

**Kinco, Ltd. and Dusty E. Numbers, now known as
Dusty E. Casey.** Case 12-CA-16528

October 23, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

The issue presented here is whether the judge correctly found the Respondent threatened to discharge, and did discharge Dusty E. Numbers/Casey because of her protected concerted activity, in violation of Section 8(a)(1) of the Act.¹ 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 and to adopt the recommended Order, as modified below.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Kinco, Ltd., Hudson, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

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

“(b) Offer Dusty E. Numbers/Casey 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 other rights and privileges previously enjoyed.”

2. In paragraph 2(d) insert footnote reference 2 after the word “Appendix” and add the following as footnote 2.

²If 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.”

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

MEMBER COHEN, dissenting in part.

I dissent from my colleagues' conclusion that Respondent uttered a threat in violation of Section 8(a)(1).

In his bench decision, the judge set forth his “proposed conclusion” that there was an unlawful threat to discharge, and that the subsequent discharge was also unlawful. The judge said that “this will be thoroughly

¹On June 6, 1995, Administrative Law Judge Robert C. Batson delivered a bench decision. On July 7, he issued the attached supplement to bench decision, which includes a recommended Order. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and an answering brief.

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

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set forth in my Bench Decision and Certification of the Record.” It is ambiguous regarding whether the word “this” referred to the threat or the discharge or both. In any event, there has been no subsequent discussion of either the threat or the discharge.

In sum, the judge's decision is both ambiguous and incomplete. It is difficult to have a meaningful review in these circumstances. Notwithstanding this difficulty, I have tried to parse the bench decision as best I can. Having done so, I can see my way clear to affirm the judge concerning the discharge. The bench decision discusses the General Counsel's prima facie case, and the Respondent's rebuttal. Although the judge promised more discussion, I am reasonably comfortable in saying that the bench decision is adequate in this respect, albeit barely so.

There is, however, no analysis of the threat. The facts are that a supervisor told an employee that another employee (the Charging Party) would be fired because she was not at work. Arguably, the statement was unlawful if the first employee realized that the asserted reason for the threatened discharge was a pretext and that a discriminatory discharge was about to occur. If the judge had offered that rationale, I could have reviewed it. The salient point is, however, that the judge gave no rationale at all for his conclusion. I am unwilling to affirm a conclusion without a rationale. I therefore dissent.

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 threaten our employees that other employees will be discharged for engaging in protected concerted activities for mutual aid and protection.

WE WILL NOT discharge our employees because they have engaged in protected concerted activities for mutual aid and protection.

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 Dusty E. Numbers/Casey immediate and full reinstatement to her former job or, if that position 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 remove from the personnel records of Dusty E. Numbers/Casey any reference to her unlawful discharge, and we will notify her in writing that we have done so and that we will not use the discharge against her in any way.

KINCO, LTD.

Thomas W. Brudney, Esq. and *Margaret J. Diaz, Esq.*, for the General Counsel.

William H. Andrews, Esq., of Jacksonville, Florida, for the Respondent.

BENCH DECISION AND CERTIFICATION

This case was heard by me at Tampa, Florida, on June 6, 1995, at the close of the hearing, I delivered a Bench Decision pursuant to Section 102.35 (a)(10) of the Board's Rules and Regulations, which found that the Respondent had engaged in certain unfair labor practices. Herewith I issue a Supplement to Bench Decision that corrects and supplements the decision in certain regards.

The portion of the transcript that contains my Bench Decision, as corrected, is attached hereto as "Appendix A." The Order Correcting the Transcript is attached as "Appendix B" [omitted from publication], and the Supplement to the Bench Decision is attached as "Appendix C."

Dated at Washington, D.C. July 7, 1995

APPENDIX A

BENCH DECISION

[Errors in the transcript have been noted and corrected pursuant to the Order Correcting the Transcript.]

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JUDGE BATSON: All right, gentlemen.

