Operating Engineers Local Union No. 3 of the International Union of Operating Engineers, AFL–CIO *and* Katherine Bellinger. Case 37–CA–4224

November 7, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On July 22, 1997, Administrative Law Judge Michael D. Stevenson issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Operating Engineers Local Union No. 3 of the International Union of Operating Engineers, AFL–CIO, Honolulu, Hawaii, and Alameda, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees in order to discourage their protected concerted activities and union activities.

(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 Katherine Bellinger 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 Katherine Bellinger whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the judge's decision, as amended.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Katherine Bellinger, 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 necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Subregion, post at its Honolulu, Hawaii facility, copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Officer-in-Charge for Subregion 37, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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 no-

[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.

We decline the judge's invitation, set forth in fn. 2 of his decision, to consider a matter that was not the subject of a charge or a complaint and was not litigated at the hearing.

We note that the denial of a pay raise for Katherine Bellinger was neither alleged and argued by the General Counsel nor fully litigated by the parties as a separate violation of the Act. Therefore, we shall amend the judge's remedy by deleting the reference to a ''missed pay raise'' for Bellinger, and we shall modify his recommended Order by deleting par. 1(a) and the reference to a ''22.8% pay raise'' in par. 2(b). In addition, in affirming the judge's finding that the Respondent had no policy or practice requiring the termination of Bellinger, we do not rely on the fact that Bellinger was denied the January 1, 1995 pay raise received by the Respondent's other clerical employees.

In affirming the judge's finding that Bellinger's activity in issue here was concerted within the meaning of the Act, Chairman Gould declines to rely on, and questions the continuing vitality of, *Meyers Industries*, 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), reaffd. 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988), cited in *Vought Corp*., 273 NLRB 1290, 1294 (1984), cited by the judge. He also notes that he separately concurred in *KNTV, Inc*., 319 NLRB 447, 454 (1995), also cited by the judge.

[2] In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(3) and (1) of the Act by discharging Katherine Bellinger, we affirm his finding that Bellinger was not a statutory supervisor. We disavow any reliance, however, on the judge's assertion that the Respondent's belated claim that Bellinger was a supervisor provides a basis to infer a shifting explanation for the discharge and thus that pretextual reasons are being proffered for the discharge. Bellinger's asserted supervisory status was never proffered as the reason for the discharge, but it was merely raised, for the first time during the hearing, as an independent basis for asserting that no statutory violation occurred.

[3] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996). We shall also correct the judge's inadvertent failure to include ''protected concerted activities'' in par. 1(b) of his recommended Order.

[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.''

tices are not altered, defaced, or covered by any other material.

(f) Within 21 days after service by the Subregion, file with the Officer-in-Charge a sworn certification of a responsible official on a form provided by the Subregion attesting to the steps that the Respondent has taken to comply.

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.

WE WILL NOT discharge employees in order to discourage their protected concerted activities and union activities.

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 Katherine Bellinger 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.

WE WILL make Katherine Bellinger 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 Katherine Bellinger, 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.

OPERATING ENGINEERS LOCAL UNION NO. 3 OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL–CIO

Jill M. Hawken and *Randy M. Girer, Esqs*., for the General Counsel.

Lawrence B. Miller, of Alameda, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at Honolulu, Hawaii, on February 25 and 26, 1997,[1] pursuant to a complaint issued by the Regional Director for the National Labor Relations Board for Region 20 on January 23, 1997, and which is based upon a charge filed by Katherine Bellinger (Bellinger) on September 20. The complaint alleges that Operating Engineers Local Union No. 3 of the International Union of Operating Engineers, AFL–CIO (Respondent) has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

Issues[2]

I. Whether Respondent proved that for all times material to this case, Bellinger was a statutory supervisor. And if not,

II. Whether Respondent threatened its employee, Bellinger, with termination in retaliation for her protected concerted activities.

III. Whether Respondent terminated Bellinger because Bellinger joined and/or assisted Office and Professional Employees International Union, Local No. 3, AFL–CIO (OPEIU) and engaged in concerted activities to discourage employees from engaging in these activities.

IV. If Respondent did either or both of the acts described in II and III above, whether it violated the Act.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and to cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent.

Upon the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits that it is an unincorporated association engaged in the business of representing employees in bargaining with employers and has places of business located in Honolulu, Hawaii, and Alameda, California. Respondent further admits that during the calendar year ending December 31, in conducting its operations described above, it collected and received dues and initiation fees in excess of $25,000 and remitted, from its Honolulu, Hawaii facility to its Alameda, California office dues and initiation fees in excess of $25,000. Although Respondent denied Board jurisdiction in its answer, it admitted at hearing (Tr. 10), and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] All dates herein refer to 1995 unless otherwise indicated.

[2] During the course of the hearing, evidence established that Respondent maintains a mandatory policy requiring all of its employees, including even house counsel, to become a full dues-paying member as a condition of employment. In some cases, Respondent's employees are then required to join a second union, such as OPEIU, which then represents Respondent's employees in a collective-bargaining relationship. Respondent's mandatory policy raises substantial issues. See, e.g., *Retail Store Employees Local 428*, 163 NLRB 431 (1967); *NLRB v. General Motors*, 373 U.S. 734 (1963); and *Communication Workers of America v. Beck*, 487 U.S. 735 (1988). While I express no opinion on any issue implicated by Respondent's policy, I urge the Board to consider sua sponte remanding this case for litigation of Respondent's policy, or such other action as the Board deems proper.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that Office and Professional Employees International Union, Local No. 3, AFL–CIO (OPEIU) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Overview*

This case is about a Union in its role as an employer and its treatment of its employee, Bellinger. When a labor organization takes on the role of an employer, the Act applies to its operations just as it would to any other employer. *Office Employees Local 11 (Oregon Teamsters) v. NLRB*, 353 U.S. 313 (1975); *Louisiana Council No. 17, AFSCME, AFL–CIO*, 250 NLRB 880 (1980). To justify its termination of Bellinger on April 14, Respondent contends that as office manager, Bellinger was a statutory supervisor and not covered by the Act. Alternatively, Respondent argues that based on custom and practice, Bellinger was terminated because her boss, the District Representative, was terminated on the same date. Finally, Respondent contends that Bellinger was terminated because she performed poorly in her job. The General Counsel argues that all reasons given to support Bellinger's termination are pretextual and that the real reason Bellinger was terminated was because of her protected concerted activities. I will sort out these opposing positions below, but for now its suffices to say that a union, like all other employers, is not prevented from discharging its employees for activities which are not protected under the Act. *Butchers Union Local 115*, 209 NLRB 806, 810–811 (1974).

