

WNAC-TV Division, RKO General, Inc. and American Federation of Television & Radio Artists, Boston Local and New England Council, AFL-CIO. Case 1-CA-18436

September 28, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On May 13, 1982, Administrative Law Judge Arline Pacht issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed cross-exceptions and a supporting brief and a brief in opposition to the General Counsel's exceptions.

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,¹ and conclusions of the Administrative Law Judge and to adopt her 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.

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), enf'd, 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings.

Chairman Van de Water and Member Hunter find it unnecessary to pass on the Administrative Law Judge's finding that Kaye's filing of a sex discrimination complaint with the Massachusetts Commission Against Discrimination constituted protected concerted activity, in finding that the General Counsel presented evidence sufficient to establish a *prima facie* showing that protected conduct was a motivating factor in Respondent's decision to discharge Kaye. They agree with the Administrative Law Judge that Kaye was involved in protected concerted activity by her participation in the September 5, 1980, staff meeting, and in the gatherings of female employees at Werner's restaurant.

DECISION

STATEMENT OF THE CASE

ARLINE PACHT, Administrative Law Judge: This matter was heard in Boston, Massachusetts, on January 4 through 8 and February 4, 1982. Pursuant to a charge filed on March 11, 1981, and amended on April 17, 1981,

a complaint issued on April 24, 1981, alleging that the Respondent (hereinafter the Station or Channel 7) unlawfully discharged employee Tanya Kaye Konjolka (hereinafter Kaye) for filing a complaint alleging sex discrimination and for engaging in other protected activities in violation of Section 8(a)(1) of the National Labor Relations Act. Respondent's answer denied the substantive allegations of the complaint.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally. Upon the record, including my observation of the demeanor of the witnesses and after due consideration of the briefs filed by counsel for the General Counsel and for Respondent, I hereby make the following:

FINDINGS OF FACT

I. JURISDICTION: THE BUSINESS OF THE EMPLOYER AND THE LABOR ORGANIZATION INVOLVED

Respondent, a Delaware corporation, at all times material herein has maintained its principal office and place of business at the RKO General Building Government Center, in Boston, Massachusetts, and is now and continuously has been engaged in the operation of a commercial television station. At all times material herein, Respondent, in the course and conduct of its business operations derived annual gross revenues in excess of \$100,000. Accordingly, I find that Respondent is now, and has been at all material times herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The American Federation of Television and Radio Artists, Boston Local and New England Council, AFL-CIO (hereinafter the Union), is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

A. Background: Kaye's Early Years of Employment

Tanya Kaye initially was hired on a part-time basis by Channel 7 in 1974. A year later, after graduating from law school, she became a full-time consumer reporter. Prior to this employment, Kaye's principal experience was in writing for various magazines and newspapers; she had only modest experience with television.

In May 1977, shortly after the arrival of a new news director, Dick Graf Kaye was offered a new method of payment. In a memo authorizing this salary guarantee, Graf pointed out that it would not constitute a pay raise in absolute terms but was intended to give the appearance of an increase as a means of boosting morale and assuring that she would not be attracted to another station.

During her first several years as a consumer reporter, Kaye received several awards, including the Dodson Headliner Award for outstanding public service and a Consumer Product Safety Commission award for excellence in consumer reporting. In 1979, the New England School of Design also honored her for integrity in reporting. More recently, the mayor of Fitchburg, Massa-

chusetts, wrote to Kaye in appreciation for her coverage of a serious fire in that community. In addition, in 1976, Kaye was singled out for favorable mention in several important trade journals. In 1979, while serving as a bureau chief, she was featured in a cover story appearing in the magazine section of a suburban newspaper. However, her career during this period was not an unqualified success. Thus, in April 1979, she was bypassed when Graf assigned a fellow reporter, Mike Taibbi, to cover the spill at the Three Mile Island nuclear plant.

Then in June, Steve Cohen, Graf's successor, decided to enlarge the station's coverage of suburban news by creating bureaus which would focus on events in locations adjacent to Boston. Kaye was offered one of three newly created positions as the west bureau chief. In a memo to Cohen dated May 25, 1978, Kaye clearly documented her displeasure with this offer. She wrote: "I view my assignment with great regret. I think the vacuum created by the elimination of a consumer beat is a great disservice to our viewers." She then reviewed some of her accomplishments as a consumer reporter and suggested that the decision to eliminate her beat was due to pressure from big business. Cohen replied to this memo the next day with a note reflecting an equal degree of umbrage:

I am appalled by your lack of introspection and your high opinion of your impact on the community. First I have yet to see a piece that was so well-handled it deserved special praise. I know you are a competent attorney and care about people—but I am certain your approach to consumerism was not broad enough in scope or sharp enough in delivery in stories you did manage to complete. Simply, while you have obvious journalistic skills, you have yet to hone them to a level commensurate with your time here as a reporter.

