Wyandanch Day Care Center, Inc. *and* Duane Middleton. Cases 29–CA–20175 and 29–CA–20361

September 26, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On June 4, 1997, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed briefs in support of the judge's decision.

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.

ORDER

The National Labor Relations Board adopts the recommended Order of the Administrative law judge and orders that the Respondent, Wyandanch Day Care Center, Inc., Wyandanch, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[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.

Emily DeSa, Esq., for the General Counsel.
Harriet A. Gilliam, Esq., for the Respondent.
Susan Mindell, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Brooklyn, New York, on January 22 and February 12 and 13, 1997. The charges were filed on July 24 and September 27, 1996. A consolidated complaint was issued on October 31, 1996, and alleged as follows:

1. That on or about July 12, 1996, the Respondent by Louise Hamlett, its director, (a) interrogated employees regarding their membership and activities on behalf of Local 340A, New York Joint Board, United Needle International Trade Employees, Unite, AFL–CIO, CLC and (b) created the impression that their union activity was under surveillance.

2. That in mid-July 1996, the Respondent, by Hamlett, interrogated employees as to whether they had signed authorization cards for the Union.

3. That on or about July 22, 1996, the Respondent for discriminatory reasons, discharged Duane Middleton.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a not-for-profit corporation, operates a day care center at its facility in Wyandanch, New York. It 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. ALLEGED UNFAIR LABOR PRACTICES

Duane Middleton began his employment at the Respondent as a teacher in May 1994. There were about 20 employees working at this facility which was under the supervision of its executive director, Louise Hamlett.

In December 1995, Middleton called Adrian Foster of the Department of Social Services Bureau of Early Childhood Services to complain about what he perceived to be violations of New York State regulations. After discussion with other employees, Middleton drafted a letter dated February 1996 to Adrian Foster. However, this letter, which did not indicate the signatory, was not sent at that time.

Meeting with other employees, Middleton finally sent the above-described letter and a second letter dated May 10, 1996, to Foster. Among the things, the letters complained of blocked air vents, high staff to child ratios, and the failure of the Respondent to hire sufficient staff. Both letters were signed, ''We are Anonymous.'' As a result of this communication, Foster visited the facility on May 21, 1996, to check its operations. In a report dated December 12, 1996, Foster noted that all the complaints had no merit.

Middleton testified that in late May 1996, Hamlett mentioned at a staff meeting that there was an anonymous staff member who was trying to hurt the Respondent and would only hurt themselves. Barbara Adams testified that she recalled a similar statement by Hamlett about a Mr. ''anonymous'' at a staff meeting but was not sure when that meeting took place. Hamlett denied making this remark, although stating that when she met with Adriane Foster in late May 1996, he told her that he had gotten anonymous calls and letters regarding alleging violations. The letters sent by Middleton were not shown to Hamlett and as they were not signed, would not have disclosed the person or persons who sent them.

Soon after the staff meeting, Hamlett visited Middleton's classroom which he states was the first time that she had ever done so. In any event, she saw that a fire exit sign[1] was not posted on the front door and told him to write to her assistant, Moore to get a sign. He testified that he immediately sent a note to Moore via two children, whereupon he got the sign and posted it on the door.

On June 3, 1996, Middleton was given a warning by Moore which he refused to sign. This read:

> On several occasions you have been found to be in non-compliance with Wyandanch Day Care Center, Inc. rules and regulations. You have been made aware of health and safety regulations on a one to one basis and collectively at staff meetings, the most recent staff meeting of Friday, May 31, 1996.

[1] This was a sign which listed what to do in case of a fire.

> Middleton, you need to know that your behavior places your employment at Wyandanch Day Care Center, Inc. in jeopardy.

Middleton testified that he had never been previously told that he was not in compliance with any rules and that he was unaware that the fire signs were missing from his classroom until this was pointed out to him on this occasion. He also testified that he had never received any previous oral or written warnings or discipline of any kind.[2] Indeed, in his final performance review which was reviewed by Hamlett and dated June 20, 1996, there is no mention of any past infractions, including the fire sign infraction that led to the June 3 letter. On the whole, I would say that the review was very favorable with 13 categories where he was rated above average and 16 where he was marked as average. The only box where a check was entered indicating that he needed improvement was in the row marked ''Loyalty.'' (G.C. Exh. 14.)

