

The Bariatric Clinic and Kathleen B. Gross. Case 6-CA-10873

April 11, 1979

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS PENELLO
AND TRUESDALE

On January 16, 1979, Administrative Law Judge George F. McInerney issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel filed exceptions and supporting briefs, and Respondent filed a brief in response to the General Counsel's exceptions.¹

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 briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.²

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, The Bariatric Clinic, Coraopolis, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(a):

"(a) Discharging any employee for engaging in concerted activities protected by Section 7 of the Act."

2. Insert the following as paragraphs 1(b) and 1(c):

"(b) Threatening its employees with the closure of its offices if they select a union to represent them.

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

² In his recommended Order, the Administrative Law Judge inadvertently failed to provide that Respondent cease and desist from discharging employees for engaging in concerted activities protected by Sec. 7 of the Act. In addition, although the Administrative Law Judge found that Respondent violated Sec. 8(a)(1) when it threatened to close its offices if the employees selected the Union to represent them, in his recommended Order he inadvertently failed to refer to the Union. Accordingly, we have modified the Administrative Law Judge's recommended Order to correct these inadvertent errors and conform it to the Board's customary remedies for violations of the kind found herein.

Finally, we reject the General Counsel's exception to the Administrative Law Judge's failure to provide that interest on backpay in this case be computed at 9 percent. It is the Board's established policy that interest on backpay be computed at the rate prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).

"(c) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act."

3. 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 in which all parties had the opportunity to present their evidence, it has been decided that we violated the law, and we have been ordered to post this notice. We intend to carry out the Order of the Board and abide by the following:

Section 7 of the Act gives all employees these rights:

- To organize themselves
- To form, join, or help unions
- To act together for collective bargaining or other mutual aid or protection
- To bargain collectively through representatives of their own choosing
- To refuse to do any or all of these things.

WE WILL NOT discharge any employee for engaging in concerted activities protected by Section 7 of the National Labor Relations Act.

WE WILL NOT threaten employees that we will close our offices if they select a union to represent them.

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

WE WILL offer Kathleen B. Gross immediate and full reinstatement to her former job or, if it no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of pay she may have suffered as a result of the discrimination practiced against her, plus interest.

THE BARIATRIC CLINIC

DECISION

STATEMENT OF THE CASES

GEORGE F. MCINERNEY, Administrative Law Judge: Based on a charge filed on January 20, 1978, by Kathleen B. Gross, an individual, the Regional Director for Region 6 of the National Labor Relations Board issued a complaint

alleging that The Bariatric Clinic, herein referred to as Respondent or the Company, violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, herein referred to as the Act, by discharging Kathleen B. Gross because of her activities for and on behalf of Service Employees' International Union, Local 585, AFL-CIO, herein referred to as the Union, and for engaging in protected concerted activities.¹ Pursuant to such complaint, a hearing was held on October 19, 1978, at Pittsburgh, Pennsylvania, at which time all parties had the opportunity to examine and cross-examine witnesses, to present evidence, and to argue orally.² Following the close of the hearing, General Counsel and Respondent filed briefs, which have been carefully considered.

Upon the entire record in this case, including my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a Pennsylvania corporation which operates a chain of four clinics in the Pittsburgh area devoted to the business of assisting people to lose weight. The clinic involved here is located in Greensburg, Pennsylvania. In the past 12 month period, Respondent received in excess of \$500,000 in gross revenues and received goods valued in excess of \$3,000 shipped directly from points outside the Commonwealth of Pennsylvania for use within the Commonwealth. The complaint alleges, the answer admits, and I find that at all times material herein The Bariatric Clinic has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent's answer to the complaint herein, by denying knowledge, called into question the status of Service Employees' International Union, Local 585, AFL-CIO, as a labor organization. Florence Stirbis, a business representative of Local 585, testified that it admits employees to membership and to participation in its activities and exists, at least in part, for the purpose of dealing with employers concerning wages, hours, and other conditions of employment. Accordingly, I find that Service Employees' International Union, Local 585, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Discharge of Kathleen B. Gross*

Sometime during the night of December 7 and 8, 1977, Respondent's Greensburg office, located in a trailer-like building on North Greengate Road in Greensburg, was broken into. The break was discovered a little after 8 o'clock on the morning of December 8 by Joyce Graham, a

full-time registered nurse employed by Respondent. Graham became alarmed and telephoned Kathleen B. Gross, who was employed as a "medical assistant" and was scheduled to report at 10 o'clock on the same morning. Gross, in turn, called the State Police and herself came immediately to the Greensburg office.