B. *Facts*

1. Stipulation of facts

Prior to hearing, the parties agreed on a written Stipulations of Facts which reads as follows:

> 1. Operating Engineers Local Union No. 3 (herein referred to as Respondent) is composed of 14 districts. The districts are located in Northern California, Northern Nevada, Utah, in Hawaii and in the Mid-Pacific Islands. Hawaii is District No. 17.
>
> 2. Respondent's headquarters is located in Alameda, California.
>
> 3. Respondent, a labor organization, has approximately 35,000 members in total, and approximately 3,000 members in Hawaii.
>
> 4. Respondent is headed by the Business Manager. Reporting to the Business Manager are the President, a Vice President, a Recording Secretary, a Treasurer, and a Financial Secretary. Each of these positions is an elected position. The Business Manager's and the President's offices are located at headquarters in Alameda.
>
> 5. Each of the 14 districts is headed by a district representative who is appointed by the Business Manager.
>
> 6. All employees of Respondent are hired by the Business Manager. The district representatives make effective recommendations regarding hiring decisions in their respective districts.
>
> 7. The clerical employees in all of Respondent's districts, except the clerical employees in District 17 (Hawaii), are represented for purposes of collective-bargaining by Office & Professional Employees International Union (OPEIU).
>
> 8. Respondent has never had a written policy or rule requiring that when a district representative is terminated, his office manager/secretary is also terminated. In all districts except District 17 (Hawaii), there has been no policy or practice of terminating or replacing the office manager/secretary to the district representative when that district representative is terminated or replaced.
>
> 9. There have been four consecutive district representatives for District 17 (Hawaii) since the late 1970s: Harold Lewis; Wally Lean (1982–1992); Joe Trehern (1992–1995); Adrien Keahokolole (1995–present).
>
> 10. In 1982, when Harold Lewis lost the election for Financial Secretary and was removed from his position as a district representative, his office manager/secretary, Amy Fujimoto, was terminated by Respondent because she was not compatible with the incoming district representative.
>
> 11. In 1982, when T.J. Stapleton replaced Dale Marr as Business Manager, Marr's secretary, Mary Glen, was removed and replaced.
>
> 12. In 1992, when Wally Lean resigned, his office manager/secretary Valerie Madamba resigned from her position.
>
> 13. In 1992, around the time that Wally Lean resigned from his position as district representative, the entire Honolulu office (including business representatives and clerical employees) was terminated and/or resigned.
>
> 14. Amy Fujimoto and Valerie Madamba were the only office manager/secretaries to the district representative who were separated from employment in District 17 (Hawaii) from 1982 through January 1, 1993.
>
> 15. Since at least 1992, Respondent has recognized for purposes of collective bargaining Office & Professional Employees International Union (OPEIU) as the exclusive representative of its clerical employees at its headquarters in Alameda, California and at each of Respondent's districts, except District 17 (Hawaii).
>
> 16. In 1994, OPEIU Local 3, AFL–CIO and Respondent negotiated a collective-bargaining agreement covering clerical in Respondent's Alameda, California office giving the Alameda clericals a wage increase of approximately 2.8% effective October 31, 1994.
>
> 17. Respondent's District 17 (Hawaii) clerical, except Katherine Bellinger, received a wage increase of approximately 22.8% on about January 1, 1995.
>
> 18. Since at least 1992, Respondent has not recognized any labor organization as the collective bargaining representative for its clerical employees in District 17 (Hawaii).
>
> 19. General Counsel Exhibit 3 is a true and correct copy of the collective-bargaining agreement effective from November 1, 1994 through December 31, 1997 between OPEIU Local 3 and Respondent covering Respondent's clericals in Alameda, Fairfield, Eureka, and San Francisco.

20. General Counsel Exhibits 4, 5, 6 and 7 are true and correct copies of the position statements and documents proffered by Respondent to Subregion 37 during the investigation of Case 37–CA–4224, and dated October 23, 1995, November 7, 1995, February 13, 1996, and February 28, 1996, respectively.

The preceding stipulations are hereby agreed to:

/s/ Lawrence B. Miller

Dated: 2/25/97

Lawrence B. Miller, Esq.
House Counsel
Operating Engineers Local Union No. 3

/s/ Jill M. Hawken

Dated: 2/25/97

Jill M. Hawken, Esq.
Counsel for General Counsel

(G.C. Ex. 2)[3]

2. Background on Bellinger

Before Bellinger was hired as a temporary replacement for then Office Manager Diane Wong, her husband was either a current or former member of the Hawaii State House of Representatives with ties to Hawaii labor in general and to Respondent in particular. Upon leaving the state legislature, Bellinger's husband became a lobbyist continuing his activities on issues dear to labor. At some point in his career, Bellinger's husband became acquainted with Joseph Trehern, General Counsel witness and former Respondent district representative for Hawaii. However, it was primarily through Trehern's wife, that Trehern became acquainted with Bellinger. Both women worked together as staff clericals in the Hawaii legislature. At some point, Bellinger left that job and happened to be seeking other work when Trehern needed a 2-week replacement for Office Manager Diane Wong, who was being trained in California. Neither Wong nor Trehern's wife testified but it appears that the latter told her husband that Bellinger had performed good work for the Hawaii legislature. In March 1993, Trehern contacted Bellinger to see if she would be interested in a temporary assignment. Bellinger accepted the offer but after Wong returned and worked briefly, Trehern expressed dissatisfaction with Wong's work. He then rehired Bellinger on a permanent basis for the position of office manager. Wong was offered a lower rated position but declined and quit. Bellinger worked over 2 years as office manager and there is controversy over the quality and quantity of her work, as I will detail below.

