Sambo's Restaurants, Inc. *and* Hotel, Motel and Restaurant Employees and Bartenders Union, Local 50, AFL–CIO. Case 32-CA-212 (formerly 20-CA-12866)

July 31, 1978

DECISION AND ORDER

BY MEMBERS JENKINS, MURPHY, AND TRUESDALE

On November 9, 1977, Administrative Law Judge David G. Heilbrun issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed an answering 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 briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge held that the Respondent did not violate Section 8(a)(3) and (1) of the Act by terminating the services of employee Diane Weekley, who had previously tendered and then withdrawn a letter of resignation. Specifically, the Administrative Law Judge concluded, on facts which are not here in dispute, that the General Counsel failed to prove by a preponderance of the evidence that the Respondent terminated Weekley for discriminatory reasons rather than for the reason assigned; namely, that the Respondent sought to replace Weekley with an employee "who had not yet demonstrated a 'coming and going attitude' " about her job. We disagree.

Prior to her involuntary termination on April 9, 1977, Weekley had been continuously employed by the Respondent as a waitress for approximately 4-1/2 years.[1] During this period, Weekley had her own customer following, was well tipped, and was considered by management to be highly efficient in performing her work. Weekley was also known by management to be openly critical of working conditions at the restaurant, which apparently began to deteriorate during the latter part of 1976, after the arrival of Robert Waldheim, the new manager. In fact, employee discontent with these conditions culminated in a series of meetings with management during which employee grievances concerning scheduling, seniority, laundry allowances, and short shifts were aired. Weekley's name was associated with these grievances and was mentioned during the aforesaid meetings. Waldheim, apparently displeased with the role played by Weekley in the formulation and presentation of grievances, labeled her a "troublemaker."

During the first 3 months of the new year, certain events occurred which are also relevant to the issues raised by Weekley's termination in April. In January, Weekley refused Waldheim's request that she provide evidence in support of his civil suit against the Union as a result of an altercation he had with a union business agent outside the restaurant on New Year's Eve. Weekley also continued to express dissatisfaction with working conditions at the restaurant. She wrote notes documenting some of the more distressing problems. In February, another waitress delivered one of these notes to Waldheim, revealing Weekley as the author. Among other things, this particular note complained that: "the dishwasher won't work unless booze is present"; new waitresses received no training; waitresses would leave the floor and not be admonished for doing so; employees did not receive breaks; the restaurant was dirty; and Waldheim drank on the job.

Thereafter, in early March, Waldheim advised Weekley that he had her transfer papers for the Respondent's nonunion Livermore restaurant on his desk and that he would do everything he could to effect the transfer smoothly. Weekley exhibited surprise, noting that she had not asked for a transfer to that restaurant. Waldheim replied that maybe she should consider accepting the transfer. Weekley declined, thus successfully fending off what the Administrative Law Judge characterized as "a mysterious effort" to have her transferred.

It is in this context that we consider the events of March 26, which, according to the Respondent, led to Weekley's involuntary termination. As found by the Administrative Law Judge, the "graveyard" shift of that date was "disastrous." Heavy patronage and an inadequate number of employees caused slowness of service and dissatisfied customers. Around midnight, Assistant Manager Edward Shute unsuccessfully attempted to augment the employee staff. By 3:30 a.m., Weekley, frustrated and weeping, wrote on a napkin: "I am giving my notice 2 weeks" and placed it at Shute's cook station. He glanced at it, said, "Okay, fine," and continued with his work. At approximately 5 a.m., Weekley, then more composed, retrieved and kept the napkin on which she had written her resignation note. Subsequently, Shute advised Waldheim of the incident, but also ad-

[1] As of the date of the hearing held herein, only 3 or 4 of the 55 individuals employed at the Respondent's San Leandro restaurant had worked for more than 4 years.

vised him that he could not locate the napkin. Waldheim immediately took steps to replace Weekley.

On Monday, March 28, Weekley lodged a grievance with Union Representative Steven Martin, who recorded the following complaints: "No breaks, no rush relief, customers walking out because of lousy working conditions." Martin immediately telephoned Waldheim and a meeting was scheduled for the following Friday, April 1, on Weekley's grievance. This meeting was later canceled by Waldheim.

