

Winn-Dixie Texas, Inc., d/b/a Foodway and Retail Clerks International Association, Local 462, AFL-CIO. Case 28-CA-4405

March 27, 1978

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS
JENKINS AND PENELLO

On December 13, 1977, Administrative Law Judge James T. Rasbury issued the attached Decision in this proceeding. Thereafter, the General Counsel 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, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

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 complaint be, and it hereby is, dismissed in its entirety.

DECISION

STATEMENT OF THE CASE

JAMES T. RASBURY, Administrative Law Judge: A charge was filed by Retail Clerks International Association, Local 462, AFL-CIO (herein called the Union), on June 20, 1977,¹ and served on Winn-Dixie Texas, Inc., d/b/a Foodway (herein called Respondent) on or about the same date. A complaint issued on July 29, alleging Respondent, through the actions of its acknowledged supervisor, Marshall J. Montano, to have unlawfully interrogated Marlene Harris, a job applicant, regarding her membership in, activities on behalf of, and sympathies for the Union in violation of Section 8(a)(1) of the National Labor Relations Act, as amended (herein called the Act); and thereafter refused to hire Marlene Harris because of her membership in and activities on behalf of the Union in violation of Section 8(a)(3) and (1) of the Act. Respondent's answer denied the commission of the alleged unfair labor practices, but admitted certain requisite jurisdictional data.

A hearing was held before me in Hobbs, New Mexico, on August 17. Counsel for each party elected to argue orally at the conclusion of the evidence, although time for submis-

sion of briefs, should any of the parties so elect, was fixed as September 7.

Upon the entire record in this proceeding and based on my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is, and at all times material herein has been, a corporation duly organized under and existing by virtue of the laws of the State of Texas. Respondent maintains its principal office and place of business in Fort Worth, Texas, and has operated and maintained retail supermarkets in several States of the United States, including a supermarket in Hobbs, New Mexico, where it is engaged in the retail sale of groceries, meats, produce, and related products. During the past 12 months, which period is representative of its operations at all times material herein, Respondent, in the course and conduct of its business operations, purchased goods and materials valued in excess of \$50,000 which were transported in interstate commerce and delivered to its places of business in the State of Mexico directly from States of the United States other than the State of New Mexico. Respondent admits and I find Respondent to be an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent admits and I find the Union to be, and at all times material herein to have been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The only problem presented is one of resolving credibility. Did Marshall J. Montano interrogate Marlene Harris regarding her past union activities? Did Montano refuse to hire Harris because of her union sympathies?

B. *The Evidence*

Marlene Harris testified that she had been employed by Albertson's (a competitive supermarket) in Hobbs, New Mexico, from September 1974 until March 1977. She testified that she first served as manager of the liquor department and for the last 2 years of her employment as a checker. She has been a member of the Union since December 1974 and served as a steward at the Albertson store from 1975 until she was released by Albertson in 1977. She testified that she was acquainted with Bill Reese and Ross Cooper, the manager and assistant manager of Respondent's store, and had talked to them in general terms about a possible job. She had gone to the store to get an application and to talk to Reese, but was told that they were out of the permanent-type applications and that she should return at a later date to get the permanent

¹ All dates hereinafter shall refer to the calendar year 1977 unless otherwise indicated.

application. She returned in a few days and spoke to a new assistant manager who was unable to locate any permanent-type application forms, but gave her a temporary application form and asked that it be completed. A short time later Paul Brunt, a friend, called her and suggested that she should come to the store on the following Monday to see Montano about a job because they were getting ready to hire a checker. Harris had known Brunt as a fellow employee at Albertson's, but at the time he called Harris he was employed by Respondent.

Harris testified that she went to the Foodway store and was interviewed by Montano who at first was very pleasant and seemed interested in her experience and qualifications but, according to Harris, seemed to "turn off" when he asked her several questions regarding the Union and learned that she was and had been a member of the Union at Albertson's. Harris acknowledged that Montano told her that he had at least one other girl to interview for the job and Harris said she saw another applicant waiting to be interviewed at the time she left the office where her interview had been conducted. Harris acknowledged that she had been terminated by Albertson's for failing to pass a checker's test and apparently so advised Montano. (A grievance over the discharge was pending at the time of hearing.)