As office manager, Bellinger was one of about eight clericals who worked in the Honolulu office. Although some clericals were employed by union benefit trusts or the Joint Apprenticeship Committee, all were responsible to Joe Trehern. The complement of clericals also included one or two on each of the Islands of Maui and Hawaii.

When Bellinger went from temporary secretary to office manager, her duties remained essentially the same; typing, filing, running errands, operating computers, mailing timecards and bills to the Alameda office, answering phones, keeping track of new collective-bargaining agreements, and assisting business agents with their clerical problems such as expense accounts. Bellinger's pay as temporary secretary increased from $461 per week to $678 per week as office manager (G.C. Exh. 9).

3. Background on Trehern

Trehern has worked for Respondent in different jobs three different times, the last between 1992 to 1995. He was fired on April 14, by then Respondent President Don Doser acting as an emissary from Stapleton. Trehern allegedly had lost the support of a large majority of Respondent's members belonging to the Hawaii district. All agree that for all times material to this case, Trehern was a statutory supervisor. As such the bona fides of the reasons given for his termination are not before me, particularly where the General Counsel disavowed at hearing any nexus between the alleged unlawful reasons for Bellinger's termination and the reasons for Trehern's termination. Briefly, Stapleton testified that he had received complaints about Trehern's performance in a volume sufficient for him to undertake a discretionary survey by mail of members' support for Trehern. The results of the survey convinced Stapleton that Trehern had to be replaced. Although Trehern never saw the written returns, his prior experience as an employee of Respondent taught him that if he ever expected to return to the fold in the future, he would have to compliantly accept the ''dictate'' from Respondent's high command that he must be replaced.[4]

Trehern's termination was bad news for Bellinger, because for the first time she and Trehern were made aware of Respondent's alleged practice apparently limited to Hawaii: when the district representative goes, his girl[5] goes too. So Bellinger was fired along with Trehern.

C. *Analysis and Conclusions*

1. Whether Bellinger is a statutory supervisor

a. *Background*

During the hearing, I inquired of Respondent's counsel whether this case presented any issues regarding Bellinger's supervisory status. He assured me that such an issue existed, although counsel had not raised it before my inquiry (Tr. 66–68). In fact, in four separate position statements submitted to the General Counsel respectively on October 23, November 7, February 13 and 28, 1996 (G.C. Exhs. 4, 5, 6, and 7),

[3] The court reporter mistakenly marked the Stipulations as U. Exh. 2. I have remarked the document as G.C. Exh. 2, placed it in the correct bound volume, and placed the proper R. Exh. 2 in the correct bound volume.

[4] At the time of hearing, Trehern was by his own account a token candidate in the approaching election for business manager against Doser who had replaced Stapleton upon the latter's retirement. For the past 2 weeks before his testimony, Trehern had been unemployed and prior to that he had worked for the past 21 months as a crane operator making substantially less than he would have made had he continued as district representative. Despite these adverse circumstances, I found him to be without bitterness, accepting of his lot, and waiting for the pendulum to swing back his way. In sum, I found Trehern to be a credible witness and will credit most or all of his testimony.

[5] Bellinger was a mature woman who may or may not have resented the use of the term ''girl'' to refer to her. I use the term only because it was part of the evidence.

counsel for Respondent never raised the issue. Nevertheless, over the General Counsel's objection, I permitted Respondent to amend its answer to allege as an affirmative defense that for all times material to this case, Bellinger was a statutory supervisor (Tr. 118–119). The matter now having been fully litigated, I will rule below on the question.

b. *Applicable law*

Respondent's belated contention that Bellinger was a statutory supervisor under the facts and circumstances present here, raises an inference of shifting explanations to justify a contested termination. This shifting explanation in turn is suggestive of pretextual reasons for discharge. *Atlantic Limousine*, 316 NLRB 822, 823 (1995); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). Here, Respondent made a full investigation of the case prior to the hearing, and submitted four separate position statements to the General Counsel for the purpose of persuading them to drop the case. Respondent's failure to mention the present issue in the position statements coupled with the fact that Respondent did not suddenly discover any new evidence to support its position[6] suggest to me that Respondent is not entirely serious about the issue and that it seeks a post hoc rationalization for its actions. See *Industrial Turn Around Corp*., 321 NLRB 181, 189 fn. 8 (1996); cf. *Burlington Truck Lines v. U.S*., 371 U.S. 156, 168 (1962). That which is merely suggested by Respondent's tardiness is proven conclusively on the merits, a subject to which I now turn.

In *Chevron Shipping Co*., 317 NLRB 379, 380–381 (1995), the Board stated that it has a duty ''not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied rights which the Act is intended to protect'' (citations omitted). The Board goes on to instruct that the ''burden of proving supervisory status is on the party who alleges that it exists. . . . [and that] supervisory authority must be exercised with independent judgment, rather than in a routine or clerical fashion.'' Id. at 381.

