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Vrable III, Inc., d/b/a Scenic Hills Nursing Center *and* District 1199, Health Care and Social Service Union. Cases 9–CA–44146, 9–CA–44296, 9–CA–44297, 9–CA–44320, 9–CA–44348, and 9–CA–44349

February 27, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On November 14, 2008, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The General Counsel filed exceptions and a supporting brief.

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

The complaint allegations of misconduct apart from the discharge of employee Amy Rupe were either resolved by settlement between the parties or dismissed by the judge without exception. Solely for the reasons below, we adopt the judge's dismissal of the allegation that the Respondent violated Section 8(a)(1), (3), and (4) by discharging Rupe.[3]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. February 27, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Naima R. Clarke, Esq., for the General Counsel.
Scott Salsbury, Esq., of Hudson, Ohio, and *James Muckle, Esq.,* of Columbus, Ohio, for the Respondent Employer.
Carol K. Walters, of Langsville, Ohio, for the Charging Party.

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DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me on September 9–11, 2008,[1] in Gallipolis, Ohio, pursuant to a consolidated complaint and notice of hearing in the subject case (complaint) issued on July 21, by the Regional Director for Region 9 of the National Labor Relations Board (the Board). The underlying charges and amended charges were filed on various dates in 2008 by District 1199,

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[2] 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.

[3] We find that under *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Respondent carried its rebuttal burden of establishing that it would have terminated Rupe for patient abuse, even absent her protected activities. (Because the Respondent failed to except to the judge's finding that the General Counsel carried his initial burden under *Wright Line* of showing that protected conduct was a motivating factor in the decision to discharge Rupe, Chairman Liebman would treat that finding as conclusive.) See, e.g., *Inn at Fox Hollow*, 352 NLRB 1072, 1075 fn. 12 (2008).

Member Schaumber finds that the General Counsel's exceptions placed the judge's *Wright Line* analysis in issue. He disagrees with the judge's conclusion that the General Counsel made a "strong showing that the Respondent was motivated by protected concerted or antiunion considerations in effectuating" Rupe's discharge. The judge found that Diane Harless, the Respondent's director of nursing, made the decision to discharge Rupe and that Harless was unaware of Rupe's union activities. It is axiomatic that an employer's decision to discharge an employee cannot be found to have been motivated by the employee's union activities if the employer did not know of those activities. *Amber Foods, Inc.*, 338 NLRB 712, 714 (2002), citing *Tomatek, Inc.*, 333 NLRB 1350, 1355 (2001). See also *Mission Foods*, 350 NLRB 336, 338 (2007). Accordingly, absent that critical element of knowledge, Member Schaumber would find that the General Counsel failed to satisfy her initial *Wright Line* burden. Id. However, Member Schaumber agrees with the Chairman that even assuming arguendo that the General Counsel satisfied her threshold burden under *Wright Line*, the Respondent carried its rebuttal burden of showing that it would have discharged Rupe even in the absence of her union activities.

The Respondent demonstrated that state law mandates the investigation of allegations of patient abuse, that its own policies also dictate such an investigation, that corroborated instances of patient abuse have consistently resulted in termination of participating employees, and that it acted consistent with its policies in investigating and disciplining Rupe. We further find that the General Counsel failed to present sufficient evidence to establish that the Respondent's asserted basis for disciplining Rupe was a mere pretext for discrimination.

Because Rupe was discharged for committing patient abuse rather than only failing to report abuse by another employee, it was, at most, harmless error for the judge to attempt to limit the General Counsel's effort to show that the Respondent's policy and practice did not mandate discharge for failing to report another employee's abusive conduct.

[1] All dates are in 2008 unless otherwise indicated.

Health Care and Social Service Union, SEIU (the Charging Party or Union) alleging that Vrable III, Inc. d/b/a Scenic Hills Nursing Center (the Respondent or Employer) has engaged in certain violations of Section 8(a)(1), (3), (4), and (5) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying that it had committed any violations of the Act.

ISSUES

The complaint alleges that in March 2008, the Respondent told employees that they would have already received a wage increase if there was no Union in violation of Section 8(a)(1) of the Act, terminated employee Joanne Haskins in violation of Section 8(a)(1) and (3) of the Act, suspended and terminated employees Lori Gravely and Amy Rupe in violation of Section 8(a)(1), (3), and (4) of the Act, and engaged in a number of unilateral changes, bypassed the Union and failed and refused to bargain collectively in good faith with the Union in violation of Section 8(a)(1) and (5) of the Act.[2]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Employer, a corporation with a place of business in Bidwell, Ohio, is engaged in operating a nursing home and providing in-patient medical care. The Employer, during the past calendar year in conducting its operations, derived gross revenues in excess of $100,000 and purchased and received goods valued in excess of $50,000 directly from points outside the State of Ohio. 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 and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent purchased the facility in November 2006 and since about April 14, 2007, the Union has been the designated exclusive collective-bargaining representative of the unit comprised of all full and part-time employees, including all nursing assistants, certified nursing assistants, dietary employees, including cooks, cook assistants, and dietary assistants, laundry employees, housekeeping employees, activity assistants, and restorative assistants. Respondent recognized the Union as the representative of the employees in the unit by its execution of a settlement agreement approved by the Regional Director on June 11, 2007. While the parties have participated in negotiations in an effort to reach their initial collective-bargaining agreement, they have been unsuccessful to date and no agreement has been reached.

