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Children's Studio School Public Charter School *and* Maria Firmino-Castillo. Case 5–CA–31624

November 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On August 31, 2004, Administrative Law Judge Richard A. Scully issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions,[3] 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, Children's Studio School Public Charter School, Washington, D.C., its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. November 30, 2004

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and positions of the parties.

[2] 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.

[3] On April 13, 2004, the Respondent filed with the Board a motion to dismiss or, in the alternative, to stay the Board's proceedings because the Charging Party had a similar claim pending before the D.C. Human Rights Commission. On May 26, 2004, the Board denied the Respondent's motion**.** In denying the motion, Chairman Battista noted that he would allow the Respondent to bring to the attention of the administrative law judge any developments in the Commission's case. On November 16, 2004, the Respondent apprised the Board, by way of its counsel's declaration, that the Commission was beginning its investigation on or about November 1, 2004. Accepting that declaration as true, the Commission is starting to investigate its case after the instant case was fully litigated by the parties and decided by the Board's administrative law judge. In these circumstances, Chairman Battista would not defer to the Commission proceeding.

Stan P. Simpson, Esq., for the General Counsel.
Alexis Segal, Esq., and *David J. Shaffer, Esq.*, of Washington, D.C., for the Respondent.

DECISION

STATEMENT OF THE CASE

RICHARD A. SCULLY, Administrative Law Judge. Upon a charge filed on December 4, 2003, by Maria Firmino-Castillo (Firmino), the Regional Director for Region 5, National Labor Relations Board, issued a complaint on February 24, 2004, alleging that Children's Studio School Public Charter School (the Respondent) had violated Section 8(a)(1) of the National Labor Relations Act (the Act), by terminating the employment of the Charging Party because she had engaged in concerted activity protected by Section 7 of the Act. The Respondent filed a timely answer denying that it had committed any violation of the Act.[1]

A hearing was held in Washington, D.C., on June 14 and 15, 2004, at which the parties were given a full opportunity to examine and cross-examine witnesses and to present other evidence and argument. Briefs submitted on behalf of the General Counsel and the Respondent have been given due consideration.[2] Upon the entire record, and from my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a District of Columbia not-for-profit corporation with an office and place of business in Washington, D.C., engaged in the operation of an elementary and secondary charter school. During the 12-month period preceding February 2004, a representative period, the Respondent in the course of its business operations derived gross revenues in excess of $1 million and it purchased and received at its Washington, D.C. facility products, goods, and materials, valued in excess of $5000, directly from points located outside the District of Columbia. The Respondent has admitted, and I find, that at all

[1] At the hearing, the Respondent filed a second amended answer to the complaint which was inadvertently marked as a part of the formal papers as GC Exh. 1(m). It should be GC Exh. 1(o).

[2] The General Counsel's unopposed motion to correct the record by renumbering certain exhibits and to correct errors in the hearing transcript is granted. The Respondent's motion for leave to file a reply brief, which the General Counsel opposes, is denied as unnecessary.

times material it was an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[3]

II. THE ALLEGED UNFAIR LABOR PRACTICES

The complaint alleges that Firmino was terminated from her position as a teacher at the Respondent's school in violation of Section 8(a)(1) of the Act because she engaged in certain protected concerted activities.

A. Background Facts

Since 1990, the Respondent has operated an accredited public charter school following a philosophy of "arts as education" through which it undertakes to teach academic subjects, literacy, math, science, social studies, etc., through the arts process. The teachers are a culturally diverse group of talented artists who use their various art forms, painting, sculpture, dance, etc., to impart knowledge to the students. The students in each of the classrooms, which are known as "studios," consist of mixed age groups who are taught using a "Socratic approach" rather than using traditional textbooks.

Marcia McDonell is the founder, owner, and president of the school. She has an office at the school and is there on a daily basis. Franklin Wassmer served as principal/associate director of the school from 1997 until June 2003. He was responsible for the operation of the school and his duties included overseeing the staff and faculty and performing periodic evaluations of the teachers. After Wassmer submitted his resignation, effective at the end of the school year in June 2003, he was replaced by Julie Doar-Sinkfield (Doar), who served as interim principal from June 2 through December 31, 2003. Their tenure at the school overlapped by about 3 weeks.

The Charging Party, Firmino, began working at the school as a grant writer in May 1999. She was appointed a teacher in August of that year and served in that capacity until the end of the academic year in June 2003 when she was informed that her contract was not being renewed.