Section 2(11) of the Act provides that:

> The term ''supervisor'' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The possession of any one of the indicia specified above is sufficient to confer supervisory status on an employee provided that authority is exercised with independent judgment on behalf of management and not in a routine manner. The exercise of some otherwise supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner does not confer supervisory status on an employee. *J. C. Brock Corp*., 314 NLRB 157, 157–158 (1994).

c. *Conclusions*

I find that Respondent has failed to prove that Bellinger was a statutory supervisor. That she was called ''office manager'' is not conclusive since title is in and of itself insufficient to confer supervisory status.[7] *Davis Supermarkets*, 306 NLRB 426, 458 (1992), enfd. 2 F.3d 1162 (D.C. Cir. 1993). This is particularly true in the present case, where several other office manager positions in district offices under Respondent's jurisdiction, such as San Jose, California; Salt Lake City, Utah; Reno, Nevada, and elsewhere are considered nonsupervisory bargaining unit positions.[8]

At page 18 of its brief, Respondent calls my attention to the position description found in the record at General Counsel's Exhibit 13: ''The office manager participates intensively in the management and day-to-day operations of the office served by applying good working knowledge of the functions and programs of this organization.'' Respondent contends that this single sentence supports his theory of Bellinger's supervisory status. When I asked Respondent's counsel at hearing to direct my attention to any paragraph or sentence in the position description that supported his theory of supervisory status, counsel responded, ''I don't see anything in that document'' (Tr. 497).[9] In any event, job descriptions do not necessarily vest employees with supervisory powers. *NLRB v. Security Guard Services*, 384 F.2d 143, 149 (5th Cir. 1967).

Respondent makes certain other arguments regarding Bellinger: that she granted time off, changed work hours, and approved sick leave. All or most of the evidentiary support for these arguments is provided by Respondent's witness, Joanne Sunae Archeta, who worked for Respondent as a clerical, in Honolulu between September 1992 and September 1993, and then returned in April. Respondent has not shown through Archeta or with other evidence, that Bellinger responsibly directs employees or independently authorizes time off. Nor has it been shown that Bellinger exercises independent judgment in assignment of work. See *Clark Machine Corp*., 308 NLRB 555, 556 (1992); *Quadrex Environmental Co*., 308 NLRB 101 (1992). The mere fact that an employee gives other employees instructions from time to time does not in and of itself render the instructing employee a supervisor for purposes of the Act. *Stop & Shop Co. v. NLRB*, 548 F.2d 17, 19 (1st Cir. 1977).

Whether Stapleton, Archeta, or anyone else believed Bellinger to be a supervisor is not sufficient to establish that Bellinger, in fact, is a supervisor, because, conclusionary statements made by witnesses in their testimony, without supporting evidence, does not establish supervisory authority. *Sears, Roebuck & Co*., 304 NLRB 193 (1991).

[6] To be sure, counsel for Respondent represented at hearing, that he was basing his motion to amend his answer on information that he just ''found out this week'' (Tr. 118). Counsel did not state what the information was or why it was overlooked during the preparation of the position statements. Based on the record, I find that counsel either knew or should have known long before the hearing began, of any evidence which would have supported his claim that Bellinger was a statutory supervisor.

[7] Sometime after Bellinger was terminated, the position in question was downgraded to ''office secretary,'' with a substantial cut in pay.

[8] Stapleton testified as Respondent's witness that office managers are bargaining unit type people (Tr. 414).

[9] Respondent's counsel also stated that the job description was a ''general'' office manager position, that not all office managers in counsel's view, are supervisors and that the Honolulu office did things that were not done in other offices (Tr. 496).

At all times material to this case, Bellinger was subject to the direction and control of Trehern, an admitted statutory supervisor. From time to time, Bellinger did interview job applicants for clerical positions and did make recommendations to Trehern. However, Trehern conducted his own interviews and made an independent evaluation of job applicants. Accordingly, Bellinger's interviews were routine only, mostly to weed out those who were obviously unqualified for a given position.

Besides Trehern, Bellinger was also subject to supervision by Gloria Gardner, Respondent's office manager at the Alameda headquarters and another acknowledged supervisor. Bellinger merely executed policy as she understood it, as set by Gardner and others at the Alameda office. As for employees time off, Bellinger was required to check with Trehern first, before granting time off.

Respondent submits as evidence supporting its position that Bellinger once asked a business agent to give up his office so that Bellinger's daughter then employed by Respondent, could have it. Neither the daughter nor the business agent, Lionel Stone, were called as witnesses, but surely Respondent is not serious when it claims, at page 20, footnote 24 of its brief, ''Only someone with authority could ask a B.A. to give up his office to a clerical.'' The fact is anyone can ask anyone else to do anything. Why the B.A. relinquished his office has not been established and this ''evidence'' proves nothing at all.

Respondent also alludes to the offer of proof regarding Wong, who as noted above, never testified. First, some background, as Respondent concedes in its brief, Wong was never subpoenaed. Next, at the close of business on day one of hearing, Respondent's counsel opined that the case would probably finish the next day (Tr. 282); the following day, just before lunch, Respondent's counsel updated his prediction, ''We can finish today if we push'' (Tr. 421). Then at the close of Respondent's case at 4:50 p.m. and with the General Counsel's rebuttal witnesses standing by, prepared to testify, Respondent's counsel asked to put the case over to the following day, saying that he ''believed'' Wong would appear on the following day, if the case were continued. After considering Respondent's offer of proof, I decided as a matter of discretion to conclude the case that evening as all parties had expected.[10] I now reconsider the offer of proof to find that the evidence that Respondent would have presented through Wong has little or no probative value. Again the minor supervisory duties held by Wong are consistent with employee status. That Wong may have considered herself a supervisor establishes no fact with respect to Bellinger, nor Wong either, for that matter, and all of Wong's purported testimony regarding her own tenure is too stale and irrelevant to be useful.