Later in the day, following a lengthy discussion between Graham, Gross, and another Greensburg employee, Sharon Koter, a part-time registered nurse, on their safety and what they could do about it, they determined that they would ask that the hours of the clinic be changed³ to permit the employees to leave before dark, or to have double coverage in case management insisted on retaining the 6 o'clock closing hour.

The next day, December 9, 1977, after further discussions, Gross telephoned Linda Coweison, Respondent's supervising registered nurse, and told her what the three women had decided they wanted to do. Coweison replied that there was no way the hours could be changed but that she would speak to Respondent's secretary-treasurer and administrative officer, Frank Eggie, about changing the work schedule to provide double coverage up to 6 o'clock. As a result of this call, a number of other calls were made on that day, and on the following Monday and Tuesday, December 12 and 13, from the three women at Greensburg, sometimes with all three on the same line at once; and from Coweison and Eggie. It is not necessary to go into detail on these conversations except to say that they all concerned various aspects of a new schedule which would allow two of the women to be present together each evening up to 6 o'clock.

Coincidentally, on December 8 or 9, Florence Stirbis, who, as noted above, is a business representative for the Union, was present in the Greensburg office as a customer. In conversation, Stirbis learned about the break-in and the problems the employees were having, and she suggested to Gross that if they (the employees) were having problems "they should maybe try to organize into a union." Gross expressed an interest in this, and Stirbis told her that she would have to contact all of the employees of Respondent in all its offices and see if they were interested in organizing before further steps could be taken.

Thereafter, on the afternoon of December 14, all of Respondent's employees, including Eggie's secretary, were contacted by Graham and Gross, and a meeting set up for the evening of December 15 in Monroeville, a nearby community. About 14 out of Respondent's 20 or so employees attended the meeting. Gross and at least one other employee signed union authorization cards at that time, but the record reveals nothing further either about the meeting or about further union activity among Respondent's employees. Eggie's secretary did not attend.

Meanwhile, during the telephone conversations on December 9 and 12, the employees at Greensburg indicated, possibly in strong terms, their concern with the new schedule. In fact, at one point on December 9, the three employees, who were on the phone together, told Eggie that they would not work until 6 o'clock if they had to work alone

¹ The complaint was amended at the hearing to allege an additional instance of conduct allegedly violative of Section 8(a)(1) of the Act.

² Certain errors in the transcript are hereby noted and corrected.

³ There is no dispute that the hours when the clinic at Greensburg was open were from 8:30 a.m. to 6 p.m. This closing time was necessary because many customers visited the clinic after work.

and would not open the office on Monday, December 12. They did not carry out this threat, and so informed Coweison on December 9, but on December 12 Eggie instructed Coweison to place an advertisement in the Greensburg local newspaper to seek replacements for all three of the employees at Greensburg.

By December 13, the Greensburg employees had apparently reconciled themselves to the new schedule, although Koter could not adjust to it and proffered her resignation. They informed Coweison of this, but Eggie felt that a firmer understanding had to be reached. Accordingly, he and Coweison went out to the Greensburg office on December 14.

At that time Eggie met with Koter, Graham, and Gross in the kitchen area, while Coweison took care of Respondent's customers (also referred to in the record as patients or clients). Eggie delivered an ultimatum to the effect that the clinic would remain open until 6 p.m. and "if they chose not to work those hours they could terminate their employment." Koter responded that she was in fact going to terminate her employment upon 2 weeks' notice, but the others, Gross and Graham, agreed to the new schedule.

Before the meeting terminated, Eggie dismissed Koter and Graham and informed Gross privately that he was not doing this intentionally to hurt her or to cause her any hardships.

In fact, however, Eggie's thoughts were traveling in a much different direction from his sympathetic words. In the car on the way back from the Greensburg office, he instructed Coweison to "go through with the ad, to take the applications, to interview the people and we would replace the employees in Greensburg." He did this, as he stated, because he was "not satisfied with the response" he got from the employees at the December 14 meeting. Eggie testified further that he was concerned by the "group action" of the employees; in response to my question, stated that he felt hurt, in a business sense, by this group action of the employees; and in response to a further question by me as to whether he took the action against Gross based in part on that, he replied, "That had a lot to do with it, an awful lot."