Montano testified that he is a store supervisor covering seven stores in a territory of some 1,200 to 1,500 miles and that he had occupied a similar position with the predecessor company that owned the Foodway stores before they were purchased by Respondent Winn-Dixie in August 1976. Montano testified that he does not do all of the hiring of applicants in the various stores which he supervises, but that he does some applicant interviewing in order to have direct knowledge of the type of people who are applying for and being hired by each of the stores which he supervises. He testified that after seeing Harris in the courtroom that he remembered his interview with her on or about May 30, but he added that to his best recollection there were at least four other applicants for the same job. He denied having interrogated her regarding her union activities and sympathies and also denied having failed and refused to hire her because of her union sympathies.

Montano testified that the applicant hired was Nancy Mitchell who had not had any grocery experience, but whom he regarded as having a much more pleasing and adaptable personality for Respondent's particular operation. He testified that she had had experience as a waitress and experience as a cashier, but not in a grocery store operation. He testified that Mitchell was hired because, in his opinion, she was more adaptable and trainable than any of the other applicants. When asked if there was any particular reason or characteristic regarding Harris as to why she was not hired, he replied, "She struck me as being a little too arrogant and fixed in her ways; thus she would not be nearly as adaptable and trainable for our type of operation."

² *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177 (1941).

³ *Universal Fuel, Inc.*, 204 NLRB 26 (1973).

⁴ *Falstaff Brewing Corporation*, 128 NLRB 294, 295, fn. 2 (1960), enfd. as modified 301 F.2d 216 (C.A. 8, 1962).

⁵ *N.L.R.B. v. Ace Comb Co. and Ace Bowling Co., Division of Amerace*

Montano also identified four application forms of individuals who had been hired by Respondent since it acquired the Foodway stores in 1976, each of which reflected former employment at a supermarket where the employees at the time were represented by a union.

Jack Jones, who is currently director of industrial relations for Respondent and was formerly vice president in charge of labor relations and personnel for the predecessor owner of the same stores, testified that he had full knowledge of the Albertson contract with the Union and that part of his duties was to be generally informed of the labor relations picture among all of the supermarket-type stores.

C. Analysis and Conclusions

The law has remained rather clear since the United States Supreme Court ruled in 1941 that an employer engages in unfair labor practices under Section 8(a)(3) of the Act if it refuses to hire applicants for employment because of their union affiliation.² The Board has also determined that an employer acts unlawfully when it interrogates job applicants concerning union membership and/or threatens that applicants will not be hired due to their union membership.³

However, legal conclusions can only be reached after one has resolved credibility and, thus, established the facts. Both Harris and Montano were excellent witnesses — articulate and forthright. They were carefully observed at the hearing and I have scrutinized their testimony, on both direct and cross-examination, but I can find no reasonable basis for discrediting one individual's testimony and crediting the other's. No one else testified. Under such circumstances it can hardly be said that the General Counsel has sustained his case by a preponderance of the evidence as he is required to do.⁴

Moreover, although certainly not conclusive, the evidence that the Respondent has recently hired some employees that had formerly worked in supermarkets where the employees were represented by a union tends to negate Harris's testimony of Respondent's union bias. Montano testified that one reason he did not hire Harris was because she struck him as being rather arrogant and strong-willed. While these characteristics are not necessarily undesirable, from my observation of Harris at the time she was on the witness stand, I would be inclined to agree with Montano's personality evaluation of Harris. If an employer does not wish to hire such a person for those reasons, it is not contrary to the law. The Act does not remove from an employer control over its personnel policies, including the right to hire and fire, so long as the motivation is not violative of the Act.⁵ General Counsel has succeeded in arousing a suspicion, but one can not find a violation based on suspicion and surmise.⁶ In my opinion, the evidence falls far short of establishing a union-related or statutory-related reason for the failure of

Corp., 342 F.2d 841, 847 (C.A. 8, 1965); *N.L.R.B. v. McGahey*, 233 F.2d 406, 413 (C.A. 5, 1956), and the cases cited therein.

⁶ *Kings Terrace Nursing Home and Health Related Facility*, 229 NLRB 1180 (1977).

Respondent to hire Marlene Harris on or about March 30, 1977.

After considering all of the foregoing, I conclude that a preponderance of the evidence does not establish that Respondent has engaged in the unfair labor practices alleged in the complaint.

CONCLUSIONS OF LAW

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

⁷ 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.

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

3. The Respondent did not engage in the unfair labor practices as alleged in the complaint.

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

ORDER⁷

It is hereby ordered that the complaint in this proceeding be dismissed in its entirety.

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.