This Complaint is based—Complaint and Notice of Hearing is based upon a Charge filed by Dusty E. Numbers, who is now Dusty E. Numbers, also known as Dusty E. Casey, that's C-A-S-E-Y, I believe, is it not?

The Charge was filed on August 30, 1994 and Complaint issued on February 28th, 1995. The Respondent admits Service of the Charge and the Complaint.

Now, the Complaint alleges that the Respondent is engaged in commerce. The Answer admits that and the facts establishes it.

Now, the allegations of the Complaint are that in June 1994 Dusty Numbers, who was an employee, a Section 2 (3)

employee of Respondent Kinco, Limited, engaged in concerted activity by complaining to supervision regarding wages, hours and working conditions and complaining—protesting supervisor Ina Parker's conduct toward employees.

The other allegation states that Dusty Numbers engaged in concerted activities for mutual aid and protection and requested monthly employee meetings with management.

Now, this—Basically, these allegations basically are not in

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dispute. As a matter of fact, in his Closing Summation Respondent conceded that Mrs. Casey, Numbers/Casey, was indeed engaged in concerted conduct. And I believe conceded that it was indeed protected, concerted activity. It was, inasmuch as she was complaining of the conduct of a supervisor which is a term and condition of employment, complaining to the effect that the supervisor interfered with her work and so on.

And accompanying her was one Timothy Shepley, on at least one of those occasions, so we don't need to get into whether or not she was just speaking for other employees, but there were two of them present.

This allegedly occurred in June of 1994. And I believe Shepley testified in about mid-June of 1994.

Now, Mr. Numbers testified that, in fact, Mrs. Numbers/Casey had been complaining since March of '94, ever since Ms. Ina Parker was returned—returned to the employer as production manager with a supervisory position over Mrs. Numbers/Casey.

However, he did—Mr. Numbers did state that Mrs. Numbers/Casey and Mr. Shepley did request monthly meetings with—with management and—concerning Mrs. Parker's conduct.

Now, ironically, in Mrs. Parker's testimony, she testified that she was unaware of any conflict or

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complaint about the way in which she did her business or performed her duties or that any employees were unsatisfied with it or had complained about it.

Mr. Numbers testified that he had told them that he would talk with Mrs. Parker about it. Whether or not he did, I don't know, because Mrs. Numbers—I mean, yeah, Mrs. Parker testified that the first she knew about it was on July the 8th.

Now, as I say, in his summation, the Respondent tacitly admitted that Mrs. Numbers/Casey was engaged in protected, concerted activity.

Now we come to the—Oh, on the—On July 8 the Complaint alleges that Respondent threatened to discharge Dusty Numbers. That is based upon testimony of Mr. Timothy Shepley.

Am I pronouncing that correctly?

MR. ANDREWS: Shepley.

Judge Batson: Shepley. The warehouse employee who says that Mr. Numbers told him on that day that—I believe it turned out is testimony was that he told him that on July 7th instead of July 8th that Mr. Numbers told him Dusty was not there and that he was going to have to get rid of her.

Mr. Numbers, I believe, denied having told Mr. Shepley that—that he was going to have to—or

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was going to terminate or going to have to terminate Mrs.—I'll just call her Casey, instead of Number/Casey for the purposes of this Decision.

I don't find that to be critical to the case. However, I do—I will find, I will credit in this regard, that Mr. Numbers did state to the effect to Shepley that he was going to have to get rid of Mrs. Numbers.

Now, the next allegation of Complaint—of the Complaint is that the Respondent discharged Dusty Numbers on or about July 8, and Respondent admits that it did so. It's well settled that merely because an employee is engaged in protected, concerted activity, a Respondent is not estopped from discharging that employee if the employee gives the Respondent another reason to do so unrelated to the protected, concerted activity and the employer, in fact, discharges the employee for that reason.

And the Respondent, of course, has the burden—I'm finding now that the General Counsel has established that she was discharged because of her protected, concerted activity.