As instructed, Coweison accepted calls in response to the advertisement which appeared on December 14, set up interviews for the following Monday, December 19, and selected a replacement for Gross on that day. On December 20, the new employee reported to the Respondent's Squirrel Hill office to begin her orientation. There were no plans at that time to replace Graham, but Coweison testified that it was Respondent's intention to do so at a later date. Apparently Graham's voluntary resignation on February 10, 1978, forestalled any actions directed to that end.

The employees at Greensburg got wind of Respondent's action in hiring a replacement for Gross sometime on December 20. Graham thereupon called Coweison to ask why, and Coweison responded that they (management) felt that "Kathleen was the ringleader, she was the rotten egg and Frank thought it was best to get rid of her." Coweison did not deny this conversation. Graham notified Gross of this conversation, and the latter in turn called Coweison. Coweison evaded Gross' question about why she was fired and stated that she was acting on Eggie's instructions.

On December 21, Gross called Eggie and asked him why she had been fired. He replied that she knew what she had done behind his back and repeated that phrase several times without elaboration. Finally he stated that he was "just dissatisfied" with her attitude.⁴

The General Counsel maintains that the facts of this case warrant findings that Respondent knew about the union activity, knew about Gross' involvement in it (primarily because of the telephone call from Gross to Eggie's secretary), and discharged her because of it. This may be so, although, as noted above,⁵ Eggie's own testimony admits that the decision to fire all the Greensburg employees, including Gross, was made, at the latest, in the car on the way back from the meeting at Greensburg on December 14, at a time before he returned to his office and, indeed, before the telephone call to his secretary announcing the union meeting was made.

However, I do not feel that it is necessary in order to effectuate the purposes of the Act that I make a finding on this issue. I do this because I find that Respondent violated Section 8(a)(1) of the Act in discharging Kathleen B. Gross on account of her engagement in protected concerted activity. Since the remedy is identical with that appropriate for a finding of an 8(a)(3) violation, economy and efficiency make it superfluous for me to expend the time necessary to come to a conclusion on the 8(a)(3) allegation.

The record evidence, as recapitulated herein, shows that Gross and the others were engaged in concerted activities concerning their safety and working hours. They may have threatened to engage in a work stoppage, or even to quit, but nothing in this record shows that they did anything that would remove their activities from the protection of the Act. They did not, in fact, quit, and did not engage in any work stoppage, but negotiated a settlement with their employer, even though one employee had to give notice of her intention to resign because of the new schedule. Contrary to Respondent's assertion in its brief, there is no evidence illustrative of its assertion that Graham and Gross, or either of them, refused to accept the new schedule at the meeting in Greensburg on December 14. Eggie's testimony on this point, even if it is viewed in a light most favorable to Respondent, would lead to the conclusion that Graham and Gross did not disagree with the new schedule, although Eggie was not convinced "that they had accepted it fully. They didn't give me that assurance." However, Eggie also testified that they gave him "the impression" they had accepted the schedule. Thus, Respondent is not warranted in postulating from this that the women "refused to continue the standing hours of operation."⁶

Eggie's dissatisfaction with the response of Graham and Gross led to his decision, while returning to his office, to terminate them all. It is this, coupled with his resentment at what he accurately described as the employees' "group action," which led to his decision. In his own words, he felt hurt "in a business sense" by this action, and this factor had

⁴ Eggie's version of this conversation is quite different. He said that he told her that she was an unsatisfactory employee, based on delays in her reports reaching him. However, this testimony is largely contradicted by Coweison. In any event, in view of my disposition of this matter, I do not find it necessary to resolve this, or any other, credibility issue in this case.

⁵ And mentioned in Resp. br.

⁶ Br. of Resp., p. 11.

"an awful lot" to do with his decision to terminate Gross and Graham.

Cowelson's comments to Graham are not inconsistent with these findings. An employee can be a "ringleader" and a "rotten egg" without being a union ringleader or an organizing rotten egg. This testimony is merely corroborative of Eggie's testimony as to his attitude toward Gross, which appeared to me to be totally credible.

