

Women Care, Inc. and Retail Clerks Union Local No. 698, United Food and Commercial Workers International Union, AFL-CIO.¹ Case 8-CA 12321

December 5, 1979

DECISION AND ORDER

BY MEMBERS JENKINS, PENELLO, AND TRUESDALE

On September 13, 1979, Administrative Law Judge Abraham Frank issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs² and has decided to affirm the rulings, findings,³ and conclusions of the Administrative Law Judge and to adopt his recommended Order.⁴

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Women Care, Inc., Akron, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

¹ The name of the Charging Party, formerly Retail Clerks Union Local No. 698, AFL-CIO, is amended to reflect the change resulting from the merging of Retail Clerks International Union and Amalgamated Meatcutters and Butcher Workmen of North America on June 7, 1979.

² Respondent requested oral argument. This request is hereby denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

³ The General Counsel has excepted to the Administrative Law Judge's recommendation that interest on backpay be computed at a rate other than the 9 percent requested by the General Counsel. We find no merit in this exception. See *Florida Steel Corporation*, 231 NLRB 651 (1977).

⁴ In par. 1(b) of his recommended Order, the Administrative Law Judge provided that Respondent shall cease and desist from "in any other manner" interfering with the employees' exercise of their Sec. 7 rights. We have examined this case in light of *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), and have determined that the issuance of a broad order is warranted in this case inasmuch as Respondent's unlawful conduct, involving three discharges and the refusal to reinstate two unfair labor practice strikers, directly affected over half of the employee complement. See *Hansa Mold, Inc.*, 243 NLRB 853 (1979).

We also wish to note that the unfair labor practice strikers, Phillips and Francisco, are entitled to backpay from October 3, 1978, the date of their unconditional application to return to work. The dischargees' awards of backpay are to be computed from September 30, 1978, the date of their discharges.

APPENDIX

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

After a hearing at which all sides had the opportunity to present evidence and arguments, it was determined that we violated the National Labor Relations Act, as amended. We have, therefore, been ordered to post this notice and to do what it says.

The National Labor Relations Act, as amended, gives you, as employees, certain rights, including the right:

- To engage in self-organization
- To form, join, or help a union
- To bargain collectively through a representative of your own choosing
- To act together for collective bargaining or other mutual aid or protection
- To refrain from any or all of these things.

Accordingly, we give you these assurances:

WE WILL NOT interfere with, restrain, or coerce our employees by discharging employees because of their protected concerted activity and by refusing to reinstate unfair labor practice strikers upon their application to return to work.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL offer Lauren Swirsky, Francine Lucas, Gina Sessions, Barbara Phillips, and Tammy Francisco immediate and full reinstatement to their former positions, if available, or, if those positions no longer exist, to substantially equivalent positions with the wage rate they enjoyed at the time they were terminated or refused reemployment, plus any increases, and without prejudice to their seniority any other rights and privileges, and WE WILL make them whole, with interest, for all losses suffered by them as a result of our discrimination against them.

WOMEN CARE, INC.

DECISION

ABRAHAM FRANK, Administrative Law Judge: The charge in this case was filed on October 10, 1978,¹ and the complaint alleging violations of Section 8(a)(1) of the Act issued on November 17. The hearing was held on April 19 and 20, 1979, at Akron, Ohio. All briefs filed have been considered.

¹ All dates are in 1978 unless otherwise indicated.

At issue in this case is the question whether Respondent unlawfully discharged three employees because of their concerted activity and refused to rehire two additional employees who quit to protest the discharges of their fellow employees.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Preliminary Findings and Conclusions

Respondent, an Ohio corporation, with an office and place of business in Akron, Ohio, the only facility involved in this proceeding, is engaged in the business of operating a family planning and abortion clinic. Respondent admits that in the course and conduct of its business it receives gross revenues in excess of \$250,000. However, Respondent denies that it is otherwise engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

On April 5, 1979, counsel for the General Counsel sent *subpoenas duces tecum* to Starr Hurst, director of the Akron clinic, and Dr. Michael Kafrissen, in charge of medical procedures at said clinic, with copies to Respondent's counsel. The subpoenas required the presence of the aforementioned individuals with documentary records relating to Respondent's gross revenues and out-of-state purchases beginning with the calendar year 1977 up to March 31, 1979. The subpoenas also required the production of personnel and/or payroll records relating to the supervisory and managerial personnel of Respondent. The subpoenas required the presence of Hurst and Kafrissen and the production of the documentary materials on the morning of the hearing in this case, April 19, 1979.