Respondent finishes its argument, brief, pages 23–24, by citing instances of secondary indicia of supervisory authority possessed by Bellinger such as higher pay, or perception by other employees that she was a supervisor. However, in the absence of primary indicia of supervisory authority, evidence of secondary indicia such as that proffered by Respondent, cannot provide a basis for a supervisory finding. *St. Francis Medical Center West*, 323 NLRB 1046 (1997); *Consolidated Services*, 321 NLRB 845, 846 fn. 7 (1996).

I conclude my decision on this segment by finding that Bellinger did not possess nor exercise any indicia of supervisory authority and that therefore Respondent has failed to prove that she was a statutory supervisor. In support of this conclusion, I cite the case of *Teamsters Local 574*, 259 NLRB 344, 347–349 (1981), a case in which the respondent union, in its role as an employer was charged with discriminating against an employee because of her union activities and other protected concerted activities. As part of its defense, the respondent argued that charging party, the office manager, was a statutory supervisor, or a managerial employee who lacked the protection of the Act. Many of the same arguments made by respondent in the instant case were tendered by respondent in *Teamsters Local 574*, rejected by the judge, and affirmed by the Board. See also *Communications Workers Local 9509*, 303 NLRB 264 (1991) (office clerical employed by the Union found not to be supervisor).

I turn now to the merits of the case against Respondent.

2. Whether Bellinger participated in protected concerted activities and was terminated because of them

a. *Applicable law*

The General Counsel has the initial burden of establishing a prima facie case sufficient to support an inference that union or other activity which is protected by the Act was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3). Once this is established, the burden shifts to Respondent to demonstrate that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. If Respondent goes forward with such evidence, the General Counsel ''is further required to rebut the employer's asserted defense by demonstrating that the [alleged discrimination] would not have taken place in the absence of the employee['s] protected activities.'' *Wright Line*, 251 NLRB 1983 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). See also *Fluor Daniels, Inc*., 304 NLRB 970 (1991), and *Manno Electric, Inc*., 321 NLRB 278, 280 fn. 12 (1996). 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).

A prima facie case is made out where the the General Counsel establishes union activity, employer knowledge, animus, and adverse action taken against those involved or suspected of involvement which has the effect of encouraging or discouraging union activity. *Farmer Bros. Co*., 303 NLRB 638, 649 (1991). Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case; even without direct evidence. Evidence of suspicious timing, false reasons given in defense, and the failure to adequately investigate alleged misconduct all support such inferences. *Adco Electric*, 307 NLRB 1113, 1128 (1992), enfd. 6

[10] I include this background as it isn't clear from Respondent's brief whether it intends to claim an abuse of discretion in closing the record without hearing from Wong.

F.3d 1110 (5th Cir. 1993); *Electronic Data Systems Corp*., 305 NLRB 219 (1991).

In this case, I find that the General Counsel has established a strong prima facie case of discrimination against Bellinger because of her union or other protected activities.

b. *Factual basis for a finding of prima facie case*

On April 14, Bellinger was apprised of a single reason for her termination: the prior termination, moments before, of Trehern, her boss and the person who had hired her. Later a second reason was given and both reasons were eventually litigated in this hearing. These two reasons and the statutory supervisor issue discussed above are all proffered to support the discharge. I have already referred to the effect under Board law of shifting explanation for a challenged act. To put it another way, when an employer vacillates in offering a rational and consistent account of its actions, an inference may be drawn that the real reason for its conduct is not among those asserted. *Zengel Bros*., 298 NLRB 203, 206 (1990); *Pace Industries*, 320 NLRB 661 fn. 5 (1996). In this case falsity is demonstrated not just by the multiplicity of reasons but by the failure of each reason to pass a test of credibility. First, however, I turn to Bellinger's protected concerted activities.

When Bellinger was hired, she was told by Trehern that her pay and other benefits would generally track that of the clericals at Respondent's headquarters in Alameda where they were represented by OPEIU. In December 1994, Trehern was informed by Stapleton that all Hawaii clericals except for Bellinger would be receiving a pay increase of 2.8 percent, the same amount negotiated for the Alameda clericals in the latter's new collective-bargaining agreement with OPEIU. This information raises several questions: why not Bellinger too; what about backpay and to what date.

Trehern took the lead in attempting to resolve these questions with Stapleton and Doser. As more information came to light, Trehern's task became more difficult. For example, he and Bellinger learned that the Alameda clericals had been working 32 hours per week in past years while the Hawaii clericals had been working 40 hours. Eventually this information led to a total pay raise of 22.8 percent effective January 1. Backpay was allocated only on the 2.8 percent of the raise retroactive to October 31, 1994, the date the former collective-bargaining agreement had expired. Contrary to the belief of some clericals that they were entitled to full backpay to the date of hire, no backpay was allowed on the 20-percent catchup provision to compensate the Hawaii clericals for their 5 hours per week extra work.[11]

Between early December 1994 and January, there was at least one meeting per week between Trehern and the Hawaii clericals. These meetings usually involved a phone call to Alameda, placed on Trehern's speaker phone so all could hear. One of the clericals at a December meeting asked Stapleton by phone why Bellinger was excluded from coverage of the pay raise. He replied that she didn't work as hard as his girls. This was news to Trehern, Bellinger's immediate supervisor, who had never expressed dissatisfaction with Bellinger. Nor had he received any complaints about her work that he considered credible. Moreover, Trehern considered Bellinger to be the hardest worker in the office and so informed Doser. Other confusion arose regarding the timing of the increase, and the disposition of whatever backpay amount would be received. For example, at one point the clericals were told that in order to receive any backpay, they would have to agree among themselves to place the backpay in a new pension trust with 100-percent clerical participation. At least one clerical objected to this offer and the backpay thought to be in the thousands (20-percent retroactive to date of individual hire) never materialized.