Cohen also referred to a consultant's study which found that Kaye had "no appreciable (measurable) impact on the market—your action report was hardly known to a substantial number of the viewers. . . . There was no need indicated in the market for what you thought you were providing the viewer. . . . [F]ew felt that you added much to the total effort."

Kaye accepted the reassignment to the bureau chief position in June 1978 and held that job until the bureau system was disbanded in June 1980.

B. Kaye Files Sex Discrimination Complaint

Graf returned as news director in August 1979.¹ In September, Kaye informed him that she was offered a position as chief of consumer affairs for the Boston Regional U.S. Attorney's office. According to Kaye, Graf responded to her announcement by assuring her that he planned to return her to consumer reporting on Channel 7. Consequently, Kaye rejected the position with the Justice Department. Notwithstanding Graf's purported promise, on October 23, he posted a notice announcing the imminent arrival of a new employee, Stephanie Le-

¹ Cohen remained news director until January 1979. He was succeeded by Fitzgerald who served as acting news director until Graf's return.

vinson, who was to serve as a consumer reporter.² A week after this announcement, on October 30, 1979, Kaye filed a complaint with the Massachusetts Commission Against Discrimination (MCAD) charging that she was discriminated against on the basis of sex.³

Kaye maintained that, on learning of the complaint, Graf warned her she would never again be employed in the industry. At about the same time Graf was alleged to have made this threat, he requested that Fitzgerald prepare a written analysis of the charges in Kaye's complaint.⁴ Fitzgerald's memo concluded that Kaye's charges were wholly without merit.

C. The Advent of Peter Leone

In June 1980, Peter Leone was employed to succeed Graf who had been terminally ill for the past 4 months. At the time of his hire, Leone was specifically charged by management with improving the ratings of Channel 7, which lagged in a sorry third place behind its two major competitors in the Boston area, the sixth largest TV market in the nation. In addressing this mission, Leone confronted problems of enormous proportions: the station was reeling and demoralized from a licensing battle and from a potential sale to new ownership. Moreover, for the past several months, the newsroom had been virtually leaderless because of Graf's illness.

Leone approached his task by studying every facet of the newsroom's operations. He soon began making sweeping changes to improve the presentation of the news. He also undertook a review of the employees' personnel files and observed their on-air appearances with an eye for change, for it is conventional wisdom in the TV industry that the surest way to improve ratings is by employing fresh talent.

² Subsequently, Levinson reneged and the position went instead to Linda Blackman.

³ Kaye alleged, *inter alia*, that she was required to do her own research while other reporters were delegated assignments; was not compensated at an equitable rate with other reporters; received a lateral transfer to the West Bureau at a lower rate of pay than other bureau chiefs; was denied equal opportunity to appear live in the studio which generated a higher salary compensation; was frequently denied the opportunity to edit her own reports; was not chosen to cover the Three Mile Island nuclear power plant story although she had expertise in reporting on nuclear energy events, but was bypassed in favor of a male reporter.

⁴ As to the pay issue, Fitzgerald noted that one of the bureau chiefs came to the station with far more experience than did Kaye and that the other bureau chief was a far more valuable contributor and major planner in the bureau concept, in comparison to Kaye whom he found "mediocre at best." With respect to Kaye's complaint about the Three Mile Island assignment, Fitzgerald stated that although she had done a couple of reports on the nuclear issue, she was far from an expert on the subject and "based on her on-air performance over the years, I would never have considered sending her to Harrisburg. A look at Taibbi's coverage of the event is enough evidence that the assignment went to the most capable person." He further explained that a conscious effort was made to limit Kaye's in-studio appearances because "she was just a poor performance on set." He further refuted her charge that she was discriminated against in the editing of her reports by explaining that a system whereby writers and editors would oversee the actual editing of the reporter's pieces was instituted to expedite the editing timetable and all the reporters were required to submit their pieces for such editing. He added that it might have helped had she been more involved in the editing process. Instead, Fitzgerald commented, "she rarely called to see if there were any problems with the editing. Instead, we would have to chase her."

Soon after Leone's arrival, Kaye met with him and he complimented her on her exclusive coverage of an oil fraud story. When, during the same meeting, Kaye asked Leone for a critique of her work, he explained that he preferred not to comment because he had just learned of her MCAD complaint and had to confer with the station's attorneys who were handling it before he could deal further with her.⁵ Leone testified that after reviewing Kaye's work over the next several weeks he concluded that she should be terminated.