Hurst and Kafrissen appeared. However, the subpoenaed documentary evidence was not produced. On April 13, 1979, Respondent, through its counsel, moved for a continuance of the hearing on the ground that two of its witnesses, Harvey Levy and Arthur Kafrissen, were not available, the former because he was ill and the latter because of his duties as a judge in the city of Philadelphia. On April 18, 1979, Respondent's motion for a continuance was denied by the Regional Director.

At the hearing, counsel for Respondent argued that it was unfairly denied a continuance and renewed its motion. I reserved judgment on the issue. The motion is denied. Neither Levy nor Arthur Kafrissen is named in the complaint. Levy's illness would not permit him to attend the hearing in this matter for several weeks; nor has Respondent suggested when, if ever, Arthur Kafrissen would be available. Neither Levy nor Arthur Kafrissen was present in Akron at times material to the issues in this case. Respondent's representation and testimony that the decision to discharge the alleged discriminatees was made by Levy is not challenged by the General Counsel. In these circumstances, I conclude that the Regional Director reasonably exercised his discretion in denying Respondent's motion, and I reaffirm that ruling.

Respondent also argued that the subpoenaed documents were not produced because they were located in Philadelphia in the possession of Levy and could not be produced without his presence. I find no merit in this position. Respondent also argued that, at the request of the General Counsel, the parties on April 13, 1979, had discussed the

possibility of arriving at certain stipulations, which would make it unnecessary to produce some of the subpoenaed documents, and it was not until that date that Respondent was aware that such materials would be necessary for this proceeding. I find this position too without merit. The period between April 13, 1979, and April 19, 1979, is a sufficient time to transport the subpoenaed documents from Philadelphia to Akron or, in the alternative, to submit a summary of such records, with an opportunity for an agent of the General Counsel to check the accuracy of the summary from the original documents, as provided in the *subpoenas duces tecum*.

As indicated above, Respondent has admitted gross revenues in excess of \$250,000. With respect to out-of-state revenue, Barbara Phillips, a registered nurse, testified credibly that she was employed at Respondent's Akron clinic from January 3 to September 30 and that during that period she worked for 5 months in the procedure and recovery rooms. In the performance of her duties she observed patients' charts and made appointments for out-of-state patients with their own doctors for followup procedures. Abortion procedures were performed on 4 days a week, Tuesday, Wednesday, Friday, and Saturday. Phillips estimated that an average of 50 such procedures were performed each week. Of the 50 patients involved, an average of 10 were out-of-state patients. The minimum cost of an abortion at Respondent's clinic was \$175. The projected revenue from out-of-state patients over an annual 50-week period thus amounted to \$87,500.

In the summer of 1978, Respondent received a suction machine from Berkeley Bio-Engineering in Berkeley, California. The cost of this machine was estimated at various amounts. Several employees testified that Hurst had informed them the machine cost several thousand dollars or \$2,000. When questioned by the General Counsel, Hurst was a reluctant and evasive witness, "guessing" that the machine cost \$1,600. On rebuttal she testified that, based on the Berkeley manual and direct conversations with Berkeley, the cost of the machine was approximately \$1,200. In addition to the suction machine, Respondent in 1978 received boxes of cannulas (tubing) from Berkeley, California, valued at about \$2.50 each. Hurst also testified that an autoclave machine that "could have" arrived at the clinic in the spring of 1978 and which she "believed" came from outside the state, was priced at "around \$900.00." At another point in her testimony Hurst testified that the suction machine was, in addition to the autoclave machine, "another Berkeley machine" that came from California.

The record shows that Respondent in 1978 had a business relationship with three other family planning and abortion clinics in Las Vegas, Philadelphia, and Milwaukee. Hurst testified that she was directed by Levy, her superior to whom she reported by telephone on a daily basis, to travel to these locations and help establish clinics patterned after Women Care, Inc., of Akron. Each of the newly established clinics included in its business name the phrase "Women Care." The director of the Las Vegas clinic visited the Akron clinic, and on some occasions thereafter Hurst and personnel in Las Vegas engaged in telephone conversations during which Hurst supplied birth control information. During her employment in other cities for the above purposes Hurst was paid her regular salary by Respondent.