Like many of the facts in this case, Bellinger's role in the weeks before the pay raise was granted is not crystal clear. It suffices to say that she was disappointed and resentful that she was excluded from the pay raise. It is less clear to what extent she worked with the clericals seeking redress of all their respective grievances. It is clear that as the frequency and intensity of complaints from Hawaii began to increase, Respondent's managers began to focus on Bellinger as the culprit responsible for ''stirring the pot.'' In mid-December speaking from Alameda, Doser was on the speakerphone to the clericals in Hawaii and singled out Bellinger for harsh criticism while the other clericals stood by. Doser told her to stop spreading rumors about the pay raise. Then he asked Bellinger, if he, Doser, had ever told her she was going to get a pay raise. She replied, no, that Gardner had told her (This refers to a phone call made by Trehern 1 or 2 weeks before. After Stapleton in Alameda said Bellinger would not be getting a pay raise, Trehern placed a followup call to Alameda and spoke to Gloria Gardner, Respondent's office manager and Stapleton's subordinate. Without telling Gardner what Stapleton had just said, Trehern asked her if all the clericals including Bellinger would be getting the pay raise and she said they would be.)

About a week later, a few days before Christmas, Trehern was sick at home when Stapleton called him there. Apparently knowing that Trehern was not at work due to illness, Stapleton nevertheless told him to go to the office immediately and fire Bellinger as she had been threatening to hire an attorney and sue the Union. Trehern arose from his sick bed and went to the office where he convened the clericals and placed a call back to Stapleton. It was then determined that Stapleton's information had been partially incorrect. Apparently, it had been another clerical named Moo Schoaf who had been threatening to sue the Union, but she had been only joking when she made the statement. Stapleton did not specifically rescind his order to fire Bellinger, but he acquiesced in Trehern's failure to carry out the order.[12]

Section 7 of the Act provides that an activity, to be protected, must be for the purpose of collective bargaining or other mutual aid or protection. The ''mutual aid or protection'' clause of Section 7 protects employees who seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship. *New River Indus-*

[11] The 20-percent pay raise was outside the scope of the OPEIU bargaining agreement and was paid by Respondent in its discretion. Doser apparently was instrumental in persuading Stapleton to grant the raise.

[12] The order to fire Bellinger without any investigation and the failure of Stapleton to decree the same fate for Schoaf, kidding or not, is evidence suggesting unlawful motivation in the subsequent termination of Bellinger. *Paper Mart*, 319 NLRB 9, 10 (1995); *Washington Nursing Home*, 321 NLRB 366, 375 (1996); *Wyman-Gordon Co. v. NLRB*, 654 F.2d 134, 141 (1st Cir. 1981).

tries v. NLRB, 945 F.2d 1290, 1294 (4th Cir. 1991). Nonunion employees as well as union employee share the right to engaged in concerted activity. *Wilson Trophy Co*., 989 F.2d 1502, 1508 (8th Cir. 1993); *Signal Oil & Gas Co. v. NLRB*, 390 F.2d 338, 342–343 (9th Cir. 1968).

I find that Bellinger was engaged in protected concerted activities by her participation in the various meetings held to resolve the confusion previously described, including the question of Bellinger's own abortive pay raise.[13] Some of these meetings involved only Bellinger and Trehern and some involved Bellinger and the other clericals. An employee's activity will be deemed concerted, when it is engaged in with or on the authority of other employees, and not solely by or on behalf of the employee himself. *KNTV, Inc*., 319 NLRB 447 (1995). The record shows that Bellinger had the necessary objective of initiating or inducing or preparing for group action, that there was some relation to group action in the interest of the employees. *Vought Corp*., 273 NLRB 1209, 1294 (1984).[14]

In the alternative, I agree with the General Counsel, brief, page 6, that Respondent perceived Bellinger to be responsible for stirring up the clericals about their right to two years of backpay and related pay and backpay issues. An employer violates the act whenever it retaliates against an employee on the basis of suspicion or belief no less than when it does so based upon actual knowledge of union or other protected concerted activities. *Handicabs, Inc*., 318 NLRB 890, 897 (1995), enfd. 95 F.3d 681 (8th Cir. 1996); *Butchers Union Local 115*, supra, 209 NLRB at 809.

If the activities of Bellinger on the pay issue are arguably clouded, her activities on behalf of organizing an OPEIU local with the Hawaii clericals are cloudless. The stipulation of the parties, published above, particularly paragraphs 7, 15, 16, 18, and 19 recites the history of Respondent with OPEIU and need not be repeated here. The narrative of this segment begins with Bellinger's vacation which she took at the end of December. Upon her return, in early January, Bellinger learned that the clericals were talking about the need for union representation. Bellinger called California and contacted an OPEIU organizer named Diana Valpini-Allen, who never testified. This contact led to Bellinger and another clerical named Linda Kahoopii receiving OPEIU authorization cards, which they circulated to the clericals. About three to four organizing meetings were held at Bellinger's home or at a nearby restaurant and all or most clericals signed cards which were returned by mail to Valpini-Allen. Messages were conveyed to the clericals at the meeting by Valpini-Allen leaving the message on Bellinger's phone recorder and then Bellinger replaying the message at the meeting. Eventually, another OPEIU agent Nancy Wahlforth called Stapleton to explain that a majority of the clericals had signed cards and that they desired union representation. Wahlforth, like Valpini-Allen never testified, but it appears that Stapleton may have said that he had no problem with union representation for the Hawaii clericals, but he demanded a secret ballot and declined to recognized the unit based upon the signed cards.[15]

For reasons that do not appear in the record, no petition was ever filed and no vote was ever held. OPEIU never represented the Hawaii clericals nor bargained with Respondent on behalf of the clericals. When Bellinger was terminated, she called Valpini-Allen to report the firing and to ask what OPEIU intended to do about the matter. Bellinger's question was answered by a deafening silence. I credit Trehern's testimony and disbelieve Stapleton's denial, that at an executive board meeting about a week before Bellinger was fired, Stapleton said to Bellinger in a private meeting in the latter's office, ''I'll bet your girl is behind this organizing drive'' (Tr. 251).[16] Although Trehern denied the ''accusation,'' the fact is that Bellinger was behind the organizing drive. So was Linda Kahoopii who never testified, but apparently continues to work for Respondent undisturbed by the ''unpleasantness'' which cost Bellinger her job.[17]

In sum, I find that Bellinger's activities on behalf of the OPEIU were protected concerted activities. *Butchers Union Local 115*, supra, 209 NLRB at 809. I find further that with respect to all of her protected concerted activities, that Re-

[13] Bellinger was responsible for first raising the issue of the clerical pay raise with Trehern who then called Alameda to make inquiry. For asking about the OPEIU pay raise and its application to Hawaii clericals, Bellinger was punished by having her own raise denied.