The burden then shifts to the Respondent to demonstrated under the Wright-Line Doctrine that it would have taken the same action against the employee

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absent the protected, concerted activity.

Now, the Respondent contends and Mr. Numbers testifies that the sole reason for his discharge was Mrs. Casey's conduct in his office on July 8 of 1994. I believe the evidence establishes that on that morning, the testimony of Ms. Parker was that Ms. Casey came in and was throwing papers around, yelling at the men, slamming things. And she testified that she called Mr. Numbers,; who—and told him essentially what Ms. Casey was doing. And I believe suggested that he come to the office.

In any event, he did go to the office on the morning of November 8, at which time—I thought had been marked. At which time, Mrs. Casey was called into Mr. Numbers' office and, according to Mr. Numbers' testimony, became completely out of control, was very angry. Was very—made very abusive comments to him, was disrespectful, totally insubordinate to him and asked him on two occasions, I believe, if she was fired. Saying am I fired, am I fired. And he said, yes.

Mr. Numbers testified at the time he called Mrs. Casey into his office that morning he had no intention of firing her and that the sole reason he did was her conduct after she came into the office on the

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morning of July 8, 1994.

Counselors, I find that, according to Mr. Numbers' testimony, Mrs. Casey's conduct had been described by him as being that way since March of 1994. Well, it turns out that Ms. Parker came back, I believe, she testified in February of '94.

Mr. Numbers' testimony was that it began immediately when Mrs. Parker came back that Dusty Numbers or Casey became very resentful and entered upon the course of conduct and it continued that way. According to my notes of his

testimony, it was—the office was an open battlefield, was I believe one term that he used.

Now, one of the critical issues here in my is that Mrs. Numbers' conduct had been very similar to what Mr. Numbers described it to be in his office on the morning of the 8th. And he had not taken—it's admitted that there was no disciplinary action of any kind taken against Mrs. Casey at any point in time until the morning of the 8th.

Now, ironically, as I say, Ms. Parker testified that she was totally unaware that there was any dissatisfaction among the employees with the way she was performing her job. Which seems a little bit ironic to me that she would not have been aware of it

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had Mrs. Casey's conduct been as described by Mr. Numbers in his testimony.

However, it was not until after Mrs. Numbers/Casey and Mr. Shepley in concert complained to Mr. Numbers in June, mid-June as has been said, concerning the manner in which Mrs. Parker was interfering with the way they were performing their job. I believe the specific instance in the case of Mrs. Casey was that Mrs. Parker would put orders in the envelopes that she had prepared for the service personnel that would throw her off—throw them off schedule and out of areas in which they were supposed to be.

Mr. Shepley's complaint, I believe, related to—Well, I don't think it necessary that I go into that, since Mr. Shepley is not a party to this proceeding.

In view of the fact that the Respondent tolerated this, this type of conduct on the part of Dusty Numbers, it may not have been precisely as it was on the morning of the 8th in his office, but from his testimony I got the—got an indication that it was almost a daily thing by his description of the office as being an open battlefield.

Now, another thing with respect to General

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Counsel's Exhibit 2, Mr. Numbers testified that he not seen that. It had been sent to Miami. No, I'm sorry; Jacksonville. However, in his testimony, he says that he signed the unemployment under duress. Now, he didn't elaborate on that, other than to say to get her out of his office.

JUDGE BATSON: Off the record.

(Whereupon, a brief discussion was held off the record, after which the following proceedings were had:)

JUDGE BATSON: On the record.

Strike that last remark. It's been called to my attention that Mr. Numbers' statement concerning signing a document for Mrs. Numbers/Casey was not the unemployment compensation, but was something totally unrelated to that. So that will be stricken from by Decision.

Now, gentlemen, I find in view of the fact that for—from February to July, after Mrs. Numbers/Casey and Mr. Shepley approached on at least two occasions Mr. Numbers complaining of Mrs. Parker's conduct toward them and the fact that he had taken no action whatsoever against Mrs. Numbers/Casey until after the two of them asked for monthly meetings with management, from his testimony, does not appear that

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her conduct on that morning was very different than it had been at other times when he had attempted to talk with her.

