its officers, agents, successors, and assigns,⁴ shall

³If 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.

⁴During the hearing, Respondent disclosed that it was negotiating for the sale of the Espanola facility, but declined to identify the po-

Continued

1. Cease and desist from

(a) Discharging or otherwise interfering with, restraining, or coercing employees for temporarily ceasing work to protest terms and conditions of employment, or for engaging in other concerted activity for mutual aid or protection.

(b) Reporting as patient neglect and abuse to the New Mexico Department of Health Licensing and Certification Bureau, or to any other agency, activity by employees that is protected by the National Labor Relations Act.

(c) Barring from its premises, as employees of another employer, employees whom it has discharged for a motivation unlawful under the National Labor Relations Act.

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

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

(a) Offer Erlinda Garcia, Mary Romero, Lorenzo Pino, Ronald Trujillo, Joe Ocana, Rosemary Vialpando, Efrén Moya, Mary Muniz, Teresa Coffeen, Mary Rose Martinez-Gonzales, and Sarah Vences immediate and full reinstatement to the positions of CNA from which they were discharged on May 3, 1994, dismissing, if necessary, anyone who may have been hired or assigned to any of those positions or, if any of those positions no longer exists, to a substantially equivalent position, without prejudice to seniority or other rights and privileges, and further, make whole those employees for any loss of pay and benefits suffered as a re-

tential buyer, although it represented that the potential buyer was aware of the potential liabilities arising from this proceeding. In his brief, the General Counsel urges that, if Respondent does not reach agreement with that potential buyer, but does negotiate with any other potential buyer, I should order Respondent to disclose to the General Counsel's Albuquerque office "the identity of any other prospective purchaser of the Espanola, New Mexico nursing home [with] which Respondent is negotiating a sale including the name and address of each prospective purchaser." The General Counsel cites no authority for a remedial order extending to notice of any prospective purchasers of Respondent's facility. Nor does the General Counsel provide any reason for directing a respondent to disclose the identity of entities with whom purchase negotiations are merely being conducted. I decline to impose so novel and far-reaching, as well as ambiguous (at what point does a purchaser become "potential"?) a remedial order. However, should it reach an agreement for sale of the Espanola facility, Respondent is directed to notify the Regional Director for Region 28 of that fact and of the identity of the purchaser.

sult of those discriminatory acts and, in addition, provide appropriate training for Teresa Coffeen and an opportunity for her to become licensed as a CNA, in the manner set forth above in the remedy section of this decision.

(b) Remove from its files any reference to the unlawful terminations of the employees named in paragraph 2(a), above, and notify them in writing that this has been done and that the discharges will not be held against them in any way.

(c) Notify the New Mexico Department of Health Licensing and Certification Bureau that the employees named in paragraph 2(a), above, had been engaged in conduct protected by the National Labor Relations Act on May 3, 1994, and make all reasonable efforts to have that agency remove from its records and files all references to the report concerning that conduct and the proceedings arising as a result of it, informing the employees named in paragraph 2(a), above, in writing of the actions that it has taken to accomplish those objectives.

(d) Notify New Mexico Rehabilitation, Inc. that there is no objection to employment on the Espanola premises of Erlinda Garcia, should that firm choose to hire her and employ her at that location, and inform Garcia in writing that this has been done.

(e) Preserve and, on request, make available to the Board and its agents, for examination and copying, all payroll and other records necessary to compute backpay and reinstatement rights as set forth above in the remedy section of this decision.

(f) Post at its Espanola, New Mexico facility copies of the attached notice marked "Appendix."⁵ Copies of the notice on forms provided by the Regional Director for Region 28, 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.

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

⁵ 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."