[14] Since Respondent is responsible for creating the confusion and ambiguity that exists in this case, it must bear the burden of any such confusion and ambiguity with respect to Bellinger's protected concerted activities in attempting to resolve the questions presented. *Acme Tile & Terrayo Co*., 318 NLRB 425, 528 fn. 8 (1995).

[15] Stapleton testified that when he first heard about the clericals' desire to be represented by a union, he was at first very disturbed by the news. He felt the clericals were ungrateful after just having received a 22.8-percent pay raise (Tr. 384–385). Upon some reflection however, Stapleton said he changed his mind because it would be less costly to have the clericals in the OPEIU pension plan and health and welfare trusts than the Respondent's pension and health and welfare trusts (Tr. 385). I believe Stapleton's initial testimony, but don't believe that he ever changed his mind. That is, the initial resentment he felt never dissipated.

[16] General Counsel presented a witness named Stanley McCormick who testified that in early 1995, while employed by Respondent in Hawaii as a business agent and organizer, he allegedly overheard Nelson Umiaka, an employee of the Hawaii Joint Apprenticeship Committee, say to three other persons that if he had his way, he would fire all the clericals who signed an OPEIU authorization card. I assign no weight to this testimony for two reasons. Respondent produced Umiaka and the three alleged participants in the conversation, according to McCormick. All denied that Umiaka made the statement in question. I cannot find by a preponderance of the evidence that the statement was made. I do not credit McCormick. Furthermore, the General Counsel has not proven that Umiaka was an agent of the Union at the time he made the alleged statement.

[17] That an employer has not targeted all union supporters for unlawful conduct does not, of itself, preclude a conclusion that it has targeted a limited number, or even one, of them as the object of unlawful conduct. See *Handicabs, Inc*., supra, 318 NLRB at 897–898 (1995), enfd. 95 F.3d 681 (8th Cir. 1996), and cases cited therein. Union support among an employee complement can be eroded and undermined by a limited number of unlawful acts directed at but a single employee. Unlawful action directed at ''a single dissident may have—and may be intended to have—an in terrorem effect on others,'' (citation omitted), *Rust Engineering Co. v. NLRB*, 445 F.2d 172, 174 (6th Cir. 1971), by ''warn[ing other] employees [that the employer does] not look favorably upon the Union,'' *Northway Nursing Home*, 243 NLRB 544 fn. 1 (1979), thereby discouraging support of a union by all of, or at least, most employees. See also *Nachman v. NLRB*, 337 F.2d 421, 424 (7th Cir. 1964).

spondent's officials were aware of her activities,[18] were hostile to these activities and took certain adverse action on account of these activities. Because Bellinger was a primary union organizer, her termination under the circumstances gives rise to an inference of violative discrimination. *Corolla Electric, Inc*., 317 NLRB 147, 152 (1995).

I turn now to see if there is sufficient proof in the record to rebut the General Counsel's strong prima facie case. I am instructed that there must be evidence that a theoretically possible reason for a particular action was in fact the reason: the assertion by itself does not suffice as proof. *GATX Logistics, Inc*., 323 NLRB 328 (1997).

c. *Bellinger's termination based on Trehern's termination*

The stipulation published above (G.C. Exh. 2), reflects at paragraphs 8–14, certain facts relative to this controversy and these need not be repeated in toto. However, as to paragraph 11, I note an update. While Maw's secretary was ''removed and replaced'' when Stapleton took over in 1982—this wording appears to leave open the question whether the secretary was terminated or merely reassigned—Gardner, the office manager in Alameda, was not replaced when Doser succeeded Stapleton as business manager (Tr. 533).

I also focus on paragraph 8 of the stipulation which reads, in part: ''in all districts except [Hawaii] there has been no policy or practice of terminating or replacing the office manager/secretary to the district representative when that district representative is terminated or replaced.'' Since this wording leaves open the question of whether such policy or practice does exist in Hawaii, I turn to the record to see if Respondent has established such.[19] The question must be considered in the context that neither Trehern nor Bellinger were aware of the policy or practice prior to April 14, that the timing of Bellinger's termination is coincident not only with Trehern's termination, but also with Bellinger's union activities to which Respondent was demonstrably hostile.[20] I also note a series of prior adverse employment decisions directed toward Bellinger such as denial of pay raise and attempt to fire her for allegedly threatening to sue Respondent, a reason shown to be false. Still further, I note that when Trehern was terminated as district representative, he was offered another job at Alameda headquarters, a job he ultimately turned down. When Bellinger was terminated, she was not offered another job anywhere. During the hearing, Respondent never addressed the question of why she was treated differently than Trehern.