B. Firmino's Protected Activity

In late February or early March 2003,[4] Firmino was called at her home by the school's volunteer coordinator, who was upset and expressed frustration with the school and complained that volunteers were being used as substitute teachers but were not being adequately compensated for their work. Firmino responded that she felt other people at the school had similar feelings and suggested that they get together with other employees to find a way to address their problem. She then discussed with a number of other staff members that Wassmer was leaving, that there were rumors about changes at the school, and that they needed to communicate their views to the school administration. Firmino and approximately seven other staff members and volunteers held a meeting at the Mark's Café. Among the things they discussed were the fact that Djenaba Faal, a program coordinator at the school had been fired, the possibility of forming a union of the school's artist-teachers, that the artist-teachers' salaries were too low in relation to their responsibilities and workloads, that certain special education needs at the school were not being met, that they would write a letter protesting the midyear performance evaluations that had been done in February, and that they would present a list of demands for changes to the school administration.

Thereafter, a meeting was held in Firmino's studio at the school and was attended by approximately seven faculty members to discuss the midyear evaluations and reach a consensus on the language to be used in their letter of protest. Firmino prepared the letter on behalf of those faculty members, dated March 12, addressed to Principal Wassmer. Another meeting was held in one of the studios at the school to discuss presenting demands for changes to the administration. Prior to that meeting, Firmino informed Wassmer about it and that the faculty member would be developing a proposal concerning labor and other issues to present to the school's board of trustees, McDonell, and the incoming principal. Wassmer responded that he also had presented a proposal concerning changes he felt were needed at the school to the Board and McDonell, but that they had rejected it. He gave her a copy of his proposal and asked her to have the faculty consider it when they prepared their own. At the meeting, she distributed copies of Wassmer's proposal and a written draft of her own proposals which were discussed along with the other faculty members' ideas.

The next meeting was held a short time later at Firmino's home and was attended by approximately five employees. They discussed the fact that many of them could not afford the cost of the health insurance the school offered, the fact that the school's retirement plan was not available to all employees, and the concern of an artist-teacher's assistant that he was being asked to substitute for a teacher but was not being compensated properly. Another meeting of four or five employees was held at the 24-7 Café. They discussed the need to get the school to do more to support the artist-teachers in the various media in which they perform, such as providing a darkroom, supporting attendance at artistic conferences and programs, and creating opportunities to display and enhance their talents.

Firmino took notes at each of the meetings in order to collect all of the ideas of the various participants on ways to improve their conditions at the school. She turned her notes over to artist-teacher Carlos Tabernero who volunteered to draft a letter to be presented to the administration. He prepared a handwritten draft which Firmino typed up and added her comments and proposed changes. The letter was not submitted to the school because they had decided to wait until they had their new employment contracts in hand before doing so. She was

[3] In its brief, the Respondent asserts that the General Counsel did not introduce evidence to establish jurisdiction over it. This was unnecessary inasmuch as its answer admits that its gross annual revenue exceeded $1 million and that it received goods and materials in excess of $5000 in interstate commerce. This meets the Board's jurisdictional standard for private schools. See *Roman Catholic Archdiocese*, 216 NLRB 249 (1975). Moreover, the Board has plenary jurisdiction over the Respondent which is located in the District of Columbia. E.g., *Catholic University*, 201 NLRB 929 (1973); *Westchester Corp.*, 124 NLRB 94 (1959). The Respondent's argument that the Board should defer to the District of Columbia Human Rights Commission, which has a complaint filed by Firmino before it, has already been considered and rejected by the Board. See GC Exh. 1(m).

[4] Hereinafter, all dates are in 2003.

the moving force behind this effort and once her contract was not renewed it went no further.

During the early part of the second semester, Firmino learned that Djenaba Faal had been asked to resign her position at the school. She discussed this with Faal, listened to her allegations as to why she was terminated, and offered her support. Faal told her that she had filed a complaint with the D.C. Office of Human Rights alleging racial discrimination and asked Firmino to write a letter of support to that Office. Firmino agreed to do so and prepared a letter, dated April 27, 2003, which stated that the school may have received certain of the criticisms and proposals that Faal had offered "with some discomfort and much misunderstanding, thus leading to hasty, and in my opinion, mistaken dismissal of an extremely competent and committed member of our team." Firmino said that after giving the letter to Faal, she sensed a lot of tension and hostility directed towards her by McDonell. She was also informed by another member of the school staff, Neomy Rivera, that McDonell was very upset about her having written the letter and felt that Firmino was hurting the school. Rivera also told Firmino that McDonell was very displeased by her support of Faal, that she should be careful, and that she might lose her job if she continued to go around talking to teachers and meeting with people who were trying to hurt the school.