Bill Potter held the position of executive director of Respondent from December 17, 2007, to June 13, and Diana Harless continues to serve as the director of nursing having been hired on May 29, 2007. Carol Walters holds the position of organizer on behalf of the Union and has serviced the employees in the unit with various owners since 1996. Employees Gravely and Rupe held the positions of state tested nursing assistants and provided care for residents at the nursing center until their terminations.

B. The 8(a)(1), (3), and (4) Allegations

The General Counsel alleges in paragraph 6 of the complaint that the Respondent suspended employees Gravely and Rupe on April 5, and then terminated them on April 7, because of their support for the Union or because the Union filed an unfair labor practice charge in Case 9–CA–44296 for which they gave testimony to the Board.

1. The facts

On February 5, approximately 13 bargaining unit employees including Gravely and Rupe participated in a candlelight vigil to support the Union's contract demands (GC Exh. 2). During the course of the vigil, they saw Potter standing in the dining room window and the administration headquarters window looking out and observing those employees that participated in the vigil.

On March 20, Gravely and Rupe saw Potter in the facility and inquired when they were going to get their wage increases. Potter replied, "that they would have already received their wage increases if there was no union or if the employees had got rid of the Union."

On April 1, approximately 50 bargaining unit employees including Gravely and Rupe signed a support petition on behalf of the Union expressing their desires to be represented by the Charging Party (GC Exh. 2). That petition was addressed and mailed to Potter and was received at the Respondent on April 2 (GC Exh. 3).

On April 5, an incident occurred around 1:45 p.m. in which two nursing home residents (referred to as KG and SW for privacy considerations) alleged that Gravely and Rupe engaged in patient abuse against KG. Both Gravely and Rupe worked the daytime shift that day which ended at 2 p.m. Based on instructions from Harless, Licensed Practical Nurse (LPN) Jimmy Skidmore telephoned Gravely at home and apprised her that she would be suspended due to the patient abuse allegations along with her coworker Rupe. Skidmore informed Gravely not to report to work the next day (Sunday, April 6). Rupe learned of her suspension when she received a telephone call from Gravely around 3 p.m. that day. Rupe immediately telephoned LPN Theresa Taylor who confirmed that the allega-

[2] After the opening of the hearing on September 9, the undersigned approved two nonboard settlements between the Charging Party and the Respondent over the objection of the General Counsel. The first settlement resolved the independent 8(a)(1) allegation alleged in par. 5 of the complaint and the 8(a)(1) and (5) allegations alleged in paras. 10, 11(b), 12, and 13 of the complaint (ALJ Exh. 1). The second nonboard settlement resolved the 8(a)(1) and (3) allegation in par. 6(a) of the complaint involving the termination of employee Joanne Haskins (ALJ Exh. 3). Additionally, the undersigned approved an informal board settlement agreement with a Notice to Employees executed by the Charging Party and the Respondent that resolved para. 11(a) of the complaint over the objection of the General Counsel (ALJ Exh. 2). Accordingly, this decision will only address the 8(a)(1), (3), and (4) allegations alleged in paras. 6(b), (c), and (e) and paras. 15 and 16 of the complaint concerning the terminations of Gravely and Rupe.

tions were made and that she was suspended effective immediately and not to report for work on Sunday. Both Gravely and Rupe contacted Harless who requested that both individuals come to the facility on Monday morning around 8 a.m. for separate meetings to discuss the allegations.

Gravely and Rupe reported to the facility on April 7, around 8 a.m. and met independently with Harless and Potter in his office. Union Representative Sharon West participated in both meetings on behalf of the employees. During the course of each meeting, Harless informed Gravely and Rupe that they were being suspended for verbal abuse, not turning the patient over in an appropriate manner, and for cursing at KG. Both Gravely and Rupe, who vehemently denied the accusations, were permitted to prepare and submit statements to Harless that summarized their position regarding what occurred on April 5, while they were in the residents room responding to their call light and trying to address the leakage in KG's feeding tube (GC Exhs. 5 and 7).