On the basis of the entire record, and relying most particularly on this testimony, I find that Eggie determined to fire Gross⁷ because of her protected concerted activities,⁸ *Sears Roebuck and Co.*, 221 NLRB 632 (1975); *Memphis Chair Company, Inc.*, 191 NLRB 713 (1971), thus violating Section 8(a)(1) of the Act.

B. The February 1978 Incident

Early in February 1978, at some time prior to the 13th, Karen Smatlack, an employee in Respondent's Squirrel Hill office, was preparing to transfer to Respondent's Johnstown office. Since she felt she was taking on more responsibility at the new location, she asked Linda Cowelson for a raise. Cowelson indicated that she did not think Smatlack could get a raise because the Company had been upset and hurt by the employees lately.⁹ She went into some detail, naming Gross as one of those who had hurt the Company. Smatlack then asked whether Cowelson and Eggie had known about the Union. Cowelson "kind of smiled" and said they knew something was going on at the time and quoted Eggie as saying "he would rather close down all of the Bariatric Center's offices than let a union run him."

Cowelson did not deny this conversation, and Eggie, while not denying the substance of the statement, placed it 3 to 4 years earlier and qualified it by saying "I would not allow a group of employees at any one office to gang up on me and make me do something that I did not want to do. I would prefer to close the door."

In view of this at least partial admission, and in view of the credibility of Smatlack's testimony, I find that the statement was made by Cowelson to an employee. Further, in light of Respondent's actions toward Gross and Graham, I find that this statement was not an isolated, harmless expression of opinion but constituted a very real threat to close the clinics if a union came in. This I find to constitute a separate violation of Section 8(a)(1). *C & T Manufacturing Company*, 233 NLRB 1430 (1977).

CONCLUSIONS OF LAW

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

⁷ Eggie determined to fire Graham as well, but since nothing to that effect was done and since there is no allegation concerning this in the complaint, I make no finding concerning Graham's situation.

⁸ Eggie's testimony about alleged deficiencies in Gross' work and her alleged improper suggestion to him about falsifying unemployment forms I view as *post hoc* justifications for actions I have found were taken for unlawful reasons.

⁹ This was, of course, after the instant charge had been filed by Gross on January 20.

2. Service Employees' International Union, Local 585, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening its employee Karen Smatlack that Respondent would close down its offices if a union was selected as representative of its employees, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By discharging its employee Kathleen B. Gross on December 20, 1977, and by refusing to reinstate her, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

THE REMEDY

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

I have found that by threatening an employee with closure of its offices Respondent restrained and coerced its employees in the rights guaranteed them in Section 7 of the Act in violation of Section 8(a)(1) of the Act. I shall recommend that it cease and desist from uttering such threats.

Having found that Respondent unlawfully discharged its employee, Kathleen B. Gross, because she engaged in protected concerted activities, in violation of Section 8(a)(1) of the Act, I shall recommend that Respondent offer Gross full reinstatement to her former or substantially equivalent position, with no loss in seniority or other benefits, and make her whole for any loss of earnings suffered by reason of the discrimination against her, by payment to her of a sum of money equal to that which she normally would have earned absent the discrimination, less net earnings during such period, with interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).¹⁰

It will be further recommended that Respondent preserve and make available to the Board, upon request, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary and useful to determine the amounts of backpay due and the rights of reinstatement under the terms of these recommendations.

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

¹⁰ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

The General Counsel has filed a supplemental brief in this matter urging that the interest be raised to 9 percent. Since the Board has not ruled on this subject, I feel it inappropriate for me to do so. The General Counsel's request is, therefore, denied.

ORDER¹¹

The Respondent, The Bariatric Clinic, Coraopolis, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from threatening its employees with the closure of its offices or in any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

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

(a) Offer to Kathleen B. Cross immediate and full reinstatement to her former job or, if it no longer exists, to a substantially equivalent position, and make her whole for any loss of pay which she may have suffered as a result of the discrimination practiced against her, in the manner 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 pay-

roll records, social security payment records, timecards, personnel records and reports, and all other records necessary for determination of the amount of backpay due under the terms of this Order.

(c) Post at all of its locations in the Pittsburgh, Pennsylvania area, copies of the attached notice marked "Appendix."¹² Copies of such notice, on forms provided by the Regional Director for Region 6, after being 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 notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

¹¹ 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.

¹² 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."