

Cardiovascular Consultants of Nevada, MI and Dolores Aragon and Michele Dubry. Cases 28-CA-13567 and 28-CA-13601

February 25, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND HIGGINS

The issue presented in this case¹ is whether the judge correctly found that the Respondent did not violate Section 8(a)(1) of the Act by suspending and then terminating employees Dolores Aragon and Michele Dubry. 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,² findings,³ and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

¹ On November 8, 1996, Administrative Law Judge Jay R. Pollack issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief. The General Counsel filed a reply brief.

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

² During the hearing the judge refused to admit into evidence the unemployment compensation referee's decision finding that Dolores Aragon was not discharged for misconduct within the meaning of Nevada State law. The judge found, however, that even if he had admitted the decision, it was not persuasive and he would not have granted it any weight. We find that although not controlling, the decision is nevertheless admissible. *Western Publishing Co.*, 263 NLRB 1110 fn. 1 (1982). Accordingly, we have considered the decision, but find, in agreement with the judge's alternative rationale, that it does not require a different result. *Volt Information Sciences*, 274 NLRB 308 fn. 3 (1985).

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

Nathan W. Albright, Esq., for the General Counsel.
Howard E. Cole, Esq. (Lionel, Sawyer & Collins), of Las Vegas, Nevada, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Las Vegas, Nevada, on September 18 through 20, 1996. On February 22, 1996,¹ Dolores Aragon (Aragon) filed the charge in Case 28-CA-13567 alleging that Cardiovascular Consultants of Nevada, MI (Respondent) violated

Section 8(a)(1) of the National Labor Relations Act (the Act). On March 14, Michele Dubry filed the charge in Case 28-CA-13601 against Respondent. Thereafter on March 29, the Acting Regional Director for Region 28 of the National Labor Relations Board issued a consolidated complaint and notice of hearing against Respondent, alleging that Respondent violated Section 8(a)(1) of the Act by suspending and discharging Aragon and Dubry because Aragon had engaged in protected concerted activities within the meaning of Section 7 of the Act. Respondent filed a timely answer to the complaint, denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record,² from my observation of the demeanor of the witnesses, and having considered the briefs submitted by the parties, I make the following

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Respondent is a Nevada corporation, with five offices in Las Vegas, Nevada, where it is engaged as a cardiology physicians' group practicing medicine and providing health care services. During the 12 months prior to the filing of the charge, Respondent purchased and received goods and materials valued in excess of \$50,000 directly from points located outside the State of Nevada. During the same time period, Respondent derived revenues in excess of \$250,000 from its medical practice. Accordingly, Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

² Aragon was awarded unemployment compensation after a hearing before a referee. The General Counsel offered the referee's decision, finding that Aragon was not discharged for misconduct within the meaning of the Nevada State law, in evidence. I rejected the offer. First, the issue before the referee was whether misconduct had been proven. That was not the same issue presented in the case before me. Second, the burden of proof was not the same. Third, the referee's decision was based on the referee's crediting testimony that the practice of employees clocking in their colleagues had been going on for some time. Conflicting testimony was not offered at that hearing. It is not clear that the rules of evidence applied. I reaffirm my ruling that the referee's decision is hearsay. See *Emergency One, Inc.*, 306 NLRB 800, 804 at fn. 7 (1992).

Even if I had admitted the referee's decision in evidence, I would have granted it no weight. As mentioned above, the referee stated that the issue presented was whether the employee had been discharged for misconduct. To determine this issue the referee did not need to consider, and did not consider, the facts necessary to establish a violation of Sec. 8(a)(1) of the Act. The decision finds that since no written policy existed and since the employer's own supervisors condoned and participated in the practice of clocking in others, no such conduct taken also by the claimant may be said to constitute misconduct. The referee's decision concerns only one issue relevant to this case, the defense for the discharge, but is silent as to the motivation for Respondent's conduct, the crucial element of this 8(a)(1) case. Accordingly, I find that the unemployment compensation issue was not parallel to the unfair labor practice issue. I further note that although some of the facts were presented to the referee, the referee did not hear all the evidence presented to me. The referee heard testimony only from Aragon and Donald Arnold, Respondent's administrator. I, therefore, do not find the referee's decision persuasive and would not grant it any weight.