Leone raised the question of terminating Kaye and several other employees with RKO's vice president of employee relations, Jeffrey Ruthizer, and Channel 7's general manager, Bob Williamson, at a meeting on July 16. Ruthizer urged Leone to proceed cautiously not only because of the pendency of Kaye's MCAD complaint, but because he felt certain that, given her legal experience, she would file additional charges if she was "fired." He then instructed Leone to carefully document Kaye's shortcomings in writing so that the Company would be in a position to support the reasons for the discharge decision. Subsequent to this meeting and throughout the next several weeks, Leone received further complaints from various personnel in the news department about Kaye's inadequacies. Consequently, on July 24 he issued a memo to her stating his dissatisfaction with her failure to generate story ideas and instructed her to submit, on a daily basis, five new story ideas in writing. He further advised that "he would be carefully monitoring her work on a daily basis in order to help you reach the standards that I expect from all reporters. . . ." Leone imposed the same requirement to generate story ideas on another employee, Paul Reece.

Kaye was outraged and offended by the memo, but on speaking to Leone about it, accepted his assurance that he meant to be constructive and not critical. Several days later, Kaye responded to the July 24 memo with a memo of her own, remonstrating that she had generated all of her stories while a consumer reporter and 80 percent of those which aired while she was bureau chief.

Kaye complied with the directive to submit written story ideas for several weeks. However, when she failed to receive any reaction to her proposals from Fitzgerald, she began forwarding them to another person on the assignment desk. When, after several weeks, she stopped submitting proposals altogether, neither Fitzgerald nor Leone made any comment.

Leone's dissatisfaction with Kaye's work continued and was supplemented by complaints he received from other personnel in the newsroom. In mid-August, as a means of minimizing Kaye's on-air exposure, he obtained authorization from Ruthizer to assign her to a weekend schedule. Then, on September 3, Leone met with Ruthizer and Williamson and sought authorization to terminate both Kaye and Reece. On this occasion, Ruthizer finally approved the decision, but counseled Leone to put

off the termination for a brief period so that he could further document Kaye's inadequacies in writing.

D. Kaye's Concerted Activities in the Fall of 1980

Several days after the September 3 meeting, Kaye and photographer Lucia Dobie drafted a petition objecting to a recently aired story on a stripper as a "regressive portrayal of women" which was offensive and tasteless. Kaye typed the statement and circulated it to a few colleagues for signature, but for the most part, the petition remained on staff member Sarah Dunlevy's desk where eventually it was signed by 25 men and women in the news department.

On learning of the petition, Leone called a staff meeting for September 5. At the meeting's outset, which was attended by 25 to 50 news personnel, Leone expressed dismay that employees would act in such a sophomoric fashion rather than presenting their concerns to him in person. He asked to see the petition and when no one responded he insisted that it be presented to him. At this juncture, Kaye volunteered that the petition was not in final form and that it was meant to be constructive. Leone interrupted and demanded to see the petition. Kaye maintained that it was incomplete. Finally, in angry and hostile tones, Leone said if she did not have it, she could "put up or shut up." Leone's stinging rebuke silenced Kaye for the balance of the meeting. To ease the tension, a number of other employees quickly interjected with comments of their own. Jan Harrison, who at that time was a co-anchor on the 11 p.m. news, commented that Leone's response was a telling demonstration of why people resorted to petitions. Mike Tiabbi, a multiple Emmy award winner, echoed some of Harrison's sentiments but spoke in a moderate manner as did Mary Richardson and John Henning, two other anchor persons. Somewhat chastened, Leone expressed his willingness to address the employees' concerns. Thereafter, several constructive suggestions were raised—one concerned maintaining an all-night photographic crew, another with exercising restraint as to stories that might be exploitative, and yet another with abolishing the suburban news bureaus.

Over the course of the month, a number of women including Mary Richardson, Jan Harrison, Lucia Dobie, and Kaye spoke to one another about the desirability of holding meetings for the newsroom's distaff members. Subsequently, on September 29, Lucia Dobie posted an unsigned notice announcing a social gathering for all women employees at a nearby restaurant on October 1. When Leone noticed the announcement, he asked his secretary if she knew anything about it. She indicated that Kaye had asked her to join the meeting or social gathering. He also asked Sarah Dunlevy if she knew anything about the meeting. He next probed for even further information from his administrative assistant, Maureen Smith, who told him that Kaye had asked her to attend. Leone also asked Operations Manager Ginny Flaherty whether she knew anything about the meeting and urged her to attend and report back to him on what occurred. Although Flaherty went to the meeting, Leone stated he had no further conversations with her about it.

