

Young Hinkle Corporation and Terri E. Drake. Case
11-CA-7686

August 16, 1979

DECISION AND ORDER

BY MEMBERS PENELLO, MURPHY, AND TRUESDALE

On May 8, 1979, Administrative Law Judge Marvin Roth issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

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 brief and has decided to affirm the rulings, findings,¹ and conclusions² of the Administrative Law Judge and to adopt his recommended Order, as modified herein.³

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, as modified below, and hereby orders that the Respondent, Young Hinkle Corporation, Lexington, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

² In adopting the Administrative Law Judge's finding that Respondent violated Sec. 8(a)(3) and (1) of the Act by denying employment to Terri E. Drake because of her union activities, we find it unnecessary to adopt or pass upon his finding that Respondent's personnel manager, Emma McKee, "presented the Company's hiring policy" when McKee told Drake that since she had engaged in union activities she need not fill out an employment application because she would not be hired by Respondent for quite some time. Respondent argues that the record is devoid of evidence that this was the "Company's hiring policy." However, whether McKee was echoing a company policy it is clear that, as she was speaking as Respondent's agent, McKee's statement establishes Respondent's unlawful motivation for denying Drake employment.

³ In par. 1(c) of his recommended Order the Administrative Law Judge uses the broad cease-and-desist language, "in any other manner." However, we have considered this case in light of the standards set forth in *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), and have concluded that a broad remedial order is inappropriate inasmuch as it has not been shown that Respondent has a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for employees' fundamental statutory rights. Accordingly, we shall modify the recommended Order so as to use the narrow injunctive language "in any like or related manner."

1. Substitute the following for paragraph 1(c):
"(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act."
2. Substitute the attached notice for that of the Administrative Law Judge.

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 parties had an opportunity to present their evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post this notice and to carry out its provisions.

WE WILL NOT discourage membership in Chauffeurs, Teamsters and Helpers Local Union No. 391, or any other labor organization, by discriminatorily refusing to hire job applicants, or in any other manner discriminating against employees with regard to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT tell job applicants that they will not be hired by us or other area employers because of their union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights to organize, to form, join, or assist labor organizations, including Local 391, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

WE WILL offer a job to Terri Drake, without prejudice to her seniority or other rights, and WE WILL make her whole for losses she suffered by reason of the discrimination against her.

All of our employees and job applicants are free to become or remain members of Chauffeurs, Teamsters and Helpers Local No. 391 or any other labor organization.

YOUNG HINKLE CORPORATION

DECISION

STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge: This case was heard in Winston-Salem, North Carolina, on March 2,

1979. The charge was filed on June 12, 1978, by Terri E. Drake, an individual. The complaint, which issued on September 19, 1978, and was amended at the hearing, alleges that Young Hinkle Corporation (herein the Company or Respondent), violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended. The gravamen of the complaint is that the Company allegedly told Drake, a job applicant, that she would not be hired by the Company or other area employers because of her union activity and refused to hire Drake because of her activity on behalf of Chauffeurs, Teamsters and Helpers Local Union No. 391, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein the Union). The Company's answer denies the commission of the alleged unfair labor practices. All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally, and to file briefs. The General Counsel and Respondent each filed a brief.

Upon the entire record in this case, from my observation of the demeanor of the witnesses, and having considered the arguments of counsel and the briefs submitted by the General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

The Company, a North Carolina corporation, operates a plant in Lexington, North Carolina, where it is engaged in the manufacture and distribution of home furnishings. In the operation of its business the Company annually ships goods valued in excess of \$50,000 from its Lexington plant directly to points located outside the State of North Carolina. I find and the Company admits that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

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

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background: Drake's Previous Employment With the Company and Her Union Activity at PPG Industries of Lexington

Terri Drake began her working career when she was hired at the Company's Lexington plant on May 28, 1972. She worked in the chair department clamping chair legs together until June 14, 1972, when she was discharged. Drake testified that her foreman told her that she was fired because she failed to disclose that she was pregnant when she applied for work. The Company's personnel records indicate that she was discharged "because of her willful failure to carry out her assigned duties to the best of her ability." Her personnel file contained a notation recommending that she not be reemployed. Nevertheless, on March 9, 1973, Drake reapplied for a job with the Company, and she was promptly hired. She worked in the rubroom wooling

and sanding furniture until November 15, 1973, when she was discharged a second time, again, according to the Company's records, for insubordination.