¹ Unless otherwise stated, all dates refer to 1996.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background and Issues

Dolores Aragon began working for Dr. Frederick Siegel in 1985. In November 1994, Aragon began working for Dr. Karen Arcotta when Dr. Arcotta took over Dr. Siegel's practice. On April 1, 1995, Dr. Arcotta merged her practice with Respondent and became a partner in Respondent's practice. Aragon then became an employee of Respondent. Aragon was employed as a front office receptionist at Respondent's east office. Aragon's duties included scheduling for doctors, answering telephones, and receiving payments from patients.

Michele Dubry was hired by Respondent in April 1995 and worked in the medical records department. After working at Respondent's main office for approximately 2 months, Dubry was transferred to the east office in the medical records department. Dubry's duties included faxing, filing, and pulling charts and records. Although Dubry and Aragon worked in the same office, they reported to different supervisors. Aragon was supervised by Ann Ramos, front office manager at the east office. Dubry was supervised by Cynthia Pollock, medical records supervisor, who worked at Respondent's main office, 5 to 10 minutes away. Both Ramos and Pollock reported to Debra Hoffman, manager of Respondent's front office and medical records departments.

It is undisputed that on February 8, Aragon participated in a meeting with other employees and representatives from Respondent's various offices to discuss employee concerns including, job descriptions, monthly meetings, authorizations, and paychecks. During this meeting Aragon expressed her displeasure with Hoffman's management style. It is also undisputed, that on February 14, Aragon was late for work and that Dubry punched in Aragon's timecard approximately 15 minutes prior to Aragon's arrival at work. In this case, the General Counsel contends that Aragon was engaged in protected concerted activities and that Respondent discharged her for engaging in those activities. Further, the General Counsel alleges that the discharge of Dubry was a ploy to establish a reason for the discharge of Aragon. Respondent concedes that Aragon was engaged in protected concerted activity but contends that those activities were de minimis and not the reason for the terminations. Rather, Respondent alleges that Aragon and Dubry were discharged because of their misconduct involving the falsification of Aragon's timecard.

B. The Facts

1. The protected concerted activities

In January, a group of Respondent's employees got together at an Applebee's Restaurant in Las Vegas to discuss working conditions. Aragon and other employees from Respondent's five offices spent over 2 hours discussing their workload, training, and supervision. The employees agreed to meet again to discuss their concerns about their working conditions. Another meeting was held at a Denny's restaurant attended by Aragon and five or six other employees. Aragon testified that she told the employees that she was upset with Deborah Hoffman, manager of the front office and medical records departments. Other employees also voiced their concerns over the workload and Hoffman's management of their departments. During this meeting the employees decided to

request a meeting with John Dini, an outside consultant working with Respondent concerning issues arising out of its recent growth and mergers. The employees also wanted Dr. Bedotto, the employee's physician representative, to be present at the meeting. The group made it clear that they did not want Hoffman to be present at the meeting.

Dini agreed to meet with the employees on February 8. Hoffman called Aragon at work on February 8 and told her to attend the meeting at 4 p.m. Aragon attended the meeting along with seven or eight other employees and Dini and Dr. Bedotto. Employee Barbara Reid prepared an agenda for the meeting and was the main spokesperson for the employees. Items discussed at the meeting included, "front office," "ideas for restructure," and "concerns." Among the listed subcategories for "concerns" were "job descriptions, monthly meetings, authorizations, and paychecks."

Aragon testified that near the end of the meeting she said, "Come on you guys, throw your cards on the table. This is one of the reasons we're here." Aragon stated that she was tired of Hoffman treating the employees like children and that Hoffman referred Aragon to memoranda whenever Aragon requested help. Aragon expressed displeasure at what she perceived as rudeness by Hoffman. She further stated that Hoffman would not take care of legitimate problems properly.

Employee Barbara Reid testified that Aragon attempted to talk about Hoffman's mismanagement of the front office. Reid, as spokesperson, told Aragon that the employees were not there to point fingers at anybody, that they were there to be constructive and not name names. The employees had previously agreed that if they made constructive comments and did not get into personality conflicts, their suggestions would receive greater consideration from management.

Hoffman was in her office during this meeting. According to Aragon she walked past Hoffman's office after the meeting. Dini testified that after the meeting he spoke briefly with Hoffman. Dini testified that Hoffman "was concerned because she knew that it was the staff that she was responsible for that had asked for the meeting." Dini told Hoffman that she had nothing to be concerned about because it had been a positive meeting and the employees had made some "terrific" suggestions. Dini told Hoffman that she had some excellent people working for her.