Meanwhile, Weekley resumed her regular schedule at 10 p.m. on Wednesday, March 30. Upon arriving at the restaurant, Weekley told Assistant Manager Wood that she "wasn't going to quit" and asked him to intercede with Waldheim. He refused to do so. Early on Sunday morning, April 3, after Weekley completed her shift, Wood handed her a note from Waldheim dated April 2, accepting her "resignation" and advising her that he has been "taking steps" to fill her position. Concededly, Waldheim wrote this note after being apprised that Weekley's grievances had been forwarded to Union Representative Martin. Weekley protested Waldheim's action to Wood, saying that she would not quit. She wrote another napkin message to Waldheim to the same effect, which Wood placed on Waldheim's desk. On the following day, April 4, Waldheim learned that the employee designated to replace Weekley would not accept a transfer to his restaurant. Notwithstanding this, Waldheim never retreated from his decision to terminate Weekley either then or subsequently, on April 6, when Martin, Weekley, and her husband paid an unannounced visit to Waldheim's office in an effort to save Weekley's job. She was terminated on April 9, 2 weeks after tendering and retrieving her resignation note.

Contrary to the Administrative Law Judge, we find that Weekley was involuntarily terminated for discriminatory reasons rather than because she demonstrated a "coming and going attitude," as the Respondent claimed.[2] The reason assigned for terminating Weekley does not bear up under scrutiny, for, if anything is certain, it is the fact that Weekley has exhibited stability with respect to her employment. Waldheim himself testified that out of a complement of 55 employees, only 3 or 4 besides Weekley had worked for the Respondent for more than 4 years. Weekley's longevity in these circumstances hardly reveals a "coming and going" attitude. Indeed, her concern over deteriorating working conditions and her persistence in attempting to remedy the situation reveal, if anything, a "staying" and not a "going" attitude. The Administrative Law Judge himself found that Weekley's resignation note "was spawned under trying circumstances not of her own making" and was in fact withdrawn before the Respondent had replaced her. Moreover, that the assigned reason is pretextual is dramatically underscored by the Administrative Law Judge's own finding that "[a]rguably too, there had been disparate treatment administered Weekley because other employees who were truly deserving a penalty received none." Again, in this respect, we need only refer to Waldheim's testimony to find unquestionable evidence of disparate treatment. He himself stated, albeit reluctantly, that one waitress who resigned was subsequently reinstated, and at least two others who walked out in the middle of a shift had been permitted to return to work. In these circumstances we find that the reason assigned by the Respondent for Weekley's termination is not entitled to belief. It is impossible to conclude otherwise, particularly in light of the Administrative Law Judge's own assessment of Waldheim as "disingenuous," or, simply stated, lacking in candor.

Having thus disposed of the pretextual ground for Weekley's termination, we must now determine by a preponderance of the evidence before us the true reasons therefor. The only plausible explanation lies in the context of events immediately preceding Weekley's termination.[3] In this respect the record shows, as previously stated, that in December 1976 Waldheim labeled Weekley a troublemaker as a result of her role in the presentation of grievances over deteriorating working conditions; in January 1977 she refused Waldheim's request to provide evidence supportive of his lawsuit against the Union arising from the preceding New Year's Eve altercation; in February Waldheim came into possession of notes comprising "Weekley's unflattering reflections on restaurant management," and in March, the same month in which she was terminated, she "fended off

[2] Likewise, we reject the Administrative Law Judge's analysis of the law applicable to this case insofar as he finds a material distinction between *Sycor, Inc.*, 223 NLRB 1091 (1976), where an employee was terminated for organizational activities "designed to *establish* an exclusive collective-bargaining representative," and the instant proceeding, which, in his view, involves "carpingly persistent, marginally valid complaints about ambiance of the workplace as *related to* contractual provisions." (Emphasis in original.) Weekley was clearly engaged in concerted, protected activity when she grieved over working conditions which had markedly deteriorated. It is elementary that the Act protects an employee so engaged no less than it does one who is involved in organizational activities. The Administrative Law Judge erred in concluding that *Sycor* is inapplicable in this case.

[3] As weekley was terminated neither for the reasons assigned by the Respondent nor because of incompetence nor on disciplinary grounds, the Board is free to draw an inference that her termination was based on unlawful consideration. "It would indeed be the unusual case in which the link between the discharge and the union activity could be supplied exclusively by direct evidence. Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence. Furthermore, in analyzing the evidence, circumstantial or direct, the Board is free to draw any reasonable inference." *N.L.R.B. v. Melrose Processing Co.*, 351 F.2d 693, 698 (C.A. 8, 1965).

a mysterious effort" to transfer her to the Respondent's nonunionized Livermore restaurant.