Because of this, Firmino sought a meeting with McDonell which was held in her office in May. McDonell began by telling Firmino that she was "more reactive than astute." Firmino asked what she meant by this and McDonell responded that Firmino was "doing things to hurt the school." Firmino responded that she was not trying to hurt the school but had written the letter in support of Faal because she thought she was valuable to the school and should be reinstated. Firmino also told McDonell that the teachers had gotten together to create a list of recommendations and demands for change. She testified that McDonell seemed unhappy about this and said that she cared deeply about the school and about the kids. Firmino responded that she and the other teachers also cared about the school and the kids and that is why they were doing this.

During a meeting of all staff, administrators, and teachers at the school, Firmino and others asked Wassmer why Faal had been terminated, but he said that he could not discuss personnel matters with other employees. Firmino told Wassmer that there had been serious allegations of possible misconduct by the school and that if they did not get more information they would have to consider the possibility that these allegations were true. Wassmer repeated that he could not discuss the matter and the meeting ended. While employed at the school, Faal had formed a group called Parents Anonymous. When she was terminated, the group had circulated a petition seeking her reinstatement. A short time later, the Parents Anonymous group disbanded and a new group called the Independent Parent Association (IPA) was formed. Firmino assisted the IPA in preparing a survey to be administered to the teachers at the school to gather information concerning their problems, concerns, and criticisms, but she did not know whether it was ever issued. She assisted the IPA by translating into Spanish a flyer it had prepared inviting members of the school community to attend one of its meetings. The flyer was distributed at a school picnic. She also assisted the IPA in preparing a letter to the Board and school administration outlining its demands concerning learning conditions, labor issues, and health and safety issues, but she did not know if it was ever sent.

The foregoing findings are based on the credible and uncontradicted testimony of Firmino. Much of her testimony about these events was corroborated by the credible testimony of witnesses Djenaba Faal, a former staff member of the school, teachers Allan Nieta and Garry James, who are currently employed at the school, Clay Harris, who served as a volunteer at the school, and Jeff Schmidt, a parent of a student at the school and member of the IPA, all of whom were involved in the one or more of the meetings and/or activities Firmino described.

C. Events Surrounding the Termination of Firmino

On June 10, Firmino met with the interim principal, Doar, in her office. Firmino testified that Doar told her that the school was restructuring but that no faculty positions would be cut. Doar asked a series of questions about Firmino's teaching, her strengths, weaknesses, and successes. Firmino described some of the projects she considered very successful and told her what she considered the school's strengths and her personal challenges with the school. She described how committed she was to the school and said that she had risked her job by initiating contacts with the Board of Trustees concerning her and the faculty's areas of concern and constructive criticisms of the school. She specifically mentioned the difficulties she encountered in implementing the arts as education process in attempting to teach math to several levels of children some with special needs. Doar asked her if she would accept a larger class size and a wider range in age of her students and she responded that she would do it if it were necessary. Doar asked for a list books and supplies that she needed for the coming year and their meeting ended.

On about June 20, Firmino was given a performance evaluation in a meeting with Wassmer that Doar also attended. Firmino told Wassmer that she believed she had a very successful year and that her evaluation did not reflect the quality of her work but that since it was his last evaluation she was not going to give him a hard time about it. She said that she questioned Wassmer about a comment on the evaluation to the effect that she needed to find constructive means to work within the school structure. He responded that she had to understand that she was part of the school structure and she could not question every decision the institution makes, could not criticize everything it did, or go above and beyond the institution every time you disagree with something. She responded that this was a public school and she felt a responsibility to speak her mind and not remain silent if she felt the school was wrong or not meeting its responsibilities. Doar said nothing during the meeting.