On the following day, February 9, Jill Lysgaard, a registered nurse, distributed a memorandum to employees, informing the employees that Respondent intended to form a committee of staff members from all of Respondent's offices and departments for the purpose of addressing "staff, concerns, issues and solutions." Respondent's offices, including the east office, were directed to select an employee representative to the committee. The committee was referred to as the "mystery committee" because it had not yet been named and because a contest was being held to name the committee. The committee was later named the Heart committee. Dini had suggested this committee to address employee concerns and Respondent had accepted his suggestion prior to the meeting of February 8.

An election was held during the afternoon of February 14, at the east office to determine the committee representative for that office. The election was a tie between Aragon and a registered nurse. Later that same day, Aragon was elected as the employee representative in a runoff election. That

same afternoon, Ramos telephoned Lysgaard and informed her of Aragon's election. Dubry testified that on the afternoon of February 14, she overheard Ramos tell employee Sharolyn Pendelton that Aragon was too much of a "hard ass" to represent the east office. Ramos did not deny making this statement.

2. The timecard incident of February 14

It is undisputed that on February 14 Aragon called Ramos around 8:15 and advised Ramos that she would be a little late that morning. Aragon did not ask that Ramos clock her in. Dubry clocked Aragon in at 8:25 a.m., although Aragon did not arrive at work until 8:42 a.m.. Aragon was due to report to work at 8:30 a.m.

Dubry testified that at approximately 8:20 a.m. Ramos told her that Aragon had called and would be a few minutes late. According to Dubry, Ramos said that she was busy with a patient and asked Dubry to clock Aragon in. Ramos, on the other hand, testified that she announced to the office that Aragon would be late. Ramos denied telling Dubry to clock in Aragon. According to Ramos, after announcing that Aragon would be late, she heard the timeclock being punched and then observed Dubry returning from the area of the timeclock. According to Ramos, she immediately called Hoffman and informed Hoffman that a timecard violation was taking place. Hoffman said she would come to the east office.

Hoffman testified that after receiving the call from Ramos, she asked Pat Rosenberry, business office manager, to go to the east office because Hoffman was too busy to leave. Rosenberry arrived at the east office in less than 10 minutes but still shortly after Aragon had arrived at the office. Rosenberry pulled Aragon's timecard and made a copy of it. Rosenberry asked Ramos what time had Aragon arrived and Ramos replied that Aragon had arrived just seconds before Rosenberry. Rosenberry left and returned to Respondent's main office where she gave the copy of Aragon's timecard to Hoffman.

On the following morning, February 15, Hoffman and Don Arnold, Respondent's administrator, went to the east office to meet with Aragon and Dubry. Arnold and Hoffman first met with Dubry. Dubry admitted that she had clocked in Aragon and asserted that Ramos had instructed her to do so. Dubry also maintained that it was common practice in the office for employees to clock each other in and out. Dubry was told that she was being suspended and was directed to submit a written statement as to what had occurred.

Arnold and Hoffman next met with Aragon. Aragon testified that Arnold informed her that another employee had clocked her in the previous day. Aragon answered that "everybody clocks everybody in and out." Arnold said that Dubry had confessed to clocking Aragon into work. Aragon responded that she hadn't known who had clocked her in. Arnold stated that he was disappointed in Aragon because she was a very valued employee. Arnold explained that he would have to place Aragon on a week's suspension without pay. Arnold directed Aragon to make a written report of what had happened on the previous day.

Aragon wrote a statement and hand delivered it to Arnold and Hoffman on February 19. Aragon stated that she was anxious to return to work and asked when she could come back. Arnold answered that he was still waiting for Dubry's written statement. According to Aragon, Arnold said he

could not have an answer for her until he received Dubry's written statement.

Aragon telephoned Hoffman at home on or about February 20 and asked about her return to work. Aragon also asked whether she would still be able to be on the employee committee. Hoffman answered that she couldn't say because no decision had been made on Aragon's return to work.

On February 21, prior to the receipt of Dubry's written statement, Aragon was called to a meeting with Hoffman and Arnold. Arnold said, "This is one of the hardest things I've ever had to do." He emphasized that Aragon was a valued employee and said he was sorry that he had to terminate her. Arnold read Aragon's termination letter to her. Arnold gave Aragon the termination letter and asked if she needed a letter of recommendation. Aragon walked out of the office.

On February 22, Dubry delivered her written statement to Arnold and Hoffman. In her statement, Dubry alleged that she had clocked Aragon in pursuant to Ramos' request. Dubry further claimed that she had been informed by Pollock when she was hired that from time to time employees covered for each other on the timeclock and that it was not a problem. Arnold read Dubry's statement and then told Dubry that she was being terminated. Dubry was given her termination letter.