The Berkeley suction machine, received by Respondent in 1978, was eventually shipped on Levy's instruction to the Women Care clinic in Philadelphia.

Respondent's failure to produce documentary evidence of its gross revenues and out-of-state purchases warrants the inference, which I draw, that such evidence would be supportive of the above commerce facts.

Based upon the foregoing, I conclude that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the policies of the Act to assert jurisdiction in this case.

The Charging Party is a labor organization within the meaning of the Act.

B. *The Facts*

Except for counsel's representation that the wife of Harvey Levy owns one-third of the issued shares of Respondent, there is no evidence in the record as to the actual ownership of Respondent. It is clear from the record, however, that Levy, a nonowner with no formal corporate title, controls the operations of Respondent and makes all important decisions, at times with the concurrence of Arthur Kafrissen. Neither Levy nor Arthur Kafrissen resides in Akron.

Respondent's services at its Akron clinic include abortions, birth control information, prepregnancy testing, and counseling.

The day-to-day business operations of the Akron clinic and all nonmedical services are under the immediate control and direction of Hurst. At times material to this proceeding, Dr. Michael Kafrissen, a brother of Arthur Kafrissen, was in charge of all medical procedures.

Except for Hurst and Michael Kafrissen, no other official or representative of Respondent supervises any of the employees at the Akron clinic. Hurst hires and fires employees and effectively recommends raises for them. She signs checks for drugs and supplies that arrive at the clinic c.o.d. from Berkeley, California. Other bills are sent to Levy in Philadelphia. She prepares weekly schedules and assigns subordinates to train new counselors. She maintains a file containing patients' evaluation reports. She is paid a salary of \$275 per week as compared to the hourly rate for employees ranging from \$4 to \$5.50 per hour.

I find that Hurst is a supervisor within the meaning of Section 2(11) of the Act.

Dr. Michael Kafrissen was first employed at the clinic on September 20, succeeding a Dr. Chiu. Kafrissen is in charge of all medical procedures, such as birth control, Pap smear, annual exams, and abortions. Necessarily, employees involved in any of these procedures are under his control and supervision. These would include registered nurses and licensed practical nurses.

The record shows, however, that Kafrissen projected a larger apparent authority. When he first arrived at the clinic on September 20, Kafrissen called a meeting of the entire staff for 11:30 a.m. that morning. He informed them that he expected them all to work together, that he had different medical procedures from Dr. Chiu, that there would be medical changes and slight procedural changes. Thereafter, he interviewed counselors individually, asking their views as to the problems at the clinic. Francine Lucas pointed out

some of the employees' personnel problems, such as not having a voice to the owners, no designated lunch break, long Saturday hours, and the fact that many employees came to work when they were ill. Kafrissen thanked Lucas for her candor and said that he would talk to the people in Philadelphia concerning the comments she had made.

Kafrissen was also instrumental in changing the fee for abortions to a maximum of \$175 with the concurrence of Levy and Arthur Kafrissen. Kafrissen is paid on a fee basis for each service performed.

Inasmuch as Kafrissen's duties as a doctor are an integral and necessary part of Respondent's business operations, and in view of his apparent staff authority and his responsible direction of employees performing medical services, I find that he is a supervisor within the meaning of Section 2(11) of the Act.

At or about 3:30 or 4 p.m. on September 29, five employees, the alleged discriminatees in this case, counselors Lauren Swirsky, Francine Lucas, Gina Sessions; LPN Tammy Francisco; RN Barbara Phillips, met at Swirsky's home which she shared with Sessions. The meeting lasted until about 6:30 p.m. The employees had decided to get together because of a lot of personnel and other problems at the clinic. After talking the matter over they concluded that something should be done about their problems. Sessions, who had been taking notes, drew up a list of grievances or problems.² They debated the timing of their action and finally agreed that something should be done the next day.

Francisco was chosen by lot to call Hurst. Hurst was not at home, and Francisco left a message that there would be a meeting at 8 o'clock at Women Care. Hurst, Kafrissen, and his wife were asked to be present. The message was signed: Staff of Women Care.

Sessions tried, but was unable to contact Kafrissen by phone.