We are persuaded by these events that the Respondent terminated Weekley because of her role in the formulation and presentation of grievances. Accordingly, we find that the General Counsel has established by a preponderance of the evidence that the Respondent caused the termination of Weekley because of her union or protected concerted activities in violation of Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Sambo's Restaurants, Inc., is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Hotel, Motel and Restaurant Employees and Bartenders Union, Local 50, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(3) and (1) of the Act by terminating the employment of Diane Weekley because she engaged in union or protected concerted activity.

4. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

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

To remedy the unlawful termination of Diane Weekley, we shall order the Respondent to offer her immediate and full reinstatement to her former job, discharging if necessary any replacement, or, if such job 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 earnings she may have suffered by reason of the discrimination against her by payment of a sum of money equal to the amount that she normally would have earned as wages from the date of her discriminatory termination to the date of a bona fide offer of reinstatement, less net earnings, in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and with interest thereon as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[4]

As the unfair labor practice committed was of a character which goes to the very heart of the Act, we shall order that the Respondent cease and desist therefrom and from in any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.[5]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Sambo's Restaurants, Inc., San Leandro, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging employees from engaging in union or protected concerted activity by terminating their employment or in any other manner discriminating against them with respect to terms and conditions of employment because they choose to engage in union or protected concerted activity.

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

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer to Diane Weekley immediate and full reinstatement to her former job, dismissing if necessary any replacement, or, if that position 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 earnings in the manner set forth in the section herein 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 under the terms of this order.

(c) Post at its San Leandro, California, place of business copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by the Respondent's representative, shall be posted by the 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 the Re-

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

[5] *N.L.R.B. v. Entwistle Mfg. Co.*, 120 F.2d 532, 536 (C.A. 4, 1941).

[6] 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."

spondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

APPENDIX

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

WE WILL NOT discourage employees from engaging in union or protected concerted activity by terminating their employment or in any other manner discriminating against them with respect to their terms and conditions of employment because they choose to engage in union or protected concerted activity.

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 Act.

WE WILL offer Diane Weekley immediate and full reinstatement to her former job, dismissing if necessary any replacement, or, if that position 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 earnings she may have suffered because of the discrimination practiced against her, with interest.

SAMBO'S RESTAURANTS, INC.

DECISION

STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge: This case was heard at San Francisco, California, on September 29, 1977, based on a complaint alleging that Sambo's Restaurants, Inc., called Respondent, violated Section 8(a)(1) and (3) of the Act by discriminatorily terminating the employment of Diane Weekley because she joined or assisted Hotel, Motel and Restaurant Employees and Bartenders Union, Local 50, AFL–CIO, called the Union, or engaged in other union or protected concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Upon the entire record, my observation of the witnesses and consideration of post-hearing briefs, I make the following:

FINDINGS OF FACT AND RESULTANT CONCLUSION OF LAW

A collective bargaining agreement, devoid of formal grievance procedure, exists between these parties.[1] In late 1976, discontent with restaurant operations under new manager Robert Waldheim resulted in an employee meeting held off-premises by Union Representative Steven Martin. Complaints were summarized and Linda Benson elected as shop steward. The next day a meeting occurred between Martin, Benson, Union Business Agent Mike Bronco, Waldheim, and Respondent's District Manager Rick Carver. Martin sought resolution of "a number of grievances" as then had emanated from "a meeting with the people." Subjects included scheduling, seniority, laundry allowance and short shift. Martin does not recall whether waitress Diane Weekley's name was mentioned during the meeting, however, Benson credibly testified that it was. The following month a meeting of similar tenor occurred at San Francisco Airport, this one concerning "problems" both at the San Leandro and Hayward stores. On this occasion Respondent's vice president attended, in fulfillment of his earlier promise to "sit down" for discussion of details in contract implementation.

By March 1977, Weekley had been employed continuously over 4 years on a graveyard shift schedule of Wednesdays through Saturdays.[2] She typically worked the dining room area on Friday and Saturday, having built up over the years a customer clientele from miscellaneous affinity groups. She was well tipped and considered by management quite efficient in her work. Weekly testified that she "continu[ously]" complained to assistant managers about restaurant conditions, primarily shortage of supplies and complications from unbalanced scheduling of personnel.