Hoffman testified that she made the decision to terminate Aragon and Dubry. Arnold testified that Hoffman made the decision to terminate the two employees and that he approved the decision. It is undisputed that the decision was made prior to the receipt of Dubry's written statement.

Hoffman testified that in November 1995 during a performance review, employee Sharolyn Pendelton voiced concern over timecard tampering at the east office. According to Hoffman, Pendelton, "by process of elimination," identified Dubry and Aragon as the offenders. Pendelton, still employed by Respondent, testified that she told Hoffman of timecard tampering but did not name Aragon and Dubry. According to Hoffman, thereafter she would drop by the office to check on timecards, but she did not catch anyone "in the act." Hoffman testified that approximately 2 weeks prior to the February 14 incident, Ramos told her that Ramos suspected that Dubry was clocking in Aragon before Aragon arrived at work. Hoffman asked if Ramos had actually seen Dubry clock in Aragon and Ramos answered that she had not. Hoffman said that before she could take action she needed proof. She told Ramos to call her immediately if such an event reoccurred. Ramos corroborated Hoffman's testimony. Ramos testified that it was because of their conversation approximately 2 weeks earlier, that she called Hoffman after hearing the timeclock and seeing Dubry return from the area of the timeclock. Hoffman testified that she decided to terminate the employees because to do otherwise would send the wrong message to Respondent's employees. According to Hoffman, at first she did not want to discharge Aragon because Aragon was a good employee and seemed remorseful. However, after further consideration, Hoffman decided that she could not simply discharge Dubry but had to discharge both employees.

3. Conflicting testimony regarding use of the timeclock

Aragon had not been required to punch a timecard while employed by Dr. Seigel and Dr. Arcotta. However, after Dr. Arcotta merged her practice with Respondent, a timeclock

was installed at the east office. Employees were required to punch in for work, out for lunch, back in after lunch, and punch out at the end of the day. Both Aragon and Dubry testified that it was common practice for employees to clock each other in when fellow employees were late to work, late returning from lunch, or when employees left early at the end of the day. Cynthia Pollock, a former medical records supervisor, corroborated this testimony. Pollock testified that she permitted Dubry and other employees she supervised to clock each other in and out.

Both Aragon and Dubry testified to numerous incidents where employees clocked each other in and out. Aragon stated that she clocked out Ramos early for Thanksgiving. Ramos did not work that week. Aragon testified that Ramos left early on her birthday and was later clocked out by another employee. Ramos' timecard shows that Ramos requested and was granted a 1-hour leave that day.³ Aragon testified that on a few occasions she asked Ramos to clock her in from lunch because Aragon was going to be late. According to Aragon, Ramos clocked her in without questioning the practice. Further, Aragon testified that Ramos would clock Aragon in without Aragon asking her to do so.

Dubry testified that Sharolyn Pendelton had been on the clock while at the department of motor vehicles for over 3 hours. Dubry testified that Ramos had asked her to clock in Pendelton even though Pendelton had not returned from lunch. Pendelton denied asking anyone to clock her in. In fact, Pendelton, who was a recent hire at that time, confronted Dubry and Aragon and requested that they not handle her timecard again. Documentary evidence shows that Ramos was not even at work that day and could not have asked Dubry to punch Pendelton's timecard.

Pollock testified that she permitted employees that she supervised, including Dubry and Robyn Weber, to clock each other in and out. Pollock was aware of employees being on the clock but not actually at work. Pollock also testified that Ramos clocked employees in and out who were not at work. According to Pollock, Ramos instructed other employees to do likewise. Pollock further testified that Ramos directed other employees to punch Ramos' timecard so she could attend to personal business. Ramos denied these allegations. As noted earlier, Pollock did not work at the east office but at Respondent's main office. Thus, Pollock could not have personally observed the conduct she attributed to Ramos. I credit Ramos' denials over Pollock's accusations.

Former employee Robyn Weber testified that she clocked in Dubry until it got out of hand. Weber testified that employees were taking advantage by more than 15 or 20 minutes. According to Weber, she got nervous when Dubry was clocking her in at times when Respondent knew that Weber was at school. Weber asked Dubry not to punch her in anymore. Weber testified that she saw no employee except Dubry and Aragon punch another employee's timecard. Aragon testified that after she was terminated, Weber stated to her, "I can't believe that they fired you for time-card violations, when everybody does it." Weber did not deny making this statement.