Both employees left the facility at the conclusion of their meetings, and around 11 a.m. received separate telephone calls from Harless to return to the facility around 1 p.m. Both employees informed Harless that they had pre-arranged appointments at that time but would come to the facility immediately after they completed them. Neither Gravely or Rupe informed Harless that the nature of their appointments involved meeting with a Board agent to give an affidavit in support of the Union's unfair labor practice charge in Case 9–CA–44296 nor did Harless inquire about it.

When both Gravely and Rupe returned to the facility on April 7, Harless informed them in the presence of Union Representative West that the investigation had been completed and based on the patient abuse allegations being substantiated, each employee was being terminated. Both Gravely and Rupe refused to sign the disciplinary action form confirming their terminations (GC Exhs. 6 and 8).

Gravely and Rupe had cared for KG and SW for approximately 7–8 months before the patient abuse allegations and neither reported any problems in working with them or any complaints raised by the Respondent.

2. Discussion

In *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 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 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 Management Corp.,* 462 U.S. 393, 399–403 (1983). In *Manno Electric,* 321 NLRB 278 fn. 12 (1996), the Board restated the test as follows. The General Counsel has the burden to persuade that antiunion sentiment 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 employee had not engaged in the protected activity.

The General Counsel asserts that Gravely and Rupe engaged in protected activity when they participated in the candlelight vigil and were observed by Potter, were informed by Potter that they would have received there wage increases already if there was no Union or if the employees got rid of the Union, and because they signed a petition addressed to Potter supporting the Union. Additionally, Gravely and Rupe along with other employees openly wore ribbons at work to express support for the Union.

While I find that the General Counsel, based on the above incidents, has made a strong showing that the Respondent was motivated by protected concerted activity or antiunion considerations in effectuating the terminations of Gravely and Rupe, I conclude that the Employer would have taken the same action against both employees even in the absence of their protected activities for the following reasons.

First, it was Harless rather then Potter who made the decision to suspend Gravely and Rupe on April 5, and after conducting the mandatory investigation into the patient abuse allegations independently made the decision to terminate both employees. Potter's role in the matter was essentially ministerial. He reviewed Harless's recommendation and agreed with its content. The evidence shows that Potter did not discuss the matter with the residents nor did he speak with staff members before they independently interviewed the residents who filed the patient abuse allegations. Likewise, Potter did not ask questions or participate orally in the two separate meetings held with Gravely and Rupe that took place on April 7. Moreover, there is no evidence on the record that Potter informed Harless that he received the unfair labor practice charge on or before April 5, that alleged he coerced employees within the meaning of the Act. In fact, Harless's unrebutted testimony confirms that she never saw a copy of the unfair labor practice charge nor did she discuss it with Potter.

Second, while Gravely and Rupe were union members neither of them was particularly active, held union office/steward positions or participated in collective-bargaining negotiations with Potter or other Employer representatives.

Third, no member of the Respondent including Potter ever interrogated Gravely or Rupe about their union activities or disciplined any employee because of their participation in the candlelight vigil or signing the support petition. Likewise, the record shows that neither Gravely or Rupe collected signatures for the support petition. While the support petition was received by a secretary of Respondent on April 2 (GC Exh. 3), the General Counsel did not conclusively establish that Potter saw or reviewed it prior to April 5.

Fourth, the investigation conducted by the Respondent into the patient abuse allegation is mandated by the Ohio Department of Health and Respondents handbook provisions (R. Exh. 2 and 3). In accordance with these requirements, staff members accused of patient abuse must be suspended and removed from the facility to prevent further contact with the residents. Additionally, if the allegations are substantiated, the employees accused of patient abuse must be terminated. Further support

for this proposition was provided by the testimony of Thelma Cohagen, an inspector for the Ohio Department of Health, who visited the facility on May 28, and certified that the Respondent adhered to all State and Federal requirements in conducting the patient abuse investigation. In fact, no citation was issued since the Respondent properly followed all mandated investigatory procedures.

With respect to the General Counsel's alternative position that Gravely and Rupe were terminated because they gave testimony to the Board in Case 9–CA–44296, I reject this argument for the following reasons.

First and foremost, both Gravely and Rupe testified that they had no knowledge that either Harless or Potter knew they met with a Board agent on April 7, to give an affidavit in support of the unfair labor practice charge. Indeed, when Harless telephoned both Gravely and Rupe to return to the facility around 11 a.m. on April 7, they both informed her that they had a prior commitment. Neither Gravely or Rupe informed Harless about the nature of the appointment nor did Harless inquire about the matter. Rather, Harless requested both employees to report to the facility upon completion of there appointment. Likewise, I find that the General Counsel did not conclusively establish that Potter received the unfair labor practice charge in the mail or reviewed it on or before April 5, the date both employees were suspended. Moreover, Harless credibly testified that she never saw a copy of the unfair labor practice charge since it was addressed to Potter (GC Exh. 1 (e)), and she never discussed it with him. Lastly, as discussed above, Potter had no active roll in suspending both employees or in the underlying patient abuse investigation that ultimately led to Gravely and Rupe's terminations.