The following morning, a Saturday, at 8 a.m. the employees met in the parking lot of the clinic. Sessions was scheduled to begin counseling at 8 a.m.; Lucas at 10 a.m.; Swirsky and Phillips were due at 8:30 a.m. and 9:30 a.m., respectively, to assist the doctor.

The employees entered the clinic and invited the receptionist, Maria Pringle, to join them in presenting their grievances, but she declined. Between 8 and 8:30 a.m. Hurst called about three times. She wanted to know who had called and left the message. Speaking on one occasion to

² The list of grievances, subsequently reduced to typewritten form, contained the following points: (1) half-hour lunch away from the job; (2) posted schedule a week in advance; (3) if scheduled, guaranteed work a minimum of 4 hours, maximum of 10 hours a day. Inform employees a day ahead of time if employee is not needed; (4) employee assumes only one "position" per day as it is too hard to assume multiple duties; (5) copies given to every employee of liability and malpractice insurance; a written statement from the insurance company; (6) no one passes out medications unless they are certified by the State to do so; (7) no one can take verbal medication orders from the doctor unless they are an RN or an LPN with pharmacology; (8) every employee is entitled to a vacation, or time off, for personal reasons if employer is given 2 weeks' notice (this does not include sick days); and (9) reply on all points by Wednesday, Oct. 4, 1978, at another staff meeting 1 hour before scheduled work begins. On an additional sheet of paper under the heading "Patients, Procedure, and Doctor/Staff relations" additional problems were noted: (1) updating of aftercare sheets now; (2) consistency in policies - written; (3) better balancing in scheduling patients; (4) staff meetings once every 2 weeks with full staff ("We're willing to volunteer half of the time"); (5) written, detailed job descriptions; and (6) published list of all employees' phone numbers.

Sessions, Hurst said, "Gina, I want you to start counseling." Sessions replied, "Well, Starr, we kind of want to have a meeting before we start counseling." Hurst insisted, and Sessions continued to refuse. About 8:45 a.m., Swirsky called Hurst and told her that the employees just wanted to have a meeting before they began the day's work and they wanted her and Dr. Kafirissen to be there. Hurst angrily said she did not know who had called and left the message the night before. Hurst finally agreed to come to the meeting.

About 9 a.m., Dr. Kafirissen and his wife, Jill, who assisted him, arrived. Kafirissen, his wife, and the employees assembled in the counseling room. A list of the grievances was handed to Kafirissen, who read them and handed them to his wife. Hurst arrived about 9 or 9:15 a.m. While Hurst was reading the list, Kafirissen said, "They all sound reasonable to me."

Swirsky opened the meeting by saying that the employees wanted to talk about problems that had been going on for a long time, particularly since Kafirissen seemed to be thinking of making other changes. Swirsky said that the employees were a united front.

Kafirissen then said in the form of a question, "When I was in school, that meant you either all stayed or you all left?"

Lucas replied, "Well, that hasn't been decided as yet."

Each of the employees read three of the grievances.

When they had concluded reading the grievances and talking about them, Kafirissen said that he thought the grievances were reasonable and that he would deal with the medical issues. Anything else was Hurst's department. Hurst said only she would have to talk to Levy and Arthur Kafirissen.

About 9:45 a.m., Pringle opened the door and said, "Is this going to go on much longer, patients are waiting?" Everyone agreed to end the meeting. The employees went to work. Four or five patients were waiting for the "procedure" and three patients were waiting for birth control. All patients were counseled and procedures were finished; none was turned away.

About 3:30 p.m., Arthur Kafirissen called and asked to speak to Hurst. Jill Kafirissen took the phone from Swirsky, and thereafter Hurst went to the phone.

The day went smoothly as far as work was concerned, except that Hurst would not talk to Swirsky unless Swirsky asked her a direct question.

About 4:30 p.m., Swirsky overheard a conversation between Hurst and Kafirissen. Hurst said, "Well, who is going to tell them?" Kafirissen replied, "Well, I will tell them."

About 6 p.m., when Swirsky was about to punch out, Hurst said to Swirsky, "Do you have a few minutes? The doctor would like to talk to you . . . He'd like to talk with you and Gina and Francine." Francine Lucas had already left for the day.

Kafirissen met with Swirsky and Sessions in the counseling room. Kafirissen said that Swirsky, Sessions, and Lucas were no longer associated with Women Care.

