

D & D Health Associates, Inc. and Diane Barczyk.
Case 7-CA-20431

30 April 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND
DENNIS

On 3 May 1983 Administrative Law Judge Elbert D. Gadsden issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

We agree with the judge, for the reasons he stated, that the Respondent discharged Diane Barczyk because she applied for unemployment compensation following a reduction in her working hours. Relying on *Self Cycle & Marine Distributor Co.*, 237 NLRB 75 (1978); *Krispy Kreme Doughnut Corp.*, 245 NLRB 1053 (1979), enf. denied 635 F.2d 304 (4th Cir. 1980); and *Air Surrey Corp.*, 229 NLRB 1064 (1977), enf. denied 601 F.2d 256 (6th Cir. 1979), the judge concluded that Barczyk's application for unemployment compensation constituted protected concerted activity and her discharge violated Section 8(a)(1) of the Act.

In our recent decision in *Meyers Industries*, 268 NLRB 493 (1984), we held that, for an employee's activity to be deemed "concerted," it must be "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." Id. at 497. In so holding, we overruled *Alleluia Cushion Co.*, 221 NLRB 999 (1975), and its progeny, which held that the invocation of relevant legislation by an individual employee without the authority or assistance of other employees constituted concerted activity.

Applying pre-*Meyers* law as noted, the judge found that Barczyk's act of applying for unemployment compensation constituted protected concerted activity. The evidence indicates, however, that Barczyk engaged in this activity by and on behalf of herself. Therefore, we conclude, for the reasons fully set forth in *Meyers*, that Barczyk's conduct does not constitute concerted activity within the meaning of Section 7 of the Act and that her discharge was not unlawful.

270 NLRB No. 30

ORDER

The complaint is dismissed.

MEMBER ZIMMERMAN, dissenting.

Diane Barczyk was discharged because she filed a claim for unemployment benefits as permitted under the Michigan Employment Security Act. Consistent with my dissenting opinion in *Meyers Industries*, 268 NLRB 493 (1984), I would find, as the judge did, that Barczyk was engaged in concerted protected activity and the Respondent's discharge of her was violative of Section 8(a)(1) of the Act.

Like the truckdriver in *Meyers Industries*, Barczyk was asserting an employment-related statutory right. The Michigan statute allowed an employee whose hours had been reduced to apply for and receive unemployment compensation. The legislature created that right for all employees who might find themselves in a situation like Barczyk's with their hours reduced from full time to half time. By statutory decree Barczyk was entitled to the assurance of compensation through unemployment benefits; such assurance was an aspect of working conditions for all employees covered by the statute. It is reasonable to assume then that all employees covered by the statute supported Barczyk's right to apply for unemployment compensation, a right they also might choose to assert. The concerted nature of Barczyk's action grows out of that support and places her within the protection of the Act. The Respondent's discharge of her for asserting a statutory right, therefore, merits the Board's censure, not its indifference. I dissent.

DECISION

STATEMENT OF THE CASE

ELBERT D. GADSDEN, Administrative Law Judge. Upon a charge of unfair labor practices filed on March 7, 1982, by Diane Barczyk, an individual and the Charging Party herein, against D & D Health Associates, Inc., herein called the Respondent, the Regional Director for Region 7 issued a complaint on behalf of the General Counsel on April 26, 1982.

The complaint alleges that the Respondent terminated the Charging Party from its employ, and since that time has failed and refused to reinstate the Charging Party to her former position because the Charging Party filed a claim for benefits with the Michigan Employment Security Commission.

An order having extended time for filing an answer, the Respondent filed an answer on December 20, 1982, denying that it has engaged in any unfair labor practices as set forth in the complaint.

A hearing in the above matter was held before me in Detroit, Michigan, on February 16, 1983. Briefs have been received from counsel for the General Counsel and

counsel for the Respondent, respectively, which have been carefully considered.

On the entire record in this case and from my observation of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

D & D Health Associates, Inc., the Respondent herein, is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of Michigan.

At all times material herein, the Respondent has maintained its principal office and place of business at 8033 East 10 Mile Road, Suite 103, Centerline Towers, Inc., Centerline, Michigan, herein called the main office. Here, the Respondent is, and has been at all times material herein, engaged in providing physical therapy and aid care to the public and to various nursing homes.

During the fiscal year ending October 31, 1981, which is a representative period, the Respondent in the course and conduct of its business operations performed services valued in excess of \$250,000. During the same period of time, the Respondent purchased goods valued in excess of \$50,000 which were transported and delivered to its main office in Centerline, directly from points located directly outside the State of Michigan.

The complaint alleges, the answer admits, and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts

The Respondent provides physical therapy and aid services in a tricity area including Wayne, Oakland, and Macomb Counties, Michigan, involving a radius of 50 miles. Currently the Respondent renders services in about 3 or 4 facilities in Macomb County, 5 facilities in Oakland County, and 11 or 12 facilities in Wayne County. However, prior to January 1982, the Respondent rendered services to the 12 facilities, some of which were located in each of the 4 named counties.

The Respondent holds contracts with nursing homes, convalescent centers, and other settings where people need and request physical rehabilitation services. The Respondent also provides physical therapy, occupational therapy, speech therapy, and social work consultation. It also provides some psychiatric social work counseling and referrals by its owner and director Dorothy Roer.