As to the fire exit sign, Barbara Adams testified that the Respondent holds frequent fire drills and that its rules regarding fire procedures are supposed to be posted on the door of each classroom. She testified that employees at staff meetings have been told that the fire signs are supposed to be posted at all times.

The General Counsel asserts that Hamlett's visit to Middleton's classroom on this occasion was an unusual occurrence, and coming shortly after the surprise inspection by Foster, indicates that she was aware of who the anonymous complainer was and came to Middleton's classroom looking for a reason to discipline him.

In mid-June 1996, Hamlett announced at a staff meeting that there would be ''downsizing.'' As a consequence of this meeting, Middleton, on or about June 20, contacted Local 340A, New York Joint Board, United Needle International Trade Employees, UNITE, AFL–CIO, CLC.[3] During the latter part of June, Middleton testified that he solicited other employees to sign union authorization cards and the evidence shows that Middleton was the liaison between the Union and employees. He was the employee most active in seeking union representation and he did so by talking to employees on the premises during lunch and other breaks. When Middleton obtained signed authorization cards from many of the employees, he turned them over to a Birch from the Union and also submitted a list of proposed contract demands that the employees were interested in.

Barbara Adams, who I believe was a particularly credible witness, testified that on or about July 9, she was called into the office and asked by Hamlett if she had signed a union card. Adams testified that she replied that she did not and that Hamlett said that she (Adams) should think about it and to keep the conversation between the two of them confidential. Adams also testified that neither on this nor any other occasion did Hamlett or Moore indicate to her that she was aware of Middelton's role in the union solicitation.

Also on July 9, 1996, Union Attorney Allen Kranz sent a letter by certified mail to the Company, requesting recognition. The letter claimed that a majority of the employees had signed union cards. The return receipt shows that this letter was received on July 11 and he testified that he spoke to Hamlett on the phone, on or about July 12 or 13 when she told him that the board of directors was on ''hiatus'' and that she could not respond until September 1996. In this regard, it is noted that in her initial testimony, Hamlett insisted that she was not aware of the Union's organizing drive until after Middleton was discharged on July 22, 1996. That testimony was obviously not correct.[4]

Isaac Capers, one of four male employees at the school, testified that on July 12, 1996, he was asked by Hamlett if he had signed a paper for the Union. He testified that he answered affirmatively whereupon she asked why and stated that it could cost him his job. In response to leading questions, Capers also testified that Hamlett told him that she knew who was soliciting the cards and who signed cards. This entire conversation was denied by Hamlett. I thought that Capers was a credible witness regarding the alleged interrogation and threat. However, I shall not rely on his testimony regarding the alleged impression of surveillance because his testimony in this regard was hesitant and was brought about only by the use of leading questions.

The event that was the proximate cause of Middleton's discharge occurred on July 19, 1996, and involved a 6-year-old child named Shawn Punter.

On this day, Middleton testified that while he was playing with the children, he was bent over when Punter jumped on his shoulders but fell off and bumped his head. Middleton states that he noticed that Punter had a small bump on his head but otherwise appeared to be OK. As there was no other teacher or adult in the classroom and as it was late on Friday afternoon, Middleton testified that he sent some children to get an ice pack which he applied and that he soon thereafter sent Punter down to the office with an accident re-

[2] Middleton's personnel file did not contain any other previous warnings or disciplinary actions. The Employer put into evidence an incident report and memoranda regarding an alleged incident back in January 1995 wherein a grandmother accused Middleton of slapping a child. This was investigated at the time and Middleton denied the accusation. As no conclusive finding was made, the matter was dropped and the notes regarding the incident were not made part of Middleton's personnel file. He was not admonished or disciplined on account of this alleged incident and Hamlett testified that it did not play any part in her decision to recommend his discharge in July 1996.

Hamlett asserts that there were a few occasions when she verbally admonished Middleton. She testified that on one occasion Middleton, contrary to the Employer's policy, sent an angry report directly to a parent about a child. She states that on another occasion, she admonished Middleton for allowing children to jump rope in the classroom. On yet another occasion, Hamlett testified that she verbally admonished Middleton for allowing a child to carry hot food.

As to these incidents, Middleton conceded only that he was spoken to once about children playing jump rope in the classroom. In any event, none of these alleged infractions led to any written warnings or even written memoranda and this leads me to conclude that these incidents were not serious.