Sessions asked, "Does that mean we are fired?"

Kafirissen said, "Yes."

The employees asked if he knew why and Kafirissen said, "No." He had just been given the order to fire them. In

reply to further questioning by the employees, Kafirissen said, "I think the grievances are reasonable and I think your work has gone very well, and I think you did a good job."

Kafirissen suggested that the employees talk to Hurst if they wanted to know the reasons why they were fired.

Subsequently, the employees talked to Hurst and asked why they were fired. Hurst said, "You know personally that I think you have some good points, your grievances are reasonable, but you went about this all wrong. You shouldn't have called the meeting the night before. You shouldn't have left me a note written on a crumpled piece of paper and not leaving a name." Hurst also said, "It was the meeting, it was just the way you went about it. Harvey and Arthur (Levy and Arthur Kafirissen) are very mad, very angry." Hurst may also have said that Levy and Arthur Kafirissen were angry because the employees had kept the patients waiting.

During this period of time, about 6:15 p.m., Hurst had a conversation with Phillips in the lab. Hurst told Phillips that Dr. Kafirissen was in the counseling room terminating three counselors and Hurst hoped Phillips would understand the owners' position, that they were very angry with what had gone on that day. Phillips said that the employees had decided it was concerted activity and she would have to resign in protest.

Subsequently, on October 3, Phillips wrote a letter to Hurst, offering to return to work unconditionally. Phillips has not been offered her job by Respondent.

About 7:30 p.m. that evening Swirsky, Sessions, and Phillips arrived at the home of Lucas and told her that she was fired. Lucas called the clinic and, before Kafirissen could tell her she was fired, she said, "Never mind, I called to tell you I quit." Lucas also told Hurst the same thing, that Lucas quit.

That evening Francisco called Hurst and told Hurst that Francisco was quitting in protest over the firing of the other employees.

On October 3, Francisco wrote a letter to Hurst offering to return to work. Francisco has not been offered her job by Respondent.

C. Analysis and Final Conclusions

Section 7 of the Act guarantees employees the right to engage in concerted activity for their mutual aid and protection. It is a violation of Section 8(a)(1) of the Act to interfere with, restrain, or coerce employees in the exercise of this right.

The instant case is a classic example of such an 8(a)(1) violation. These employees had legitimate, mutual grievances which they concertedly presented to their Employer. The immediate reaction of Respondent was to fire three of them at the end of the day. The fact that the employees' meeting with their supervisors resulted in delayed services for several patients for 20 or 30 minutes is no justification for denying these employees their statutory right to engage in concerted activity. Moreover, I conclude on this record that the employees were discharged by Respondent solely because they had the temerity to demand better working conditions and to call a meeting specifically for that purpose.

Accordingly, I find that, by discharging Lauren Swirsky, Francine Lucas, and Gina Sessions on September 30, Respondent violated Section 8(a)(1) of the Act.

Barbara Phillips and Tammy Francisco became unfair labor practice strikers when they resigned on September 30 to protest the above unlawful discharges. They are entitled to full reinstatement to their former or substantially equivalent positions upon their application to return to work. By refusing to reinstate Barbara Phillips and Tammy Francisco to their former positions upon their applications of October 3 to return to work, Respondent further violated Section 8(a)(1) of the Act.

The above unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER³

The Respondent, Women Care, Inc., Akron, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing employees by discharging employees because of their protected concerted activity and by refusing to reinstate unfair labor practice strikers upon such strikers' application to return to work.

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

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

(a) Offer Lauren Swirsky, Francine Lucas, Gina Ses-

³ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

sions, Barbara Phillips, Tammy Francisco immediate and full reinstatement to their former positions, if available, or, if those positions no longer exist, to substantially equivalent positions with the wage rate they enjoyed at the time they were terminated or refused reinstatement, plus any increases, and without prejudice to their seniority and other rights and privileges, and make them whole for all losses suffered by them as a result of the discrimination against them in the manner set forth by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950); *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). The General Counsel's request for an interest rate of 9 percent is denied. *Neely's Car Clinic*, 242 NLRB 335 (1979).

(b) Preserve and, upon 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 other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its clinic in Akron, Ohio, copies of the attached notice marked "Appendix."⁴ Copies of said notice, on forms provided by the Regional Director for Region 8, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notice is not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 8, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

⁴ In the event that 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."