In 1974 Drake went to work for PPG Industries of Lexington (herein PPG). In early 1978 she became active in the Union's campaign to organize PPG. On March 13, 1978, PPG fired Drake. The Union filed unfair labor practice charges alleging that PPG discriminatorily discharged Drake and other union adherents and engaged in other acts and conduct violative of Section 8(a)(1) and (3) of the Act. The Regional Director issued a complaint, and hearing in the PPG case commenced on March 2 (the same day that the present case was heard) before another administrative law judge. The Union's organizational campaign and the subsequent unfair labor practice proceedings attracted considerable attention in the Lexington area. (Lexington is a relatively small community, having a population of 17,205, according to the 1970 census.) Company Personnel Manager Charles Kinley, the Company's only witness in this case, testified that he learned about the Union's organizational campaign in the spring of 1978, i.e., after the Union filed its charges, through newspapers and by word of mouth.

B. The Company's Alleged Refusal To Hire Drake

After her discharge from PPG Drake applied for unemployment compensation. She testified that she was told by North Carolina Employment Security Commission (NCESC) to seek other employment, and that she did. Drake testified that in early May 1978 she applied for a job at the Company's Lexington plant because it was her first place of employment, and she thought that the Company might hire her. She testified that she signed the register in the personnel office, whereupon a lady came out and asked if she could help Drake. According to Drake, she (Drake) asked if they were taking applications, and the lady answered that they were and asked Drake if she would like to fill one out. Drake said that she would, adding, "I was fired for Union activity." Drake testified that she said the same thing at other places where she applied for employment. According to Drake, the lady laughed and said: "Oh well, in that case there won't be no need of filling out an application because you won't get hired around here for quite some time." Drake testified that she thanked the lady and left. According to Drake, the lady never asked her her name, whether she was previously employed by the Company, whether she had signed the register, or if she had an application on file.

The Company introduced into evidence its personnel office register for Monday, May 8, 1978, which indicates that Drake was the eighth person to sign the register that day, on a list of 36 persons (3 of whom scratched out their signatures). The Company's personnel office is staffed by two persons. Personnel Manager Charles Kinley and his subordinate, Assistant Personnel Manager Emma McKee. Kinley has been with the Company for 16 years and has held his present position since late 1972. McKee has been assistant personnel manager since September 1977. Kinley is responsible for interviewing and hiring job applicants and also gives formal personal notice to terminated employees

at the time of separation. McKee has authority to interview and hire applicants in Kinley's absence. However, her normal duties, as will be discussed, are to obtain such documents (application forms and/or prior employment records) as are necessary to enable Kinley to interview the applicant. McKee also does typing and prepares timecards for payroll. It was stipulated at this hearing that McKee, although not a supervisor within the meaning of Section 2(11) of the Act, was at all times material an agent of the Company acting on its behalf. In her testimony Terri Drake indicated that she believed that McKee was the person who spoke to her.

McKee, who was presented as an adverse witness for General Counsel, testified that although she was at work on May 8, 1978, she never saw Drake before this hearing and had no recollection of Drake coming to the personnel office or of any such conversation as that described by Drake.¹ Personnel Manager Kinley testified that he was also in his office on May 8, 1978, that he did not interview Drake, but that McKee placed Drake's personnel file (covering her former employment) on his desk. The significance of this testimony by Kinley will be discussed, *infra*. Kinley further testified that whether an applicant is hired depends on the applicant's work record and ability and the jobs available but, that to his knowledge, he has never hired an applicant with knowledge of the applicant's union activity. The Company's plant is unorganized, as are most plants in the Lexington area. Company counsel stipulated that the Company is opposed to unionization. Among those who signed the register on May 8, one applicant was hired the same day. The applicant was placed on a job in the repair department, which job did not require any skill. The Company also hired about five other individuals who signed the register but who had actually applied during the previous week and were not reporting for work.

Kinley and McKee testified, in sum, that McKee followed a standard procedure in dealing with job applicants. When an applicant came in McKee would see the person through a one-way mirror in the personnel office. McKee would come out and ask if the person signed the register and if he or she had filed an application within the previous 6 months. If so McKee would pull the previous application and place it on Kinley's desk; if not McKee would ask if the applicant was a previous company employee. If so McKee would pull out the applicant's personnel file and place it on Kinley's desk, and the file would be used in

¹ I do not agree with the Company's argument that the General Counsel, by calling McKee as a witness, thereby vouched for her credibility. As McKee was admittedly an agent of the Company with respect to the matters at issue, she qualified as a witness identified with the Company within the scope of Rule 611(c) of the Federal Rules of Civil Procedure, and I so ruled at the hearing. Even if she did not so qualify the only pertinent restriction placed on counsel for the General Counsel would be that, generally, leading questions could not be asked on her direct examination. As the representative of a government agency, the General Counsel has an obligation to present such evidence as he deems material to resolution of the unfair labor practice case, whether favorable or unfavorable. Therefore, the General Counsel cannot be expected to vouch for the credibility of every witness presented in the prosecution of an unfair labor practice case. Moreover, the administrative law judge, who must make his own determination of the credibility of the witnesses, is not bound by the express or implied representations of the parties in this regard.