⁵ Leone and Kaye offered somewhat different versions of this encounter. For example, Leone alleged, contrary to Kaye, that she first raised the matter of her complaint and persisted in discussing it in spite of his reluctance to do so. The disagreement as to exactly what was said and by whom at this meeting is quite minor and has no bearing on my resolution of the ultimate issue in the case.

Approximately 15 to 18 women employees attended the first gathering at the restaurant on October 1. Problems of individual and general concern bearing on such matters as overtime pay and negative portrayals of women were discussed. No one woman chaired the meeting and although the possibility of taking more organized steps such as forming a coalition or filing a class action were raised, no further efforts were made toward those ends. The women met again on October 8 and 15. Dobie testified that the second meeting was announced by word of mouth and that no notices were posted because management had registered considerable concern about the first one.

E. *The Discharge*

Sometime during the third week of September, Kaye met with Leone to review five recent tapes of her work. Several days after the critiquing session, Leone prepared a memo summarizing the comments he allegedly conveyed to Kaye during the meeting. Leone's criticisms were devastating: he found that she had failed to make clear the premise underlying the stories in each of the tapes; that the facts were presented in a disjointed, rambling, and inaccurate manner. In several news items, he noted that she failed to obtain interviews with appropriate persons and, in another instance, failed to ensure that the story was aired on time. Leone concluded with this admonition:

I must stress my growing dissatisfaction with your disorganization and incomplete reporting. I will continue to closely monitor your work, but if you do not start measuring up to the standards that I have set and we have discussed, I will be forced to again evaluate your reporting abilities and decide upon your continuing with Newsroom 7.

Contending that the memo contained comments which Leone had not made in person, Kaye determined to set the record straight. In an acid memo written a few days later, she accused Leone of harassing and retaliating against her for "exercising her statutory rights." She defended each of her presentations in a point-by-point refutation of Leone's criticisms and suggested that her colleagues expressed favorable reactions to her work, in contrast to Leone's.

Two weeks after this exchange, on October 17, 1980, Kaye was terminated.

F. *Evidence as to Kaye's Competency*

Much of the evidence in this case focused on Kaye's abilities as a TV reporter. The General Counsel, on the one hand, attempted to prove that because Kaye was a highly competent and well-regarded performer Respondent's ostensible business justification for discharging her was a sham. In addition to evidence discussed above that Kaye was the recipient of three awards, favorable press reviews, and salutary comments from her colleagues, the General Counsel also adduced evidence from an expert witness, William A. Henry III, formally a TV critic for the *Boston Globe* and more recently a political writer and TV critic for *Time Incorporated*. Henry's introduction to

Kaye's work came about when he was requested by the station's public relations office to review a series she did on privacy and technology. Thereafter, he observed Kaye's performance and those of other reporters on a sporadic basis. Overall, Henry ranked Kaye among the 25 percent best reporters in the Boston market. His general impressions were that she was "clear, direct, unalarmed and thoroughly professional."

In addition to Henry, the General Counsel also adduced testimony from Lucia Dobie, a news photographer. She attested that while working closely with Kaye during the summer of 1980 she found her to be easy to work with, gave clear instructions, and was a competent professional.

Respondent, on the other hand, was intent on proving that Kaye was, at best, a mediocre talent whose dismissal came about out of a desire to improve the news department's ratings. Toward this end, Respondent presented extensive evidence that Kaye was held in low esteem by her peers and by experts.

Several witnesses testified that Graf wanted to terminate Kaye as early as 1979. However, Ruthizer persuaded him not to take any action while the MCAD complaint was pending. An expert witness for Respondent, David Claytell, an associate professor of broadcast journalism at Boston University's School of Public Communication, testified that during his association with Graf in 1980 the news director posited that Kaye was not qualified to continue as a reporter. Moreover, based on substantial viewing of news programs for 3 to 4 hours each weekday over a period of approximately 7 years, Claytell had formed his own judgment of Kaye's abilities. In his view, Kaye fell into the bottom quartile of reporters in the Boston area. Specifically, he found that often she was ill at ease and that her stories tended to be simplistic.

Another expert witness, Willis Duff, who as the director of a research firm specializing in television news served as a consultant to Channel 7 in 1976 and again in 1980, also assessed Kaye as an average to a below average reporter in the Boston market.

Assignment editor, Chuck Gordon, judged Kaye as the least able of the bureau chiefs and labeled her work weak or bland. Marcie Diehl, currently the executive producer of the 6 p.m. news, and winner of several Emmy awards,⁶ testified that she found working with Kaye difficult and made her dissatisfaction known to Graf, Cohen, and Leone. Diehl observed that Kaye did not communicate well when working in the field, was ill-prepared, disorganized, and presented a spiritless performance. Fitzgerald's views paralleled those of other newsroom management personnel. He found that Kaye's work lacked vitality, that her stories were often incomplete, and that her delivery was dull.