C. Disparate Treatment

In essence, the General Counsel argues that Gravely and Rupe's version of the facts should be credited rather then Harless's determination to rely on the independent interviews conducted by four different staff members, the witness account,[3] and her own independent interview of both residents.[4]

The General Counsel further argues that a ruling that I made concerning its subpoena duces tecum requesting disciplinary records for patient abuse allegations for the year 2007 denied it due process and an opportunity to prove the violation. In this regard, due primarily to the terminations occurring in April 2008, and the tenure of Potter for the limited period between December 2007 and June 2008, I determined to limit any disciplinary action information for patient abuse allegations to the year 2008.[5] Despite this ruling, the Respondent at my request, voluntarily provided numerous documents that it found in its records that addressed patient abuse investigations for the years 2006 and 2007, including documentation for employee Patty Wittman who the General Counsel alleged received more favorable treatment due to her having filed a decertification petition (GC Exh. 27).[6]

While the General Counsel is critical of the Respondent for not calling Potter as a witness, the facts establish that the General Counsel alleged Potter as a supervisor/agent and could have called Potter as an adverse witness but neglected to do so. Moreover, the General Counsel admits that it did serve Potter with a subpoena duces tecum at the facility but made no attempt to inquire about his whereabouts or enforce it when it arrived after he left there employ, an action it could have taken if it deemed his presence was critical to their case in chief.

The General Counsel's argument in posthearing brief that the Respondent failed to interview all employees who worked during the accused persons shift is also unavailing. To have interviewed LPNs Skidmore and Taylor who did not personally observe the patient abuse and only communicated by telephone with Gravely and Rupe to inform them that they were being suspended and should not report to work on Sunday, April 6, was cumulative and not critical to the underlying issue of whether patient abuse occurred. Likewise, arguing that the Respondent did not call as witnesses other employees who had interviewed the residents and had memorialized the results of those discussions does not enhance their case since the General Counsel made no attempt to subpoena these individuals.

In summary, the General Counsel contends that the patient abuse investigation was undertaken to mask the true reason for Gravely and Rupe's termination. I reject this argument as the General Counsel did not conclusively establish that the patient abuse investigation departed from past practice or that Harless' decision to rely on corroborating evidence from neutral staff members and a witness account was pretextual.[7]

[3] Rupe admitted that she did not discern that either KG or SW, the two residents that lodged the patient abuse allegations, was impaired in any way.

[4] I note Harless' unrebutted and credible testimony that she initiated the investigation and directed the four staff members to interview each resident separately. Moreover, it was Harless rather then Potter who prepared and coordinated all of the paperwork including the staff members interview summaries. She then forwarded the documents to the Ohio Department of Health (R. Exh. 1). Similarly, Tracy Green the Respondent's director of clinical services, testified that if an employee is found to have committed patient abuse, the penalty is termination without exception. The Respondent's practice is to terminate if there are two or more substantiating statements. In the subject case, there was a witness statement in addition to four separate staff interview reports that confirmed consistent stories regarding the patient abuse allegations.

[5] The General Counsel principally relies on the knowledge of Potter about Gravely and Rupe's union activities and his singular action in effectuating their subsequent suspensions and terminations.

[6] I have carefully reviewed both General Counsel and Respondent exhibits that reflect patient abuse allegations that occurred at the facility in 2007 and 2008. Each exhibit conclusively establishes that the Respondent strictly followed Ohio Department of Health regulations and its own internal guidelines when dealing with such cases. Indeed, I specifically note that in two separate allegations of patent abuse occurring in 2007 and 2008 in which terminations resulted, the Respondent followed the identical procedures as in the subject case (GC Exh. 10 and R. Exh. 9). Contrary to the General Counsel, I find no disparate or preferential treatment was granted to Wittman. Indeed, with respect to the allegations lodged against her, the resident gave inconsistent testimony and there was no corroborating witness. In the subject case, both of these aspects are present.

[7] See, e.g., *Yuker Construction Co.,* 335 NLRB 1072 (2001) (discharge of employee based on mistaken belief does not constitute unfair labor practice, as employer may discharge an employee for any reason, whether or not it is just, so long as it is not for protected activity).

CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not engage in violations of Section 8(a)(1), (3), or (4) of the Act when it suspended and then terminated employees Lori Gravely and Amy Rupe.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. November 14, 2008

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.