³ Aragon and Ramos worked together for less than a year. Therefore, there is no confusion about which Thanksgiving or birthday was at issue.

Aragon testified to an incident of alleged tampering with the timeclock in which Arnold did not discipline the employee involved. Arnold credibly testified that he investigated an allegation that an employee had improperly adjusted the time on the timeclock. The employee denied doing so. Further, Arnold believed that the employee did not have the requisite time to adjust the clock as alleged. Based on a lack of proof, Arnold took no action against the employee.

The key credibility resolution is the direct conflict in the testimony of Dubry and Ramos regarding the morning of February 14. Dubry testified that Ramos asked her to clock Aragon in on the morning of February 14. Dubry made that claim on February 15 when first confronted by Arnold and Hoffman. Ramos testified that she announced that Aragon would be late so that Pendelton and the other employees would know that Aragon was late. Ramos denied asking Dubry to clock in Aragon when told of Dubry's claim in February. Both witnesses were convincing and consistent. From the totality of the circumstances, I credit Ramos' testimony. I find that Ramos announced that Aragon had called in late. Based on an open practice of clocking in Aragon, Dubry understood the announcement as an invitation to clock Aragon in. Dubry did not expect any negative consequences from such an action. I cannot credit Dubry's testimony that Ramos requested that Dubry clock in Aragon for her. To credit such testimony, I would have to find that Ramos was involved in a nefarious plot to set up Aragon and Dubry for discharge. Further, I would have to find that Hoffman initiated, or at least was involved in, such a plot and later included Rosenberry and Arnold in the scheme.⁴ I simply do not believe that Ramos did what has been attributed to her. Rather, I find it more likely that Dubry read more into the announcement than was intended. I further believe that Dubry had clocked in Aragon on numerous occasions so that Dubry had no reason to believe that she would be disciplined on this occasion. Neither Aragon nor Dubry expected discipline for this offense because they believed "everybody did it."

C. Analysis and Conclusions

Section 7 of the Act reads, in pertinent part: "Employees shall have the right to . . . engage in other concerted activities for the purpose of . . . other mutual aid and protection." Respondent does not deny that Aragon, Reid, and the other employees were engaged in protected concerted activities in discussing working conditions with each other and in the meeting with Dini and Dr. Bedotto. The General Counsel contends that Aragon was discharged because, in discussing working conditions, Aragon criticized Hoffman, the supervisor who she believed was the cause of many of the problems. As stated earlier, the General Counsel contends that Dubry was discharged in order to justify the discharge of Aragon. Respondent alleges that Aragon's protected activities were de minimis and had nothing to do with the suspensions and discharges of the two employees. In this case the issue is Respondent's motivation for the discipline of the two employees.

In *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the

⁴ I found Arnold, Hoffman, and Rosenberry all to be credible witnesses.

Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. On such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Corp.*, 462 U.S. 393, 399-403 (1983). In *Manno Electric*, 321 NLRB 278 at fn. 12 (1996), the Board restated the test as follows: The General Counsel has the burden to persuade that protected conduct was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity.

It is unquestioned that the General Counsel must establish unlawful motive or union animus as part of his prima facie case. If the unlawful purpose is not present or implied the employer's conduct does not violate the Act, even if it is unjustified or unfair. *Howard Johnson Co.*, 209 NLRB 1122 (1974). The issue is the employer's motive and the burden is on the General Counsel, *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969). Thus, the Board requires proof of unlawful motivation or animus as part of the General Counsel's prima facie case. *Abbey Island Park Manor*, 267 NLRB 163 (1983); *Class Watch Strap Co.*, 267 NLRB 276 (1983). However, direct evidence of union animus is not necessary to support a finding of discrimination. The motive may be inferred from the totality of the circumstances proved. *Fluor Daniel, Inc.*, 311 NLRB 498 (1993); *Asociacion Hospital del Maestro*, 291 NLRB 198, 204 (1988).

The General Counsel has produced no evidence that Respondent harbored any animus against employees for engaging in the protected concerted activities. Dini and Dr. Bedotto met with the employees and discussed the employees' complaints and recommendations. Dini reported back that the meeting had been positive and constructive. Prior to this meeting, Dini had recommended that Respondent form a committee to discuss employee concerns. That suggestion was accepted by Respondent and a memorandum informing employees about the committee was circulated on February 9. The very purpose of that committee was to encourage employees to voice their concerns, discuss problems, and suggest solutions. The Heart committee has made recommendations and Respondent has instituted some of these recommendations. No other employee involved in the February 8 meeting was subject to adverse action. Several of the employees were later promoted. The evidence suggests that Respondent was encouraging, not discouraging, employees in their efforts to improve working conditions.