[3] It was stipulated at the hearing that the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

[4] On July 24, 1996, the Union filed a petition for an election and after a hearing, the Regional Director ordered that an election be held. The election was held on October 3, 1996, and a certification was issued to the Union on October 18, 1996.

port with his brothers.[5] Middleton also testified that he simultaneously wrote a letter to Punter's mother.[6]

The Respondent asserts that Middleton did not follow the proper procedures in relation to this incident which, as it involved an injury to the head, was very serious. As asserted in the Respondent's brief:

> Middleton failed to follow Center policy with respect to the reporting of and treatment of head and facial injuries. Specifically, he failed to accompany the child to the office to report the incident; instead he sent the child to the office accompanied by his two young brothers.

In this regard, the Respondent introduced into evidence a series of identical memoranda issued to the staff on January 19, April 19, and June 12, 1996. These stated:

> Please handle all facial and head injuries in the following manner:
> 1. Teacher is to accompany child to front office regardless of how non threatening injury appears.
> 2. Complete accident report.
> 3. Written notice to parent/guardian. All written notices must be reviewed by immediate supervisor or front office.
> 4. Child is to be observed throughout time in Day Care.

Obviously if it was evident or even suspected that a child had suffered a concussion or was injured in some other way, the common sense thing to do would be for the teacher to take (or carry) the child to the office and have the rest of the class come with him if there was no other adult available to watch the class. This is the opinion of Barbara Adams who testified that this is what she would do in a similar situation. However, given the circumstances in the present case, and the apparent absence of injury, Middleton's response to the situation seems to me to be not unreasonable even if he didn't follow all the instructions of the memoranda described above. That is, he applied an ice pack, saw that the child looked OK, wrote a note to the mother, wrote a short report on the accident, and sent Punter down to the office with a ''buddy'' in accordance with the school's buddy procedures.[7]

Hamlett testified that after the above incident she conferred with Francois Dure, the president of the board and recommended that Middleton be discharged. Dure agreed and on Monday, July 22, Middleton was fired. There is no dispute that at the exit interview, there was a heated exchange between Middleton and Hamlett; Middleton testififying that he was ''pissed off.'' He admits that he told her that in his opinion, the whole thing was ''bullshit,'' that people despised her and that children were taken out of the school because she was not liked. Nevertheless, he credibly denied that he made any threatening remarks to her.

Analysis

The evidence suggesting that the Respondent, and specifically Hamlett was aware that Middleton sent the anonymous letters which resulted in the inspection visit by Foster, is in my opinion, somewhat ambiguous. There is credible evidence that during a staff meeting she referred to a complaint filed by a Mr. ''Anonymous,'' thereby narrowing the field to four possible suspects.

Whether or not Hamlett was aware that Middleton was the author of the anonymous letters and therefore the instigator of the complaints, I find that she was aware of his role in the union organizing drive. In this regard, the credible evidence shows that on July 9, Barbara Adams was illegally interrogated by Hamlett about whether she had signed a union card. Also the credible evidence shows that Isaac Capers, on or about July 12, was also interrogated about signing a union card and was threatened with discharge. Moreover, although, Hamlett initially testified that she was unaware of the Union's organizing campaign until after Middleton was discharged, this was shown not to be the case as she received the Union's letter demanding recognition and spoke to Attorney Kranz at least 6 days before the incident involving Middleton and Punter.

The evidence here indicates to me that Hamlett was aware of the general union activity and the circumstantial evidence convinces me that she was aware of Middleton's role in the union campaign. In *Darbar Indian Restaurant*, 288 NLRB 545 (1988), the Board stated:

> [T]he Respondent contends . . . that the General Counsel failed to establish that it had knowledge of Saha's union activities. Although there is no direct evidence of the Respondent's knowledge, we believe that the circumstances here support an inference of knowledge based . . . on the Respondent's general knowledge of union activity among the small group of seven dining room employees, the timing of the discharge, the contemporaneous 8(a)(1) conduct, the shifting and pretextual reasons asserted for the discharge and the absence of any incident involving Saha or any conduct by him to explain his discharge on June 8.

