JCR Hotel, Inc. *and* Patsy M. Wilson. Case 17–CA–20622

September 30, 2002

DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

On February 9, 2001, Administrative Law Judge Albert A. Metz issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, JCR Hotel, Inc., Jefferson County, Missouri, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified.

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

"(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this order."

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

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. Further, we note that despite the Respondent's contentions to the contrary, the judge, in fact, credited the testimony of all of the Respondent's witnesses regarding the problems they had working with Charging Party Patsy Wilson. Specifically, the judge indicated that several former and present employees credibly testified concerning Wilson's abrasive manner when dealing with her coworkers. The judge found, however, that Wilson was discharged at least in part for engaging in concerted activity, and that she would not have been discharged in the absence of that activity.

[2] We shall modify the judge's recommended order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001). Further, we shall substitute a new notice in accordance with our recent decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

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 Federal labor law and has ordered us to post and obey by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Chose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge Patsy M. Wilson or any other employee because they engage in concerted activities protected under the 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, within 14 days from the date of the Board's Order, offer Patsy M. Wilson full reinstatement to her former job or, if her job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Patsy M. Wilson whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Patsy M. Wilson, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

JCR HOTEL, INC.

Richard C. Auslander, Esq., for the General Counsel.
Anthony L. DeWitt, Esq., for the Respondent.

DECISION[1]

ALBERT A. METZ, Administrative Law Judge. The issue presented is whether the Respondent's discharge of employee Patsy M. Wilson is a violation of Section 8(a)(1) of the National Labor Relations Act (the Act).[2] On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the parties' briefs, I make the following

[1] This case was heard at Columbia, Missouri, on November 30, 2000.

[2] 29 U.S.C. § 158 (a)(1).

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Missouri corporation, operates a Ramada Inn in Jefferson City, Missouri. The 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.

II. BACKGROUND

The Respondent's inn is a large facility composed of 233 guestrooms that are located in four buildings. The Respondent employs approximately 130 employees, including 32 housekeeping employees.

Patsy M. Wilson started work for the Respondent on October 28, 1997. She was terminated from employment on November 2, 1999. Teresa Riley, the Respondent's general manager, testified that over the years she had received several employee complaints about Wilson. These complaints centered on Wilson's abrasive manner when dealing with fellow workers. Several former and present employees credibly testified about their knowledge of friction between Wilson and themselves or other employees. Riley testified that because of this discord, Wilson was transferred to different jobs. Wilson started her employment as the catering manager. Riley then moved her to the night desk manager position. Wilson was finally transferred to a housekeeping inspector's job in September 1999. In this position she was to insure that housekeepers performed their duties as directed.

The Government alleges that Wilson's November 2 discharge resulted, at least in part, because the Respondent believed that Wilson had concertedly encouraged employees to walk out of work in protest of working conditions. The Respondent asserts that Wilson's employment was only terminated because she could not work well with others. The Respondent denies that Wilson ever engaged in concerted protected activity, and, even if she did, that was not the reason for her discharge.

III. WILSON'S REMARKS CONCERNING A WALKOUT

It was a practice of the Respondent that employees could obtain a free meal when at work. On October 26, 1999, when several housekeeping employees went to get their meals they were told that none were available that day. They were disgruntled by this turn of events and discussed the matter after returning to their breakroom. Wilson was present in the breakroom for this discussion. Employee Norma Augustine testified that she also was in the room and recalled fellow worker James Whittler say that the Respondent would pay attention to the employees when they all walked out or sat down. Augustine recalled that Wilson then spoke and said, "Yes, we ought to just walk out one day when there is a full house."

Wilson testified that she did say as a followup to Whittler's comment, "On the full house day like when the Elks [club] were there." Testimony established that the Elks organization booked the entire inn once a year for a meeting. This organization had such a meeting approximately a month prior to the October 26 discussion in the housekeeping breakroom. According to Wilson she only made the statement as a flippant remark and was not serious about organizing a walkout of employees. Wilson and the other employees soon left the breakroom and returned to their duties.

Wilson continued working from Tuesday, October 26, until her days off of Saturday, October 30, through Monday, November 1. She returned to work on Tuesday, November 2, at which time she was discharged.