Further, there is no evidence that the individuals recommending and effectuating Aragon's discharge knew of Aragon's protected conduct which allegedly triggered the discipline. Hoffman knew that Aragon had attended the meeting with Dini because Hoffman called Aragon to inform her of the time and place of the meeting. Dini credibly testified that he merely reported that the meeting had gone well and that he was impressed by the employees' suggestions. Dini as-

sured Hoffman that it had been a positive meeting. Hoffman denied knowledge of what took place at the meeting. There is no evidence that Ramos had any knowledge of what took place at the meeting. Lastly, Arnold had only heard from Dini that the meeting had gone well. Arnold and Hoffman knew only that Aragon, like several other employees, had attended the meeting with Dini.

Contrary to the General Counsel's argument, I do not find Respondent's defense to be a pretext. Respondent had suspected these employees of timecard falsification in the past. However, no action was taken because Hoffman did not have proof. This time Respondent had proof of misconduct. I am not convinced that Respondent had condoned such action in the past. Apparently, Supervisor Pollock had permitted or even encouraged timecard violations. However, there is no evidence that Hoffman or Arnold condoned such conduct. Rather, the credible testimony of Pendelton, Ramos, and Hoffman establishes that Hoffman did not condone such action but rather sought evidence of wrongdoing before taking disciplinary action.

The fact that Respondent had no prior written rules regarding use of the timeclock does not establish its defense as a pretext. Even in the absence of published rules, Respondent could reasonably expect that employees would not manipulate timecards so that they were paid while not at work. As stated earlier, the discharge of these employees does not violate Section 8(a)(1) if it is motivated by legitimate and substantial business reasons. The General Counsel contends that Respondent's reasons are not legitimate or substantial. However, without evidence to establish that Respondent was motivated by Aragon's protected activities, I am not going to substitute my judgment for that of Respondent. Whether the General Counsel believes that the discharges were unfair or unjustified is irrelevant. Absent evidence that Respondent was motivated by protected concerted activities, I cannot find that a violation of the Act has occurred. The Act "does not require that an employer act wisely, or even reasonably; only whether reasonable or unreasonable, that it does not act discriminatorily." *Paramount Metal & Finishing Co.*, 225 NLRB 464, 465 (1976).

The General Counsel points to the evidence that Ramos described Aragon as too much of a "hard ass" as proof that Respondent disciplined the two employees because Aragon was elected as a representative to the Heart committee. First, the investigation of the timecard incident took place prior to the election for the Heart committee. The undisputed evidence shows that Rosenberry went to the east office, made a copy of Aragon's timecard and delivered the copy to Hoffman at the main office prior to the elections held that day. Second, Arnold and Hoffman immediately followed through on this information. The very next morning, Arnold and Hoffman went and spoke with both employees. Dubry admitted that she clocked in Aragon before Aragon arrived at work but contended that Ramos had told her to do so. Aragon admitted that someone had clocked her in but denied that she had asked anyone to do so. Aragon was embarrassed and remorseful. Arnold suspended the employees and asked them to provide written statements. Arnold also obtained written statements from Ramos and Rosenberry. Ramos specifically denied Dubry's allegation that she asked or told Dubry to clock in Aragon.

Similarly, I reject the General Counsel's theory that Respondent increased the discipline from suspension to termination because Aragon was elected to the Heart committee. At the time the two employees were suspended, Hoffman and Arnold already knew that Aragon was elected as Heart committee representative for the east office. If they wished to increase the penalty because of the election they could have done so on February 15. It is more likely, that the employees were suspended while Hoffman and Arnold considered whether to discharge the employees. Hoffman decided to discharge the employees, because she believed to do otherwise would send the wrong message to other employees and because she believed she had to impose the same discipline on both employees. I give more weight to Hoffman's testimony than the General Counsel's speculation. In sum, I find that the General Counsel has not established that Respondent's discipline of Aragon and Dubry was motivated by Aragon's protected activity.

CONCLUSIONS OF LAW

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

2. The General Counsel has failed to establish that Respondent violated Section 8(a)(1) of the Act by suspending and discharging employees Dolores Aragon and Michele Dubry.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The complaint is dismissed in its entirety.

⁵All motions inconsistent with this recommended Order are denied. In the even 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.