Based on the credited testimony of Middleton, it is my opinion that he acted rationally in the way he dealt with the Punter accident. This being the case, it is my opinion that the Respondent's assertion that this was the precipitating reason for his discharge either is not true or is substantially disproportionate to the alleged offense. Significantly, notwithstanding my warning at the hearing, the Respondent refused to turn over to the General Counsel subpoenaed personnel records of other employees and, therefore, the General Counsel was unable to ascertain whether other employees, in similar situations, were treated in the same or in a disparate manner. Given this refusal to turn over properly subpoenaed records, I shall infer that they would have been unfavorable to the suppressing party. *Staten Island Hotel Limited Partnership*, 318 NLRB 850, 852 (1995); *Auto Workers v. NLRB*,

[5] The school uses a buddy system whereby no child goes anywhere outside the classroom without a buddy. The buddy system is one of the rules and regulations that is constantly stressed at staff meetings.

[6] In the note, Middleton wrote: ''Shawn bumped the back of his head (left side) while playing in my room today. The office was informed and an ice pack was applied.''

[7] In a note written by Moore to Hamlett on July 19, 1996, she stated; ''This afternoon Shawn Punter came to the office. He had an ice pack on his head. Shawn said he was playing with Mr. and was on his neck. Shawn said he pulled away and Mr. M dropped him on his head. Note was written to mother.''

459 F.2d 1329, 1338 (D.C. Cir. 1972). Thus, in *Auto Workers v. NLRB*, supra, the court stated:

> But while the adverse inference rule in no way depends upon the existence of a subpoena, it is nonetheless true that the willingness of a party to defy a subpoena in order to suppress the evidence strengthens the force of the pre-existing inference. Indeed, in some circumstances defiance of a subpoena may justify striking a defense . . . . or completely barring introduction of evidence on the point in question. . . . The reason why existence of a subpoena strengthens the force of the inference should be obvious. If a party insists on withholding evidence even in the face of a subpoena requiring its production, it can hardly be doubted he has some good reason for his insistence on suppression. Human experience indicates that the most likely reason for this insistence is that the evidence will be unfavorable to the cause of the suppressing party.

Having established, prima facie, that the Respondent discharged Middleton for protected union activities, the burden shifts to the Respondent to show that it would have discharged him irrespective of his protected activity. As it is my opinion that the Respondent has not met its burden, I conclude that the Respondent violated Section 8(a)(3) by discharging Middleton. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Conclusions of Law

1. By discharging Duanne Middleton from his position as a teacher, the Wyandanch Day Care Center Inc. violated Section 8(a)(1) and (3) of the Act.

2. By interrogating employees about their union sympathies and membership, the Respondent has violated Section 8(a)(1) of the Act.

3. By threatening an employee with discharge because he signed a union authorization card, the Respondent has violated Section 8(a)(1) of the Act.

4. By the aforesaid conduct the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. Except as set forth above, it is recommended that the other allegations of the complaint be dismissed.

Remedy

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

The Respondent having discriminatorily discharged an employee, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, 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).

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

Order

The Respondent, Wyandanch Day Care Center, Inc., Wyandanch, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for joining or engaging in activity on behalf of Local 340A, New York Joint Board, United Needle International Trade Employees, Unite, AFL–CIO, CLC or any other labor organization.

(b) Interrogating employees about their union sympathies and membership.

(c) Threatening employees with discharge or other reprisals because of their membership in or support or assistance to Local 340A, New York Joint Board, United Needle International Trade Employees, Unite, AFL–CIO, CLC or any other labor organization.

(d) 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 Duane Middleton full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(c) 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.

(d) Within 14 days after service by the Region, post at its facility in Wyandanch, New York, copies of the attached notice marked ''Appendix.''[9] Copies of the notice, on forms provided by the Regional Director for Region 29, 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 Respond-

[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.

[9] 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.''

ent 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 July 14, 1996.

(e) 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.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for joining or supporting Local 340A, New York Joint Board, United Needle International Trade Employees, UNITE, AFL–CIO, CLC.

WE WILL NOT interrogate our employees about their union sympathies and membership.

WE WILL NOT threaten employees with discharge or other reprisals because of their membership in or support or assistance to Local 340A, New York Joint Board, United Needle International Trade Employees, UNITE, AFL–CIO, CLC.

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 Duanne Middleton, full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his 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 Duanne Middleton and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that any such references will not be used against him in any way.

WYANDANCH DAY CARE CENTER, INC.