G. *Comparable Treatment*

The second major prong of Respondent's defense was based on its contention that Kaye was not singled out for disparate treatment.

⁶ Diehl also was the recipient of numerous other awards of national stature.

Evidence was presented showing an extremely high turnover in the station's newsroom personnel. Of the 20 or so reporters who worked with Kaye in 1976, only 2 remained on the Channel 7 news staff at the time of the hearing. In the intervening years, Respondent terminated, demoted, or failed to renew contracts of 20 men and 4 women employees besides Kaye.⁷

After Leone became news director, several employees in positions more visible than Kaye's also suffered adverse employment actions. The station failed to renew the personal service contracts of anchors Jack Cole, John Hennings, and Mary Richardson. Anchor Jan Harrison was demoted to street reporter while another anchor, Ted O'Brien, was transferred to programming.⁸ In addition, the record shows that Leone requested two other reporters besides Kaye to generate story ideas, and that numerous other reporters had their work monitored and received criticisms orally and in writing.

Respondent also offered proof that numerous employment decisions were made which advanced women's careers at the station. For example, Marcie Diehl was promoted from producer to executive producer; Sarah Dunlevy was promoted to the position of director of electronic newsgathering; Sasha Norken was promoted from producer to special projects director; Susan Brody was hired to anchor a news program replacing Ted O'Brien; Susan Burke also was hired as an anchorperson; two women were hired to replace two men on the assignment desk; and Maureen Smith, Leone's administrative assistant, had her duties considerably enlarged.

III. DISCUSSION

A. The Wright Line Test

This case poses the question of whether, as the General Counsel contends, Tanya Kaye was discharged for filing a complaint alleging sex discrimination and for engaging in other protected activities, or, as the Respondent submits, out of a need to remove an unsatisfactory performer as part of the station's effort to revitalize its news service. Where, as here, an employer asserts that its decision was based on a legitimate business reason, the finder of fact must determine whether the reason offered is genuine, for "the Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them . . . and . . . the Board is not entitled to make its authority a pretext for interference with the right of discharge when the right is exercised for other reasons than intimidation and coercion." *N.L.R.B. v. Jones and Laughlin Steel Corp.*, 301 U.S. 145-146 (1937).

Accordingly, in cases such as this, where both good and bad motives are ascribed to the employer, the Board has imposed upon the General Counsel the initial burden of making a *prima facie* showing that an improper moti-

⁷ The following employees were terminated between 1975 and 1980: Paul Reece, Ron Hurst, Bob Gamene, Lavelle Dyett, Fred Ward, Skip Cilley, Mel Burnstein, Steve Fentress, Jack Kelly, Jay Scott, Homer Cilley, Howard Nielson, Bubba Johnson, Ken Wayne, Milton Chow, Jay DeJourna, Lynn Richards, and Teresa Caldwell; Ted O'Brien and Jan Harrison were demoted.

⁸ Harrison testified that although such transfers are viewed in the industry as demotions, she personally preferred her new assignment.

vation underlay the decision to discharge the employee. Thereafter, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the employee's protected activity. *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).⁹

B. Application of Wright Line to the Instant Case

Although it is a close question, I find that the General Counsel has presented evidence sufficient to meet its initial burden for a *prima facie* case.

Although Kaye did not act in concert with other employees in filing a complaint with the MCAD, it is nevertheless well settled that such conduct constitutes protected concerted activity. See *Hotel and Restaurant Employees and Bartenders Union, Local 28, et al.*, 252 NLRB 1133-34 (1980); *Alleluia Cushion, Co.*, 221 NLRB 999, 1000 (1975).

Nor can there be a serious question that Kaye's participation in the September 5 staff meeting at which she spoke in defense of the "stripper" petition, and in the October meetings at Werner's Restaurant at which the newswomen voiced their concerns about certain working conditions were concerted activities protected by Section 7 of the Act. The mere fact that no formal action resulted from the women's meetings in October does not negate their concerted nature for as the Supreme Court stated in *N.L.R.B. v. Washington Aluminum Company, Inc.*, 370 U.S. 9, 14 (1962): "We cannot agree that employees necessarily lose their right to engage in concerted activities under Section 7 merely because they did not present a specific demand upon their employer to remedy a condition they found objectionable." The record shows that the Channel 7 women at least considered the possibility of taking further formal action during the course of their gatherings at Werner's. Thus, these discussions went beyond mere griping and are entitled to the same protections as are other concerted activities in full bloom. See *Hugh H. Wilson Corp. v. N.L.R.B.*, 414 F.2d 1345, 1347 (3d Cir. 1969).