IV. WILSON'S DISCHARGE

Riley and other witnesses testified that there was dissatisfaction among some housekeeping employees about working with Wilson. Riley and Supervisor Teresa Atkisson, executive director of housekeeping, met with Wilson on September 24 to discuss the situation with Wilson. Riley testified that at this meeting she told Wilson to improve her relationship with the employees. I credit this testimony that, in sum, showed that several of Respondent's employees did not like working with Wilson and that this was a longstanding situation.

Atkisson testified that on approximately October 28 she overheard employees discussing that Wilson was organizing a walkout of employees. Atkisson heard the same thing "indirectly through a separate employee."

Atkisson testified that she had been concerned about Wilson's interpersonal relations with employees. Specifically she stated that some housekeepers had come to her and reported that Wilson was picking on them or was going to extremes as to what she expected of them. In late October, Atkisson telephoned Riley (who was off work for the day) and complained about Wilson. The two women arranged to meet off the Respondent's premises to discuss the matter. Riley recalled that during their telephone conversation Atkisson was upset and told her that "Patsy (Wilson) was going off about the hotel and the management."

Riley and Atkisson met at a restaurant and the latter outlined the problems she was having with Wilson. Atkisson testified that during this conversation she also disclosed to Riley, "that rumor had it that Patsy (Wilson) was trying to get some of the people to walk out on a full house day." Riley's testimony confirmed that during this meeting she learned from Atkisson that it was rumored Wilson was trying to get employees to walk out during a busy business period.

Riley testified about problems she had with Wilson throughout her employment that had caused her to shift Wilson to different jobs. Riley stated she was concerned that there was no where else to place Wilson and the problems continued to occur. Riley related that, based on this background and her conversation with Atkisson about ongoing problems with Wilson, she decided to discharge Wilson. Riley called the owners of the Respondent and related her decision to discharge Wilson. The owners concurred in her decision. Riley denied that the report of Wilson trying to encourage employees to walk out had anything to do with her discharge decision.

Wilson testified that she was working on the morning of November 2 when Riley approached and asked that she step into one of the hotel rooms. The two women went inside a room and Wilson recalled that Riley said, "Patsy we can't work together anymore. And I said what have I done now Teresa, and she said you just can't work with people. And I said Teresa I want

to know what I have done, and she said Patsy you just can't work with people. And I said but Teresa I want to know what I have done. And I asked her several more times and she said word is you are planning a walk out with the housekeeping department."

Riley testified that:

> I don't remember the exact words that I said to Patsy, but I probably said you know I am sorry, I am going to ruin your day, but . . . we have tried and we can't continue to work together, you can no longer be employed at the Ramada Inn because you do not work well with others. . . . And I believe that yes, after I told her she could not longer work at the hotel and probably after she pushed my hot button, I said you know, rumor has it you are planning a walk out . . . .
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> And as we were getting ready to walk out the door, and probably as I was walking out the door before her I said, and rumor has it you are planning a walk out. I was disappointed in that but certainly not the reason why I fired her sir.

While the testimony of the two women is somewhat similar, I have assessed their recitations based on their comparative demeanor. I have also taken into consideration Riley's admission that she did not remember the exact words of what she said when discharging Wilson, and her prefacing her recollection with the caveat that she "probably" said what she related in her testimony. Considering all these factors, I credit Wilson's testimony as being the most accurate recounting of what was stated in the discharge conversation.

V. ANALYSIS OF WILSON'S DISCHARGE

A. Concerted Activity

Section 7 of the Act protects employees' concerted activities that are for the purpose of mutual aid or protection. Under *Myers Industries*, 268 NLRB 493, 497 (1984), employees' activities in this regard are concerted if they are "engaged in with or on the authority of other employees and are not solely by and on behalf of the individual employee." Moreover, once the Government establishes that an employee who has suffered adverse action was engaged in protected concerted activities, the employer knew of the concerted activity, and the adverse employment action was motivated by the protected concerted activity, the burden shifts to the Respondent to demonstrate that the same action would have been taken, even absent any protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399 (1983); *Electromedics, Inc.*, 299 NLRB. 928, 937 (1990), enfd. 947 F.2d 953 (10th Cir. 1991); *Presbyterian/St. Luke's Medical Center*, 723 F.2d 1468, 1478–1479 (10th Cir. 1983). The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). "A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

The Respondent argues that Wilson was not engaged in protected concerted activity as contemplated by the Act when she made her remarks to fellow employees concerning a walkout. The Respondent urges that Wilson made her remarks as a jest and that there was no serious plan or effort to engage in a walkout. Additionally, the Respondent asserts that the Respondent did not believe that the employees would walk out.