Accordingly, I find that the Respondent has failed to sustain its burden that it would have taken the same action against Mrs. Numbers/Casey as it did absent her having engaged in protected, concerted activity.

Now, gentlemen, I find this will be more thoroughly set forth in my Bench Decision and Certification of the Record. But my proposed Conclusion of Law is one that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. And that by telling one employee that it was going to fire another employee amounted to a threat to discharge in violation of Section 8(a)(1) of the Act.

And, two, by discharging Mrs. Dusty Numbers/Casey on or about July 8, because she engaged in protected, concerted activities, the Respondent violated Section 8(a)(1) of the Act.

I will recommend a Notice that essentially recites what I have—what I have just read into the record to the effect that we will not—the Notice will read the National Labor Relations Board has found

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we violated the National Labor Relations and has ordered us to Post and Abide by the Terms and Conditions and we Promise to do so. We will not threaten employees that we will discharge other employees because they engaged in protected, concerted activity. We will not discharge our employees because they engage in protected, concerted activity. We will take the following affirmative action: We will offer Mrs. Dusty Numbers/Casey reinstatement to her former position or, if that position no longer exists, to a substantially equivalent one without loss of seniority or other benefits. And we will not in any other like or related manner violate the National Labor Relations Act.

In the reinstatement of Mrs. Numbers/Casey, she shall be offered reinstatement with backpay less any interim earnings during the period that she has been terminated to be computed on a quarterly basis in a manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

If no exceptions are filed as provided by 102.46 of the Board's Rules and Regulations, these Findings and Conclusions and Recommended Order shall be provided in Section 102.48 of the Rules, be adopted by

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the Board and all objections to them shall be deemed waived for all purposes.

So that will essentially constitute my Order. And, as I say, Counselors, you will have—What is it, 20 days in which to file exceptions, from the receipt of my Written Decision of Bench Decision and Certification of the Record.

Now, of course, the parties are free to go on and resolve this matter or essentially comply with the Order and get it out of the way if that's your desire.

That concludes my Decision. Is there anything further, Gentlemen?

APPENDIX C

SUPPLEMENT TO BENCH DECISION

This matter was heard by me at Tampa, Florida, on June 6, 1995. At the close of this evidence and arguments, I delivered a Bench Decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations, which found Respondent had engaged in certain unfair labor practices.

The decision is further supplemented to include the following recommended Order and proposed notice to employees.

On the findings of fact and conclusions of law set forth in the bench decision delivered at the close of evidence and argument, and on the entire record, I issue the following recommended¹

ORDER

The Respondent, Kinco, Ltd., Hudson, Florida, its officers, successors, and assigns, shall

1. Cease and desist from

(a) Threatening an employee that it will discharge another employee because that employee engaged in protected concerted activities.

(b) Discharging its employees because they engaged in protected concerted activities.

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

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

(a) Make Dusty E. Numbers/Casey whole for any loss of pay or benefits she may have suffered by reason of the discrimination against her in the manner described in this Bench Decision.

(b) Offer Dusty E. Numbers/Casey reinstatement to her former position or if that position is no longer available to a substantially equivalent one without prejudice to her seniority or other rights and privileges she may have previously enjoyed.

(c) Remove from her personnel file any references to her unlawful discharge and notify her that it has done so, and that it will not be used against her in any way.

(d) Post at the Respondent's Hudson, Florida site copies of the attached notice marked "Appendix." Copies of said notice on forms provided by the Regional Director for Region 12, after being duly signed by Respondent's representative shall be posted by it immediately upon receipt thereof and be maintained by Respondent for 60 consecutive days thereafter in conspicuous places including all places where notice to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Preserve and, on request, make available to the Board or its agent for examination and copying all payroll records, social security payment records, timecards, personnel records

¹If 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.

and reports and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Notify the Regional Director of Region 12 in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.