Respondent obviously had immediate and direct notice of Kaye's MCAD complaint. Respondent maintained that it was unconcerned about the complaint because the allegations contained therein were wholly without merit. But whether or not Kaye's charges of sex discrimination are valid is beside the point. Regardless of the ultimate disposition of that complaint, management was plainly concerned by the fact that a complaint was filed during a troublesome time in which the renewal of the station's license was in question. Graf's grim remark to Kaye that she would be blackballed for filing such a complaint is

⁹ The Board's causation test also is applicable to 8(a)(1) discharges where motivation is in issue. See *Castle Instant Maintenance Maid, Inc.*, 256 NLRB 130 (1981). Recently, two circuit courts of appeals, including the circuit in which this case arises, endorsed the Board's *Wright Line* causation test but rejected the burden-shifting analysis adopted in that case on the ground that the burden of proof remains throughout with the General Counsel. See *Behring International v. N.L.R.B.*, 675 F.2d 83 (3d Cir. 1982); *N.L.R.B. v. Transportation Management Corp.*, 674 F.2d 130 (1st Cir. 1982); but see *N.L.R.B. v. Fixtures Mfg. Co.*, 669 F.2d 542 (8th Cir. 1982), which expressly approved the Board's burden-shifting approach. Board authority, of course, governs this decision.

not a statement which reflects an intended course of action, but it clearly constitutes an expression of animus.¹⁰ By the testimony of several of Respondent's witnesses, the complaint loomed large in corporate thinking since it was at the heart of the decision to retain Kaye for the next several years.

Respondent further suggests that the lapse of time between the filing of the complaint in October 1979 and Kaye's dismissal a year later disproves any causal connection between the two events. If filing the MCAD complaint was the only activity in which Kaye had engaged, Respondent's argument might have greater merit. Leone would have had little reason to be personally offended by a charge of sex discrimination which was filed against his predecessors. However, Kaye's initial action cannot be viewed in isolation. Rather, the filing of the MCAD charge must be viewed as merely the first step in a chain of events which included her role in the September 5 staff meeting and in the October single-sex meetings. The irritation which management surely felt toward Kaye for filing the MCAD complaint had to be rekindled by her participation in these later events.

Respondent argues that since Dobie was as responsible as Kaye for drafting the petition and for planning the meetings at Werner's and since Kaye did not play a dominant role at those meetings which were attended by many other women, none of whom suffered any retaliation, it follows that her involvement in these meetings played no part in Respondent's decision to terminate her. However, Respondent's theory ignores the way in which Leone reacted to Kaye's role in these events. When Kaye was the first person to speak in defense of the petition at the September 5 meeting, Leone surely had to regard her as the moving force behind it. His intemperate outburst directed specifically at her during that meeting cannot be attributed simply to his vexation that no one would produce the document. It is far more likely that he viewed her sponsorship of the petition as yet another challenge to his and the station's posture on feminist matters. Similarly, Leone's intense interest in the women's gatherings at Werner's Restaurant cannot be explained as the mere product of idle curiosity. He questioned no fewer than four women to find out what the meetings were about. When his administrative assistant informed him that Kaye had especially invited her to the first gathering, it is not unreasonable to infer that he regarded her as a ringleader.

Added to the foregoing considerations, the timing of Kaye's discharge provides some cause to suspect the propriety of Respondent's motivation. Leone testified that he was intent on dismissing Kaye as early as July 16 but, like Graf, was prevented from doing so by Ruthizer who was reluctant to approve any adverse action because of the pendency of her MCAD complaint and the prospect of new charges of retaliation. Yet, her complaint was still pending in October when she ultimately was fired. It is difficult to account for the reversal in Respondent's position without taking into account Kaye's involvement in the events of early September and October. Respondent

submits that the decision to discharge Kaye was made on September 3, thereby predating her participation in these activities. However, a question remains as to why that decision was not put into effect until some 6 weeks later. The answer may be, as Respondent suggests, that Ruthizer simply was exercising an abundance of caution. Indeed, the reason for his restraint—apprehension that Kaye would amend her MCAD complaint—proved entirely accurate. However, this explanation does not altogether resolve the doubts which arise from the coincidental timing of the discharge. The Board frequently had stated that timing is a factor which may give rise to an inference of illegal motivation. For the purposes of establishing a *prima facie* case, such an inference is warranted here. See *The Berry Schools*, 239 NLRB 1160, 1162 (1979).