place of a written application. Otherwise the applicant would be instructed to fill out an application. The Company contends that in light of this procedure, which is inconsistent with that described by Terri Drake, it is unlikely that a conversation would have taken place as testified to by Drake. I do not agree because the evidence indicates that the Company did not uniformly follow the procedure described by Kinley and McKee. When Drake applied for reemployment with the Company in 1973, having worked for the Company within the previous year, she filled out a new application for employment which the Company retained in its personnel file. (The application was introduced in evidence in this case.) Charles Kinley was personnel manager throughout 1973, but he did not testify that the application procedure was changed during his tenure. Kinley also testified that there were times when a former employee would be asked to fill out an application, e.g., when the former employment dated back many years. In sum, I find that McKee did not uniformly follow the practice described by her, and therefore that Drake cannot be discredited on this ground. I also do not find it incredible that Drake would volunteer that she was discharged for union activity. An employee may, for whatever motive, when facing a situation involving potential employer discrimination voluntarily declare his or her union activity and thereby deprive the employer of a defense of lack of knowledge of such activity. *Ohio Valley Graphic Arts, Inc.*, 234 NLRB 493, fn. 4 (1978). Drake knew that she was seeking employment in a largely unorganized area where there was outspoken employer opposition to unionization and, that upon listing her prior employment an employer would soon learn, if it did not know already, that she had allegedly been discharged for union activity. Therefore Drake may have decided to draw out the Employer at the beginning in order to determine whether she was employable, regardless of whether she experienced apparent discrimination at other locations before or after applying for employment with the Company.

In sum, I find that Drake's testimony concerning her abortive application is not inherently incredible. However, as the General Counsel has the burden of proof in this case, it remains to be determined whether, in light of the evidence adduced in this case, it is more likely than not that Drake's testimony is true. I find that the evidence supports Drake's testimony. In particular, I find that Drake's testimony is inferentially corroborated by Charles Kinley's unexplained admission that he did not interview Drake on May 8, but that McKee placed Drake's former personnel jacket on his desk. This means, as the Company itself concedes in its brief, that Drake must have presented herself to McKee as a job applicant, that McKee learned or knew her name and status as a former employee, that Kinley anticipated interviewing Drake, but that for some reason Drake did not remain to be interviewed. It does not follow that Kinley and McKee could have known who Drake was only if Drake had identified herself to McKee. Drake's name was on the register. Drake was hired and terminated in 1973 when Kinley was personnel manager. As indicated, Kinley admitted that he learned about the Union's organization campaign at PPG in the spring of 1978 through the

newspapers and by word of mouth. It is probable that as an employer in the community and as a former Employer of Drake that Kinley would have heard or seen her name mentioned in connection with the campaign and remembered it.² In his testimony Kinley (unlike McKee), did not deny knowing Drake, and it is quite possible that Kinley saw and recognized her through the one-way mirror in the personnel office.

The next question posed by the evidence is why Drake left without being interviewed. If Drake was not seeking employment in good faith but simply walked out after trying to entrap the Employer into making an incriminating statement or got cold feet and hurriedly left then it is probable that McKee would have remembered such an unusual event and would have recalled it when Drake filed her unfair labor practice charge. Therefore, I do not credit McKee's testimony that she could not remember Drake coming to the personnel office. The only remaining explanation is that offered by Drake; namely, that she left because she was told, in essence, that it would be futile for her to pursue her application. The evidence does not indicate that this had anything to do with her prior employment history or qualifications or available job openings. The Company was hiring even unskilled help, and Drake had previously been rehired by the Company after being discharged for alleged insubordination. Indeed, Kinley had not yet examined her prior employment record. The only explanation presented is, as testified to by Drake, that she was told, in sum, that she would not be hired because of her alleged union activity. I credit Drake. As McKee was and is admittedly an agent of the Company acting on its behalf, I find that McKee presented the Company's hiring policy when she told Drake that because of her alleged union activity, "there won't be no need of filling out an application, because you won't get hired around her for quite some time." I find, as alleged in the complaint, that the Company violated Section 8(a)(1) of the Act by telling Drake that she would not be hired by the Company or other area employers because of her union activity. See *Universal Fuel, Inc.*, 204 NLRB 26 (1973), *enfd. per curiam*, 498 F.2d 1400 (5th Cir. 1974). In sum, the Company told Drake that she was blacklisted. As the evidence indicates that the Company was hiring at the time that Drake applied for a job, and that there was at least one job opening for which Drake was qualified, I find that the Company further violated Section 8(a)(1) and (3) of the Act by refusing to accept her application and refusing to hire her because of her union activity. See *Phelps Dodge Corporation v. N.L.R.B.*, 313 U.S. 177, 187 (1941); *Universal Fuel, Inc.*, *supra*.