On June 27 Firmino met with Doar in McDonell's office. McDonell left as Firmino arrived. Doar said that she had decided not to invite Firmino back for the next year. Firmino asked if there was anything to discuss and Doar said "no" and the meeting ended. She then encountered Wassmer and McDonell and asked if McDonell was aware of what had happened and if she approved Doar's decision. McDonell re-

sponded that she did. Firmino asked what she had done wrong and McDonell responded it was Doar's decision. Firmino asked again and McDonell responded that there have always been "areas of difficulty." Firmino asked what these areas of difficulty were, as she had never received a warning, reprimand, or other disciplinary action. McDonell said that Firmino had many good qualities as a teacher but there were "areas of concern" which she would not identify. Firmino said that she wanted to continue teaching there and asked what she could do. McDonell responded that there was nothing she could do. While Firmino was pleading for her job, Doar entered the office and told Firmino that this perfectly illustrated why she made her decision, because Firmino was "argumentative and uncooperative," and that all she could do was to pack her things and turn in her keys. The foregoing findings are based on the credible testimony and largely uncontradicted of Maria Firmino. McDonell and Wassmer testified at the hearing but neither gave any testimony, which disputed Firmino's version of these events or cast any doubt on her veracity or recollection.

Julie Doar testified that her only current association with the Respondent is as a parent of a student at the school. After becoming interim principal in June, she was given responsibility to determine which teachers would be offered contracts to teach during the following academic year. She did not consult with Wassmer about these determinations although he was still at the school because he indicated he did not want to be involved. Firmino was the only teacher whom she decided not to invite back. She never observed Firmino in a classroom and based her decision on the fact that Firmino told her that "she couldn't teach all the standards the way she was supposed to." When she informed Firmino that her contract was not being renewed she told her the reason was: "I didn't think she had the right spirit for us to be going through the transition."

Analysis and Conclusions

The General Counsel contends that Firmino was terminated in retaliation for the concerted protected activity she engaged in while employed by the Respondent. The Respondent contends that the reason it did not renew her contract was that Firmino told interim principal Doar that "she lacked the ability to do her job."[5]

In cases where the employer's motivation for a personnel action is in issue, it must be analyzed in accordance with the test outlined by the Board in *Wright Line*, 251 NLRB 1083 (1980), enfd 662 F.2d 800 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel must introduce persuasive evidence that animus toward the protected activity was a substantial or motivating factor in the employer's decision. Once that has been done, the burden of persuasion shifts to the employer to demonstrate that it would have taken the same action even in the absence of protected activity on the part of the employee. *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). To sustain his initial burden, the General Counsel must show (1) that the employee was engaged in protected activity; (2) that the employer had knowledge of that activity; and (3) that the activity was a substantial or motivating reason for the employer's adverse action. *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). Direct evidence of unlawful motivation is seldom available and it may be established by circumstantial evidence and the inferences drawn there from. E.g., *Abbey Transportation Service*, 284 NLRB 689, 701 (1987); *FPC Moldings, Inc. v. NLRB*, 64 F.3d 935, 942 (4th Cir. 1994); *Shattuck Denn Mining Corp.*, 362 F.2d 466, 470 (9th Cir. 1966).

There is substantial uncontradicted evidence in the record that throughout the first half of 2003, Firmino engaged in concerted activity with other employees. This activity included her initiating and participating in a number meetings with other teachers and staff members to discuss various issues relating to their terms and conditions of employment, assisting in the preparation and submission of a letter on behalf of a group of faculty member protesting their midyear performance evaluations, and the preparation of proposals concerning improvements in their terms and conditions of employment that they wanted the Employer to implement. She also spoke out at a staff meeting at the school in support of discharged employee Djenaba Faal and wrote a letter to the D.C. Human Rights Office challenging her discharge. She consulted with and assisted the IPA, a dissident parent group at the school, which make recommendations to the school administration on a number of subjects, including, labor issues. This group had also expressed support for Faal and was critical of her dismissal. Firmino's activity was engaged in with other employees and not solely by or on behalf of herself and is protected by the Act. E.g., *Merit Contracting, Inc.*, 333 NLRB 562, 563 (2001); *Meyers Industries*, 281 NLRB 882, 885 (1986); *Meyers Industries*, 268 NLRB 493, 497 (1984).

In its posttrial brief the Respondent contends that Firmino's "disruptive behavior" does not constitute protected activity. This is apparently based on the testimony of former-teacher Carololivia Herron that she considered Firmino's conduct at certain meetings, held by Wassmer to allow the teachers to express their views, to be disruptive. I find there is no evidence that any of Firmino's concerted activity discussed herein could reasonably be considered so outrageous, egregious, or disruptive as to forfeit the protection of the Act. E.g., *Wolkerstorfer Co.*, 305 NLRB 592 fn. 2 (1991); *Martin Marietta Corp.*, 293 NLRB 719, 725 (1989).