In an attempt to wedge Trehern into a comparable status with former Hawaii district representative Wally Lean, Respondent notes at brief, page 29, that Trehern is campaigning against Doser. I noted above that Trehern is a nominal candidate, but the main difference between Lean and Trehern is that the former started a rump group immediately after resigning, while Trehern did not begin his campaign until some time long after he was terminated. Further, Lean's office manager/secretary resigned. It appears from paragraph 10 of the stipulation that Amy Fujimoto, employed by Lean's predecessor, was removed from her position as office manager/secretary sometime after Wally Lean took over in 1982. Only then was it determined that Lean was not compatible with Fujimoto. In any event, an alleged ''personality conflict'' is not a sufficient reason to terminate an employee where the evidence otherwise shows unlawful discrimination as it does here. Cf. *Brownsville Garment Co*., 298 NLRB 507, 508 (1990). Any concerns that Bellinger would pass confidential information on to Trehern to Respondent's prejudice are speculative at best. There is no evidence that Bellinger meets the Board definition of ''confidential secretary.'' *Communication Workers Local 9509*, supra, 303 NLRB at 271. (No evidence that employee assisted and acted in a confidential capacity to persons who formulate, determine and effectuate management policies in the field of labor relations.)

In sum, I find that Respondent has failed to prove that Hawaii has an unwritten policy dictating that when the district representative is fired, his office manager/secretary must be terminated as well.[21] I find further that the district of Hawaii is not so unique that such a policy could even be justified when no other district within Respondent's jurisdiction has any such policy or practice (G.C. Exh. 2, Stip. par. 8). Therefore, I find that Respondent's asserted defense is false, pretextual and completely unavailing to rebut the General Counsel's prima facie case. *T & J Trucking Co*., 316 NLRB 771 (1995).

d. *Termination based on poor work performance*

As I prepare to discuss the evidence of Bellinger's alleged poor work practices, I first recall as mentioned above, how she came to be hired by Trehern. Then I note that most of the alleged poor work performed by Bellinger was based on the alleged reports of others who were never called as witnesses. Some of the evidence was stale and so remote that one must speculate on why the Respondent tolerated this alleged poor work for so long, unless the evidence is a product of exaggeration or incredible circumstances. Finally, I note that Trehern considered Bellinger his hardest working clerical and did all he could to secure for her the missed pay raise. Who, after all, would be better equipped to judge her work than her immediate supervisor on a day-to-day basis. So with this background, I turn to review briefly the long list of shortcomings allegedly possessed by Bellinger and allegedly endured by Respondent until April 14.

(1) Late timecards—supposedly Bellinger allowed two business agents and a clerical to be tardy in submitting weekly timecards resulting, in the case of the clerical, in her being paid for sick leave which she had exhausted. In the case of the two business agents, they were frequently on a travel status and in any event, Bellinger had no authority to punish them for late submissions. As to the clerical, Shoaf, she apparently was negligent and Bellinger made continuous re-

[18] Because of the direct evidence of knowledge, it is unnecessary to rely upon the ''small plant'' doctrine. *Howard Press, Inc*., 265 NLRB 1389 (1982), petition denied 729 F.2d 172 (2d Cir. 1989).

[19] Respondent's bare assertion of such a policy without proof of its existence will not suffice to satisfy the Respondent's *Wright Line* burden. *GATX Logistics, Inc*., supra.

[20] Timing alone may suggest antiunion animus as a motivating factor in an employer's action. *NLRB v. Rain-Ware, Inc*., 732 F.2d 1349, 1354 (7th Cir. 1984).

[21] Board law does not permit an employer from imposing new terms and conditions of employment to retaliate against employees who are engaged in acts protected by Section 7 of the Act. *OPEIU*, supra, 307 NLRB at 268.

quests for her to submit her timecard on time. None of the three employees in question testified.

(2) Late bills—under Respondent's procedures, bills like timecards were funneled through Bellinger to Alameda. If the bill was not received on time, it wasn't paid on time. Evidence was presented with respect to late bills, but Bellinger denied the fault was hers. No credible proof of late mailing to Alameda was presented and on this record, it is as likely that the late bills were the results of mistakes at Alameda as it was that Bellinger erred.

(3) Mislaid or unavailable contracts—during Bellinger's tenure, a new computer system was installed and there is controversy about how much instruction Bellinger had and her mastery of the computer. However, Gardner's testimony that Bellinger had a continuing persistent problem with regard to tardy production of contracts is not credited.

(4) Bellinger was too bossy. This accusation has some credibility to it. However, Bellinger's attempt to exercise authority she did not possess raises only a personality and not a disciplinary problem. One or more clericals may have complained. However, Bellinger is an employee who came to work early/the better to plant flowers around the office building, flowers purchased with her own funds.

I have considered Respondent's other evidence of Bellinger's poor work and find all such evidence not credible and pretextual. It would serve only to further elongate this decision to recite further contentions that are meritless. I find that Respondent has again failed to rebut the General Counsel's prima facie case. Therefore, I find that Bellinger was terminated in violation of the Act as alleged in the complaint.

Conclusions of Law

1. The Respondent, Operating Engineers Local Union No. 3 of the International Union of Operating Engineers, AFL–CIO, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Office and Professional Employees International Union, Local No. 3, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Katherine Bellinger because of her protected concerted activities including activities to organize, Respondent violated Section 8(a)(3) and (1) of the Act.

4. The above unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that Respondent offer Katherine Bellinger full and immediate reinstatement to the position she would have held but for her unlawful discharge. If her job no longer exists, Bellinger is to be reinstated to substantially equivalent positions, without prejudice to her seniority or other rights and privileges. Further, Respondent shall be directed to make Bellinger whole for any and all loss of earnings and other rights, benefits and privileges of employment she may have suffered including the missed pay raise, by reason of Respondent's discrimination against her, with interest. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See also *Florida Steel Corp*., 231 NLRB 651 (1971), and *Isis Plumbing Co*., 139 NLRB 716 (1962).

Respondent shall also be required to expunge any and all references to the unlawful discharge of Bellinger from its files and notify her in writing that this has been done and that the unlawful discharge will not be the basis for any adverse action against her in the future. *Sterling Sugars, Inc*., 261 NLRB 472 (1982).

[Recommended Order omitted from publication.]