The graveyard shift of Saturday, March 26, was disastrous. Heavy patronage and short-handedness caused slowness of service and temperamental customers. Assistant Manager Edward Shute, filling in that particular night for his counterpart, Gary Wood, attempted emergency scheduling around midnight but to little avail. At 3:30 a.m., Weekley, weeping and frustrated, wrote "I am giving my notice 2 weeks" on a napkin and placed it at Shute's cook station. He glanced at it, said "Okay, fine" and kept on cooking. Around 5 a.m. Weekley, then more composed, retrieved the napkin and kept it. At first opportunity Shute advised Waldheim of the resignation notice, but that he could no longer locate the napkin on which it was written. Waldheim took steps to replace Weekley with a person working at Respondent's Alameda restaurant, and while this was underway, Weekley, on Monday, March 28, was contacting Martin about events. Martin recorded the following on a "complaint sheet" as prelude to action:

[1] Respondent corporation operates restaurants at various locations, including that here involved at San Leandro, California, where it annually derives gross revenues in excess of $500,000, while purchasing and receiving goods valued in excess of $5,000 which originated outside California. I find that Respondent is an employer within the meaning of Sec. 2(6) and (7) of the Act, and that the Union is a labor organization within the meaning of Sec. 2(5).

[2] All dates and named months hereafter are in 1977.

> No breaks, no rush relief, customers walking out because of lousy working conditions. This has been going on bad for at least 4 weeks. I have told mgmt. & they refuse to do anything.

Martin then telephoned Waldheim, and a meeting on what came to be termed Weekley's "grievance" was set for that Friday.[3] Waldheim later canceled out for Friday, and a meeting actually occurred April 6, under circumstances yet to be described.

Weekley resumed her schedule at 10 p.m. on March 30. Upon arriving at work that evening she asked Wood to talk with Waldheim for her because she "wasn't going to quit." He refused to involve himself, and Weekley felt nothing further could be done at the time. She continued through the week and upon preparing to leave work after Saturday's graveyard shift was handed a letter from Waldheim dated April 2, reading:

> This letter will confirm the two week notice which you gave to Mr. Shute on March 26th. Your notice was confirmed and witnessed by a number of your fellow employees and I have been taking steps to fill your shift for the past week. Consider your resignation accepted and if I can be of any assistance to you don't hesitate to call upon me.

She protested again to Wood, emphatically saying she would not quit and that things needed to be talked over. Weekley then wrote another napkin message as follows and saw Wood place it on Waldheim's desk:

> April 3, 1977
>
> Bob,
>
> I did not turn in a written notice. It was handed back. I will discuss this with you, but I'm not going to quit.
>
> Diane Weekley

The following Monday Weekley recontacted Martin concerning the escalated problem of her imminent drumming out from employment. He rather urgently attempted to contact Waldheim and, being unsuccessful, showed up at the restaurant the morning of April 6 with Weekley, her husband, and a colleague. As it happened both Waldheim and Carver were present, and a meeting commenced. Operational matters were first discussed with flavor added as Shute was called forth to concede the graveyard shift of March 26 had been a "terrible night." Martin then brought up the subject of Weekley's resignation, pressing Waldheim for ". . . why was he so intent on accepting it, particularly to the point of writing a letter, and the letter has never been written accepting any kind of resignation at this store, or any other Sambo's store that I know of under our jurisdiction."[4] No satisfactory rationale was voiced, and Martin angrily concluded the meeting. Weekley then worked through her customary series of days and was paid off on Saturday, April 9. The following week, Martin finessed Waldheim into a "Board of Adjustment" proceeding, wherein a bipartite body deadlocked over the issue, "discharge of Diane Weekley."[5]

As General Counsel has correctly argued, it is " . . . unnecessary to decide whether Weekley was fired or quit . . . ." The dynamics of emotionally submitting, then edgily withdrawing, a written resignation notice simply frame what must be analyzed. There are many shadings to the employment relationship here and generally. Several of these were highlighted in testimony elicited from Waldheim. There have been instances where an employee purely quit without notice, those where an employee (with or without reasonable justification) walked off the job abruptly, and those where feigned illness was used to mask either unwillingness to work or as excuse why the assigned shift was not covered or not completed. Such instances in turn trigger notions of full sanction against future reemployment, of only possible reemployment, or of treating the episode as not rupturing the employment relationship but instead arguably warranting censure or discipline within its bounds. This case is different yet, for Weekley was involuntarily terminated solely because Waldheim chose to treat what his assistant once saw written on a restaurant napkin as indication of such impermanence that the better course was simply to release Weekley, and replace her with another whose momentum was into an indefinite employment relationship, not away from it.[6] The ultimate issue devolves simply to whether in context of this collective bargaining relationship, and Weekley's known proclivity toward protesting working conditions through the Union or otherwise, Waldheim pretextually forced her off the job.[7]