There is also substantial uncontradicted evidence that the Respondent had knowledge of Firmino's involvement in protected activity. She not only told Wassmer that the teachers were meeting and preparing a proposal to be submitted to the school administration concerning the changes they wanted implemented, he asked her to have the teachers consider his own proposals for changes in the course of their deliberations. A letter the teachers prepared protesting the midyear performance evaluations was sent to Wassmer with a copy to McDonell. Firmino spoke out at a staff meeting in support of Faal and she told McDonell about her letter in support for Faal and that the

[5] The General Counsel asserts that the Respondent has failed to fully comply with a subpoena duces tecum issued to it and requests that the defenses related to the unproduced documents be stricken. While I agree that the Respondent has failed to establish that it made a good-faith effort to fully comply with the subpoena, I find that the General Counsel has not been prejudiced thereby and deny the request.

teachers were preparing a proposal concerning changes in working conditions they wanted implemented. Moreover, the small size of the work force at the school supports the inference that the Respondent was aware of Firmino's concerted activity. *La Gloria Gas & Oil Co.*, 337 NLRB 1120, 1123 (2002).[6] Both Wassmer and McDonell testified at the hearing but neither denied knowledge of Firmino's concerted activity.

The Respondent argues that there is no evidence that the person it says made the decision not to offer Firmino a new contract, Doar, knew about Firmino's protected activity. I do not agree. Such knowledge can be inferred from circumstantial evidence. E.g., *La Gloria Gas & Oil Co.*, supra, at 1123; *Abbey Transportation Services*, supra at 701. After being appointed interim principal, Doar had a meeting with her predecessor, Wassmer, in which he gave her an "overview of the school" and his "perspective on the various faculty members." She also sat in on the meeting in June when Wassmer gave Firmino her performance evaluation in which he told her she could not question and criticize every decision the school administration made or go above and beyond it every time she disagreed with something. In her hearing testimony, Doar did not deny knowledge of Firmino's concerted activity.[7] Her statement to Firmino on the day she was told that her contract would not be renewed, that she was "argumentative and uncooperative," further supports the inference, which I draw, that Doar knew about Firmino's concerted activity. There is no other reasonable explanation for this comment since there is no evidence that Firmino and Doar had any significant personal interaction other than their one meeting on June 10 and there is nothing in the record to suggest that Firmino was argumentative or uncooperative during that meeting.

There is direct and circumstantial evidence establishing the Respondent's animus towards Firmino's protected concerted activity. In the meeting at which Firmino informed school president McDonell that she had written a letter in support of Faal and was working with other teachers to prepare a proposal for changes at the school, McDonell accused her of "doing things to hurt the school." Doar admitted that she told Firmino that the reason for her was termination was that she didn't have "the right spirit." Similarly, in a conversation with McDonell about the decision to terminate Firmino, Doar referred to Firmino's being unwilling to work together as a part of the "team." The Board has long considered similar comments, such as accusing an employee of having a "bad attitude," to be a veiled reference to the employee's protected activities. E.g., *Climatrol, Inc.*, 329 NLRB 946 fn. 4 (1999); *Promenade Garage Corp.*, 314 NLRB 172, 179–180 (1994); *Cook Family Foods*, 311 NLRB 1299, 1319 (1993). When referenced in the context of explaining why an employee was terminated, it constitutes "especially persuasive evidence" that the termination was unlawfully motivated. *Cook Family Foods*, supra at 1319. Under the circumstances involved here, I find that Doar's statement that Firmino was "argumentative and uncooperative" indicates that her concerted activities were considered by the Respondent to constitute a lack of cooperation and played a role in the decision to terminate her. *We Can, Inc.*, 315 NLRB 170, 171 (1994).