Wilson's remarks about a walk out when the hotel was busy were made to fellow employees during a discussion of their dissatisfaction about working conditions. In particular the dissatisfaction centered upon the Respondent's failure to provide them with the customary daily meal. Wilson's statement was made in agreement with fellow employee Whittler's remark that the Respondent would pay attention to the employees when they all walked out or sat down. I find this discussion between employees about such working conditions and what they could do about the matter, was protected concerted activity. I find that Wilson's statement was protected concerted activity under the Act. *Salisbury Hotel*, 283 NLRB 685, 686–687 (1987).

The record shows that the Respondent took Wilson's remarks seriously. Atkisson testified that the information she heard was that Wilson was organizing a walkout of employees. This is what she conveyed to Riley prior to Wilson's discharge. Riley told Wilson at the time of the discharge that she understood Wilson was planning a walk out with the housekeeping department. Riley testified that she was "disappointed" about learning of Wilson's walkout discussion. I find that Riley was concerned about Wilson's alleged plan of action for housekeeping employees. It is clear that Riley did not know the extent to which Wilson was serious about carrying out such plans. I find that Riley did take the threat of the walk out as an important matter and that she believed Wilson was engaged in concerted activity. *Daniel Construction Co.*, 277 NLRB 795 fn. 4 (1985).

B. Motivation for the Discharge

The Respondent argues that Wilson was only discharged because she could not get along with other employees. The record supports the conclusion that Wilson did have many problems in dealing with other employees. The Respondent had tolerated this situation since the start of Wilson's employment in 1997. The problems continued into her new position as housekeeping inspector. The end of the Respondent's tolerance coincided with Atkisson's report that the problem was continuing. It also coincided with the Respondent receiving reports that Wilson was trying to organize a walkout of the housekeepers. The record shows that Atkisson was upset because Wilson "was going off about the hotel and the management." The credited testimony establishes that Riley, when pressed by Wilson for the reasons she was being fired stated, "[W]ord is you are planning a walk out with the housekeeping department." Riley conceded she was "disappointed" about learning of the walkout talk and that this was a "hot button" issue for her. I find that the Government has shown that Wilson was discharged, at least in part, because of her protected concerted activity of discussing a possible walkout of employees. I further find, that in light of the statements made by Riley to Wilson as to the reason Wilson

was being fired, that the Respondent has failed to establish that she would have been discharged regardless of her protected concerted activity. I, therefore, find that the Respondent did violate Section 8(a)(1) of the Act when it discharged Patsy M. Wilson on November 2, 1999.

VI. RESPONDENT'S MOTION TO STRIKE

The Government's complaint also alleged that Riley unlawfully interrogated Wilson concerning her protected concerted activities. I granted the Respondent's motion to dismiss this allegation at the conclusion of the Government's case in chief. The basis for the ruling was that no evidence had been produced to sustain this allegation. The Respondent filed a posthearing motion to strike a part of the Government's brief that made reference to the alleged interrogation, citing the judge's dismissal as grounds in support of the motion.

The Government's brief did contain a reference to Riley's testimony that she had asked Wilson if it were true that she was discussing a walkout with other employees. This testimony came in during the Respondent's case. The General Counsel's brief noted that this admission was being cited only for the purpose of showing animus on the part of Riley concerning Wilson's walkout talk. I find that the Government's argument in this limited regard was proper and, therefore, I deny the Respondent's motion to strike.

CONCLUSIONS OF LAW

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

2. The Respondent violated Section 8(a)(1) of the Act by the November 2, 1999 discharge of its employee Patsy M. Wilson.

3. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

4. Respondent has not violated the Act except as herein specified.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, JCR Hotel, Inc., Jefferson City, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging Patsy M. Wilson, or any other employee, because they engage in protected concerted activity.

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

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

(a) Within 14 days from the date of this Order, offer Patsy M. Wilson full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Patsy M. Wilson whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, computed on a quarterly basis, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Patsy M. Wilson, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against her in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order. *Bryant & Stratton Business Institute*, 327 NLRB 1135 (1999).

(e) Within 14 days after service by the Region, post at its facility in Jefferson City, Missouri, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 17, 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 2, 1999, *Excel Container, Inc.*, 325 NLRB 17 (1997).

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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

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[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommend 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.

[4] 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."