C. The Discharge Was Lawful

Based on the evidence outlined above, I conclude that Kaye's involvement in protected concerted activities to some extent influenced Respondent's decision to terminate her. However, in weighing the evidence in the entire record, I find that Respondent has presented far more compelling evidence that the discharge was the result of lawful considerations.

Respondent avers that it fired Kaye solely because of dissatisfaction with her marginal performance. In evaluating the *bona fides* of Respondent's asserted rationale, it is important to bear in mind that the standards for measuring acceptable performance in the industrial world do not translate well to the TV industry. Factors such as length of service or bare competency which might be sufficient to assure continued employment for an assembly line worker, are hardly likely to guarantee job security for the TV reporter. Evaluations of a TV performer necessarily involve subjective judgment based on elusive criteria. Indeed, it is difficult to conceive of another profession where the ingredients for success are less amenable to precise definition. Even those who are knowledgeable about the TV industry cannot account for the vagaries of public taste. Reasons for preferring one performer over another do not lend themselves to written rules or precise quantification. In these circumstances, where wide differences of opinion can flourish among well-intentioned experts, Respondent surely is entitled to judge for itself the standards it finds desirable in its employees. See *St. Ann's Episcopal School*, 230 NLRB 99, 102 (1977). The trier of fact should exercise the utmost caution in overriding such judgments. Misgivings about tying management's hands in making personnel decisions are particularly critical here where the station was struggling to capture a larger share of the Boston television market.

In concluding that Respondent terminated Kaye for legitimate business reasons, I rely heavily on the fact that persons with great expertise who had daily opportunities to observe Kaye's performance over an extended period of time expressed virtually unanimous opinions that she was of below-average caliber.

It is unnecessary to repeat their assessments here. Sufficient to say that each of the news directors for whom Kaye worked—Graf, Cohen, Fitzgerald, and Leone—did

¹⁰ I conclude that Graf made this remark. Had Kaye wished to fabricate, she could have attributed many more offensive statements to Graf than she did, knowing he was unable to contradict them.

not believe that she possessed outstanding talent. To the contrary, the evidence shows indisputably that these men found her severely deficient and failed to terminate her solely because of the pendency of her MCAD complaint.

The General Counsel argues that Graf thought well enough of Kaye's professional skills prior to the time that she filed her MCAD complaint to award her a more desirable form of payment. However, as Respondent points out, the new payment plan which Graf authorized did not constitute an absolute increment in Kaye's salary. Moreover, Graf recommended this revision shortly after his arrival at the station in 1977. Although it is fair to infer that Graf valued Kaye's services at that time, it is an equally valid inference, judging by his subsequent actions, that his esteem waned over time. Thus, by the fall of 1979 he obviously had decided against returning Kaye to the consumer beat. Instead, he offered that position to another woman. Graf's announcement of Levinson's appointment as a consumer reporter preceded by a week Kaye's MCAD complaint. Thus, his decision to deny that position to Kaye apparently stemmed from an assessment of her skills and not from a retaliatory intent.

The evidence also establishes that neither Cohen nor Fitzgerald was impressed with Kaye's abilities. Memos prepared by them set forth in devastating and unmistakable terms their low evaluation of Kaye's worth. Those memos are especially convincing in that they were written contemporaneously, and do not seem fabricated in order to create a record for courtroom litigation. Thus, Cohen's memo of May 26, 1978, was directly responsive to Kaye's memo protesting her transfer from consumer reporter to bureau chief. Fitzgerald's internal memorandum was informal and roughly typed, apparently dashed off as a quick response to Graf's request for an explanation of the allegations in Kaye's MCAD complaint.

Leone's dissatisfactions with Kaye have been discussed above and are well documented in the record. In addition, uncontroverted testimony was offered that Leone received numerous complaints about Kaye's performance from many of the persons who worked with her on a day-to-day basis.

The testimony of Marcie Diehl was particularly persuasive in this regard. As the winner of a number of Emmy awards, the most prestigious in the TV industry, as well as other national awards, Diehl's career has advanced because of recognized talent. She had no need, then, to curry favor with management by adopting a false position as to Kaye's abilities. She was not in any way involved in Kaye's charges of sex discrimination, and only indirectly could influence the decision to discharge or retain her. Yet, she spoke bluntly as to the difficulties she encountered in working with Kaye both in the past and through the summer of 1980. In order to discount the overwhelmingly negative evidence as to Kaye's abilities, I would have to find that the managerial staff at Channel 7 engaged in an elaborate conspiracy to defeat Kaye at this hearing. There is no foundation in the record for such a conspiratorial theory.