What makes the Respondent's motivation for terminating Firmino most suspect is the weakness of its purported reason for doing so. Wassmer, Doar, and McDonell all testified that teaching children by means of the "arts as education" process is a difficult task which can take years to perfect. A teacher who can successfully do this is "very difficult" to find and is a highly valuable employee. Firmino had been teaching at the school for 4 years and there is nothing in the record to suggest that she had not performed her job successfully.[8] On the contrary, Wassmer, who was the principal during that period and did several performance evaluations, testified that there were no major deficiencies in Firmino's ability to perform as a teacher at the school, that there was no performance-based reason not to renew her contract, and that he had given her high ratings on the performance evaluations in the category of understanding and implementation of arts as education. At the time Firmino was terminated, two other teachers had already announced that they would not be returning to the school for the fall semester. There is no evidence that the Respondent had lined up replacements for any of them, let alone, that it had anyone more qualified than Firmino available to replace her. Despite this, Doar chose to terminate Firmino, notwithstanding her 4 successful years of teaching at the school and the fact that Doar, who had been interim principal only about 3 weeks, had never observed her in the classroom.

There is also circumstantial evidence supporting the inference that Firmino was terminated for engaging in protected activity. The timing of an adverse action can indicate an unlawful motive. E.g., *Masland Industries*, 311 NLRB 184, 197 (1993); *Limestone Apparel Corp.*, 255 NLRB 722, 736 (1981). Firmino had been employed by the Respondent for 4 years during which no disciplinary action had ever been taken against her and she had received consistently positive performance evaluations. She began to actively engage in protected concerted activity in the spring semester and she was terminated immediately after it ended, which was the Respondent's first opportunity to do so once her contract expired. This occurred soon after, but not until, Doar took over as principal from Wassmer who, as noted, testified that he would not have terminated Firmino.

[6] Firmino and Respondent's witness Neomy Gutierrez testified that when something happened at the school "everybody" knew about it.

[7] Doar did testify that Firmino had told her that she had written memoranda to the board of trustees but she did not know what this involved. These memoranda are not a part of the protected concerted activity alleged in the complaint.

[8] Counsel for the General Counsel put into evidence summaries he prepared based on those teachers' performance evaluations that were actually produced by the Respondent pursuant to subpoena. He contends that they establish that Firmino was rated higher than other teachers who were not terminated. The Respondent offered its own version of the summaries and contends that the evaluations are not relevant because they establish no meaningful distinction exists between the scores of all the teachers. I find the evaluations are relevant at least to the extent that they support the testimony of Wassmer, who made the evaluations, that Firmino was successful in implementing the arts as education process and that there was no performance-based reason for her termination.

Firmino had openly assisted Faal and the IPA during the Spring semester and both were at odds with the school administration. McDonell testified that she perceived both as having done things to harm the school, a charge she also leveled at Firmino. According to McDonell, the IPA had circulated material that was critical of the school and which she considered libelous and untrue. After that, the IPA was no longer permitted to use the school for its meetings. At some point, Faal's employment was terminated, effective at the end of the school year, contingent upon her not discussing her personnel situation with other school employees and parents. When the Respondent believed she had violated that proviso, her employment was terminated immediately.

On January 10, in connection with an application Firmino was making for financial aid for her son's education, the Respondent issued a letter on her behalf which confirmed her employment and stated: "The probability of her continued employment is excellent." By the end of June, she was out of a job. The only thing that had changed in the interim was that she engaged in the protected concerted activity discussed herein.

Based on all of the foregoing, I find that the General Counsel has met his burden under *Wright Line* of establishing that Firmino's protected concerted activity was a motivating factor in her termination. I also find that the Respondent has not established that it would have terminated Firmino even in the absence of that protected activity.

The Respondent points to the fact that other teachers joined Firmino in her protected activity and were not terminated and argues that this is proof her termination was lawful. The evidence is clear that Firmino was the moving force behind much of the protected activity going on at the school during the spring semester and the most visible participant. In any event, it is well settled that a discriminatory motive, otherwise established, is not disproved by an employer's proof that it did not weed out all of the employees who engaged in the activities that displeased it. E.g., *Nachman Corp. v. NLRB*, 337 F.2d 421, 424 (7th Cir. 1964); *Audubon Regional Medical Center*, 331 NLRB 374, 376 (2000).