There were reasons for Waldheim to have been more tractable, chiefly because Weekley was a long-service em-

[3] Waldheim denied being told the purpose of this meeting, explaining instead that he routinely met with Union functionaries when requested on the assumption there was something of significance to talk about. I credit Martin's contrary testimony that he expressly named Weekley as a grieving employee. His memory was sharper on the point, and probabilities of such a contact would result in this disclosure.

[4] At this point in time Waldheim had learned, 2 days earlier, that the person set up for transfer from Alameda changed her mind. Subsequently another person was hired but worked only 3 days, and thereafter the "replacement" of Weekley simply merged into overall scheduling configurations.

[5] Absent any contractual grievance mechanism, the Board of Adjustment functioned essentially because Waldheim was too unschooled in esoterics of labor management relations to refuse involvement. I find that this entire facet is irrelevant for decisional purposes, as the crux of the case revolves around Waldheim's explanation of why and how he dealt with Weekley's particular situation.

[6] This characterization is most accurate as of April 4, when prospective replacement Myra Sellers backed out, and Waldheim was presented the chance to do otherwise than request dispatch by the Union of another waitress. It is essentially in this vein that *Sicor, Inc.*, 223 NLRB 1091 (1976), is factually distinguishable, for there the issue of a retracted resignation was inextricably intertwined with more basic issues of an employer's " . . . knowledge of her (terminated employee) involvement in any current organizational campaign . . . ." 223 NLRB at 1093. It would subvert longstanding Board doctrine to mechanistically equate concerted activity designed to *establish* an exclusive collective-bargaining representative with carpingly persistent, marginally valid complaints about ambiance of the workplace as *related to* contractual provisions.

[7] This proceeding is itself tantamount to a request for reinstatement on her behalf. I am mindful of this element, as part of viewing instances where individuals were continued in employment by Waldheim after some untoward event. An inherent infirmity in the process is that Respondent is entitled, as it is doing, to defend against claimed violation of law. Theoretically, an employer could so act while simultaneously reemploying the alleged discriminatee, either in tactical mitigation of potential damages or just through ordinary recruitment processes. Such theory rarely sees actual application, so for practical purposes the distinction is academic.

ployee of concededly average reliability and above-average competence. Continuing her would have caused no discernible scheduling burden, and the first napkin note was spawned under trying circumstances not of her making. Arguably too, there has been disparate treatment administered Weekley because other employees who were truly deserving a penalty received none. Several added indicators are in the background. There was essentially uncontradicted testimony that in late 1976 Waldheim once labeled Weekley a "troublemaker," that she orally grieved the lack of overtime pay last Thanksgiving's eve, that she refused Waldheim's request to provide evidence supportive of his civil lawsuit against the Union arising from last New Year's Eve's altercation, that in February Waldheim had been given notes comprising Weekley's unflattering reflections on restaurant management, and that around March she fended off a mysterious effort to transfer her to Respondent's nonunionized Livermore restaurant.

Respondent's case stands primarily on Waldheim's described "mental policy" of how it seemed best in this "unique" situation to be done with Weekley, in favor of any other person who had not yet demonstrated a "coming and going" attitude. In a larger setting, Waldheim has faced a fairly constant stream of institutional protest from the Union since assuming this managership in June 1976, equanimously saw the appointment of a shop steward late that year at his restaurant, and while demonstrating no interest in smoothing the Union's path to his door, has relatedly displayed no hostility toward it, nor unambiguously so toward Weekley. Events in 1976 are stale with respect to the April finale, and disassociated indicators of early 1977 create but modest suspicion that chagrin was rising in Waldheim. The final question is whether sufficient proof has emerged upon which to infer a discriminatory motive. I believe it has not, deciding instead that General Counsel and the Charging Party have presented only a fragment of Respondent's employee relations history that could inspire the neutral observer to view Waldheim as arbitrary, disingenuous, and self-defeating. The Act does not address these characteristics.

[Recommended Order for dismissal omitted from publication.]