As impressive as the views offered by the foregoing witnesses were, the testimony of experts Duff and Claytall was even more so. I am aware that Duff was a consultant for Respondent and, to some degree, his views

might be tainted by a purported need to please his client. At the same time, I bear in mind that a consultant's continued employment depends on the overall quality of his advice which is worth little if it turns on sycophancy. Duff did not strike me as a consultant whose views were for sale. He was methodical, even pedantic, in discussing Kaye's deficiencies.

None of the considerations which might otherwise taint Duff's views attach to those offered by Professor Claytall. He was, unquestionably an independent, knowledgeable, and close observer of the Boston television scene. Any doubts as to the genuineness of Respondent's assessment of Kaye disappeared when Claytall, comparing her abilities to those of other Boston newscasters, placed her in the lowest quartile.

This is not to say that the opinions expressed by William Henry as to Kaye's ability are invalid. He was as thoughtful and incisive a critic as either of the experts presented by Respondent. However, Henry conceded that he had much less exposure to the Boston TV news scene than did his colleagues. Consequently, his recollection of Kaye's performance was much more generalized and less fresh than that of his fellow critics. It may well be that if another half dozen critics were summoned to the courtroom, after reviewing Kaye's tapes, they would be as divided in their evaluation of her abilities as were Claytall and Henry. Disagreements among experts merely serves to underscore the subjective nature of the evaluative process involved herein.

Of course, Kaye disagreed with those who judged her harshly. She pointed with some justifiable pride to the awards bestowed upon her and to trade journal articles favorably mentioning her as proof of her distinction. Without diminishing the value of these honors, they must be viewed in perspective. None of these awards is well recognized in the industry, as is the coveted Emmy. As Diehl suggested, they may have been noncompetitive measures of appreciation. The complimentary articles were, in most instances, due to the promotional efforts of the station's public relations department. Kaye's reaction to criticism reveals that she did not possess a particularly balanced view of her own capacities. The record evidence shows not only an acute sensitivity to criticism but an outright denial that it had any legitimacy. Consequently, it appears that she converted that criticism into unfounded conclusions that she was treated in a discriminatory manner. Even if Kaye is correct in believing that her superiors misjudged her value, labeling their actions as discriminatory does not necessarily make them so.

The question is not which of the experts is more correct or whether Kaye was somewhat better or worse than her peers. Rather, the issue is whether Respondent's estimate of Kaye's abilities was so aberrant as to give rise to an inference that the decision to fire her was discriminatorily motivated. Given the weight of the evidence, the number of witnesses whose views were mutually corroborative, and the ample documentation that Kaye had been criticized consistently over the past several years, Respondent has more than vindicated the legitimacy of its decisional process; it has proved convincingly that it

terminated Kaye because of a perceived need to eliminate a reporter who added no luster to the newsroom.

The total lack of proof of disparate treatment provides further telling evidence that discrimination was not at work here. That only two employees remained of those who were in the newsroom when Kaye arrived attests to the job instability in this high-risk profession. Discharges of both men and women were commonplace. Adverse employment decisions were made without regard to sex, seniority, or status. For example, Paul Reece, who was hired before Kaye, was fired several days after she was. Anchor John Hennings, who was a well-known figure in Boston TV circles according to Henry, was demoted from the 11 p.m. to the less prestigious 6 p.m. news show, and finally, his personal service contract was not renewed. Similarly, the personal service contracts of anchors Mary Richardson and Jan Harrison were not renewed. Although Jennings and Richardson ultimately left Channel 7 of their own accord, it can be inferred that they were encouraged to do so when the station signaled its discontent with their performance by failing to renew their contracts. If relatively prominent TV reporters have no assurance of job security, then certainly a street reporter cannot expect kinder consideration.¹¹

Conclusion

Kaye's termination after 6 years with Channel 7 was necessarily a traumatic experience. However, discharges

¹¹ Respondent introduced evidence as to the professional advancement of women at Channel 7. Although such evidence may have bearing on Kaye's pending charge with the MCAD, it has little relevance to this proceeding, where the issue is not whether she was discriminated against on the basis of sex, but whether she was discharged because she was engaged in protected concerted activity.

of the famous and not-so-famous are facts of life in the television industry. Respondent's decision that Kaye was expendable may have been unsound, but there is no evidence which would uphold a conclusion that the decision was not honestly made. In the final analysis, Respondent has succeeded in surmounting any doubt as to the legitimacy of its motivation by proving that Kaye's discharge in October 1980 would have occurred independently of any involvement in protected concerted activity. Accordingly, I shall recommend dismissal of the complaint in this case.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has not engaged in the unfair labor practice alleged in the complaint.

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:

ORDER¹²

The complaint is dismissed in its entirety.

¹² 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.