According to the testimony of Doar, Firmino essentially terminated herself by stating at their meeting on June 10 that she "couldn't teach all the standards she was supposed to." Specifically, Doar said that she read the following question: "Are you able to adequately teach through your art processes all the required capabilities and knowledge as required in math, science, social studies, and literacy?" Firmino answered: "No, there [are] too many children and too many standards and too many different levels to be able to do that."[9]

Firmino had a different recollection of their conversation on June 10. She testified that she told Doar about the difficulties she had encountered in teaching math through the arts as education process because of the different levels of ability of the children in her class, some of whom had been diagnosed as having special education needs, but that she was "stridently making an effort" to do so. Doar asked her if in the coming school year she would mind having the size of her class increased and would work with an assistant. Firmino responded that she would prefer not to have the size of her class increased but that she "would live with it" and that she was used to working without an assistant because the assistants were often shuffled to other classes to serve as substitutes. Doar asked her about teaching a wider range of ages in her class and Firmino responded that if it were necessary she would do it. Firmino had no recollection of being asked scripted questions or a specific question being asked concerning her ability to teach the arts as education process. Rather, she recalled a general conversation concerning the arts as education process in which she outlined in detail the challenges and the successes she had encountered with that process. Their meeting ended with Doar asking Firmino to provide a list of the supplies needed for her classroom in the coming year. She described Doar as being "supportive" during the meeting.

I credit Firmino's detailed and essentially uncontradicted description of this meeting over the cryptic account by Doar, which was elicited in large part through leading questions by the Respondent's counsel. That testimony establishes that Firmino raised questions about the challenges she faced in implementing the arts as education process, as Doar admitted other teachers had done in similar interviews. It also establishes that Firmino did not say that she was unable to teach the standards but expressed her belief that despite difficulties she was making a "strident" effort to do so. Doar apparently accepted similar responses from the other teachers as sufficient to show "the right spirit," but not from Firmino.

However, even if Doar's version of this conversation were found to be credible, it is simply not believable that any reasonable employer would base a decision to terminate one of its most senior and successful teachers on this single question and answer. This is particularly true where Doar expressed no misgivings to Firmino about her answer at the time and did not ask her any followup questions or seek any clarification of her answer. On June 27, after learning she was being terminated, Firmino repeatedly told McDonell of her desire to continue teaching at the school and pleaded with her to tell what she needed to do to stay on. McDonell's only response was "there's nothing you can do." Considering all of the circumstances, I find the Respondent's asserted reason for its termination of Firmino was a pretext. It apparently does not contend that there was any other reason for her termination.[10] Accord-

[9] Doar admitted that other teachers had told her they were struggling with the arts as education process but she said that they told her that they were "working on it, " She claimed Firmino did not. However, she could identify only one of these teachers, John Murillo, and did not remember what he said. Murillo and the others were offered contracts for the fall semester.

[10] On this point the Respondent tries to have it both ways. At the hearing, the Respondent presented testimony from Neomy Gutierrez, a parent of one of Firmino's students, that was critical of her performance as a teacher during the spring semester. The Respondent' s counsel stated that this testimony "goes to possible causation for her [Firmino's] termination" and "supports Doar's reasoning." While in its post-hearing brief it does not specifically argue that this played a role in Firmino's termination, it does allude to counsel's remarks at the hearing. I have given this testimony no consideration since there is no evidence that Gutierrez raised any objections about Firmino to the

ingly, I find that the Respondent has not established that Firmino would have been terminated in the absence of protected concerted activity on her part and that her termination violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Children's Studio School Public Charter School, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) by terminating the employment of Maria Firmino-Castillo because she had engaged in concerted activity protected by Section 7 of the Act.

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

REMEDY

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

The Respondent having discriminatorily discharged Firmino, it must offer her reinstatement and make her 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[11]

ORDER

The Respondent, Children's Studio School Public Charter School, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise disciplining employees because they have engaged in concerted activities protected by Section 7 of the Act.

(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 the Board's Order, offer Maria Firmino-Castillo 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 Maria Firmino-Castillo 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 decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge and within 3 days thereafter notify Maria Firmino-Castillo 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, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Washington, D.C., copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 5, 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 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 June 27, 2003.

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

Dated Washington, D.C. August 31, 2004

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.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union

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school administration or that it entered into Doar's reasoning. On the other hand, I find the Respondent's suggestion that this evidence shows that Firmino's "performance was unsatisfactory" (R. Br. p. 18) raises the inference that it is grasping for reasons to justify an unlawful discharge. See *U. S. Service Industries*, 324 NLRB 834, 837 (1997).

[11] 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.

[12] 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."

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 participating in concerted activities protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Maria Firmino-Castillo 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 Maria Firmino-Castillo 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 this Order, remove from our files any reference to the unlawful discharge of Maria Firmino-Castillo 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.

CHILDREN'S STUDIO SCHOOL PUBLIC CHARTER SCHOOL