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

² Evidence of general discussion of a matter or the likelihood of such discussion within all or part of community or local circle may raise an inference of knowledge of that matter by a member of that community or circle. See H. Wigmore, *Evidence* (3d ed., 1940) §§245, 261, pp. 43, 83-84, cited with approval in *State v. Costa*, 11 N.J. 239, 94 Atl. 2d 303 (1953, Brennan, Jr., J.).

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

3. By discriminatorily failing and refusing to hire Terri E. Drake, thereby discouraging membership in the Union, the Company has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

4. By interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act the Company has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

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

THE REMEDY

Having found that the Company has committed violations of Section 8(a)(1) and (3) of the Act, I shall recommend that it be required to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Company discriminatorily refused to hire Terri Drake, I am recommending that the Company be ordered to offer her employment. *Phelps Dodge Corporation v. N.L.R.B.*, *supra* at 192-193; see also *Savoy Faucet Co., Inc., d/b/a Savoy Brass Manufacturing Company*, 241 NLRB 51 (1979). It cannot be said with any degree of certitude that absent the discrimination against her the Company would have hired Drake on May 8, 1978. Conversely, it cannot be said that the Company probably would not have hired Drake in any event. The Company does not have a policy against rehiring employees who are terminated for insubordination, as evidenced by the fact that Drake was hired in 1973 even though the Company's records indicated that she was an unsatisfactory employee who was discharged because of her willful failure to carry out her assigned duties to the best of her abilities. Lawrence Fleming, who signed the register later than Drake on May 8, 1978, was promptly hired for a job which had no special qualifications. Where, as here, a respondent employer or union has engaged in misconduct which might have prevented an employee from obtaining or regaining a job but the evidence is inconclusive on this point, the Board will normally resolve the doubt against the wrongdoer rather than against the wronged employee. *Associated Truck Lines, Inc.*, 239 NLRB 917 (1978). Therefore, it is appropriate to direct the Company to offer employment to Drake, without prejudice to her seniority or other rights and privileges.

I am further recommending that the Company be ordered to make Drake whole for any loss of earnings that she may have suffered by paying her sum of money equal to that which she normally would have earned as wages from the date of the discrimination until the date of the Company's offer of employment. *Phelps Dodge Corp. v. N.L.R.B.*, *supra* at 197; *Savoy Faucet Co., Inc.*, *supra*. The backpay for the said employee shall be computed in accordance with the formula in *F. W. Woolworth Company*, 90 NLRB 289

(1950), with interest computed in the manner and amount prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).³ It will also be recommended that the Company be required to preserve and make available to the Board or its agents, upon request, payroll and other records necessary to facilitate the computation of backpay due. General Counsel's request for interest at 9 percent is, as General Counsel frankly concedes in its supplemental brief, a request that the Board reconsider its decision in *Florida Steel* regarding the interest rate. So long as *Florida Steel* remains Board policy, I am obligated to follow that policy. It is possible that as a result of the pending unfair labor practice litigation in the *PPG* case, *PPG* might be ordered to make restitution to Drake. However, this possibility does not deprive Drake of her right to a full remedy in the present case. Any rights as between *PPG* and the Company may be resolved in compliance proceedings. See *N.L.R.B. v. Louisville Chair Company, Inc.*, 385 F.2d 922, 926 (6th Cir. 1967), cert. denied 390 U.S. 1013 (1968), enforcing 161 NLRB 358 (1966). As the present case involves serious 8(a)(3) discriminatory conduct, I shall recommend that the Company be ordered to cease and desist from infringing in any manner upon the rights guaranteed in Section 7 of the Act. *Savoy Faucet Co., Inc.*, *supra*.

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:

ORDER⁴

The Respondent, Young Hinkle Corporation, Lexington, North Carolina, its officers, agents, successors, and assigns, shall:

I. Cease and desist from:

(a) Discouraging membership in Chauffeurs, Teamsters and Helpers Local Union No. 391, or any other labor organization, by discriminatorily refusing to hire job appli-

cants or in any other manner discriminating against employees with regard to their hire or tenure of employment or any term or condition of employment.

(b) Telling job applicants that they will not be hired by Respondent or other area employers because of their union activity.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights to organize, to form, join, or assist labor organizations, including the above-named labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

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

(a) Offer immediate and full employment to Terri Drake, without prejudice to her seniority or other rights or privileges, and make her whole for losses she suffered by reason of the discrimination against her, as set forth in the section of this Decision entitled "The Remedy."

(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 all other records necessary to analyze the amount of backpay due.

(c) Post at its Lexington, North Carolina, plant copies of the attached notice marked "Appendix."⁵ Copies of said notice, on forms provided by the Regional Director for Region 11, after being duly signed by Respondent's authorized representative, 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 job applicants and to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 11, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

³ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716, 717-721 (1962).

⁴ 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.

⁵ 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."