To carry out its business operations, the Respondent employs a number of personnel including physical therapists and aides to physical therapists. Aides assist the physical therapist in preparing for hot packs, special toweling to prevent injury to particularly aging skin, and to assist in exercising limbs of patients as specified in an exercise plan prescribed by the therapist. The aides also assist in gait training, wheeling patients from one point to another in facilities, and cleaning the whirlpools after they are used. Physical therapists are licensed in the State of Michigan but aides are not. Aides are given a

training course upon being employed by the Respondent which involves classroom instruction during the last 2 hours of the day for several weeks. The aides are paid for the whole day while they are in training and they are also paid for mileage in traveling to and from facilities to perform their work.¹

B. Barczyk's Employment Tenure with Respondent

In July 1981, Diane Barczyk, whose last name by marriage since the past 7 months is Janco, was employed by the Respondent as a physical therapist aide. At the time she was hired, physical therapist and director of education, training and placing of aides Jane Maczei testified that she tells all new employees, including Barczyk, that there is a chance they may be relocated or reassigned to where they are needed to work. She said she tells them the Respondent can never guarantee them full-time work but they try to provide them with full-time work. Barczyk denied that Director Maczei ever told her the job of an aide was part time and Barczyk always considered her job full time. In this regard Barczyk testified that she commenced work at 8:30 a.m. and worked 35 to 40 hours a week after she completed training. The record (G.C. Exhs. 2 and 5) shows especially for the months September, October, and November 1981 that Barczyk worked between 35 and 40 hours per week.²

The record shows without dispute that early in her employment (about September or October 1981) Barczyk was given an assignment by Director Maczei at a facility located in a high crime section of the Cass Corridor area of Detroit, which she refused to accept because of the high crime rate. Barczyk stated she thought the facility was the Ambassador but Director Maczei as well as Administrator Roer testified that the Respondent did not have an account with the Ambassador Nursing Home at that particular time. I credit the Respondent's witnesses in this regard but I do not deem the testimony of Barczyk as having been intentionally untruthful or misleading. Rather, if her name of the facility is in fact wrong, I am persuaded that Barczyk was mistaken with respect to the correct name of the facility. I also deem such mistake in this respect insignificant, in that both Barczyk and the Respondent's managerial witnesses did not deny that there was a nursing home located in a high crime area which appears to have been in the Cass Corridor. Administrator Roer testified that she was advised by Director Maczei about Barczyk's refusal to accept that particular assignment and expressed her preference not to

¹ The facts set forth above are undisputed and are not in conflict in the record.

² I credit Director Maczei's account of what she told newly employed aides, including Barczyk, about the weekly volume and location of work. However, it is particularly noted that while Director Maczei said the Respondent could not guarantee full-time work, she also said the Respondent would be trying to do so. Since it may be reasonably inferred from the latter statement that the Respondent was providing a job for aides which, for the most part, would be full time, but employees were being alerted, in truth, that there would be weeks when they would not work all 40 hours. Under these circumstances, I also credit Barczyk's testimony that the Respondent did not inform her that her job was part time. Moreover, Barczyk's hours of work record (G.C. Exhs. 2 and 5) supports this conclusion since she worked several 40-hour weeks, and many weeks over 33-35 hours.

work in high crime areas of Detroit. However, both Director Maczei and Administrator Roer testified that the Respondent agreed to accommodate Barczyk's wishes in not assigning her work in the Detroit area, but rather, by assigning her to facilities at other locations. They both agree that even though Barczyk had expressed *her preference* not to work in the Detroit area, she nevertheless had in fact accepted and worked assignments in the Detroit area; and that the early refusal by Barczyk to accept an assignment in Detroit was the only such refusal by her.

However, during the first week in December 1981, Barczyk's hours of work were reduced by the Respondent to approximately one-half the amount of hours she normally worked, as a result of a decrease in the workload at one of the facilities where she worked (Abby House). During the week of December 7, Barczyk went to the main office where she discussed her reduction in working hours with the Respondent's administrator Dorothy Roer. She told Mrs. Roer she needed more work because she needed the money. According to Barczyk, Roer told her "at the moment," there was no place to assign her, that she would "just have to wait" for more work. According to Roer, she discussed Barczyk's reduced working hours with her and advised her "*work might be available, but it would probably be in Detroit.*" She said Barczyk replied that her father did not want her working in Detroit and Roer told her she would try to accommodate her situation, but she had no control over where the work was, and if Director Maczei had more work it would probably be in Detroit.³

Subsequently, Barczyk filed an application (G.C. Exh. 3) with the Michigan Employment Security Commission (MESC) for unemployment compensation on December 14, 1981. Barczyk testified that she told the clerk at MESC that her working hours had been reduced from 35-40 hours per week to 18-21 hours per week. She stated that she did not tell the agent that she was a part-time employee because she considered herself a full-time employee. At that time a clerk of the MESC wrote on Barczyk's application in ink "underemployed." In a document distributed by the MESC describing rights and responsibility under the Michigan Employment Security Act (G.C. Exh. 4, p. 11, item 6) "unemployed" is defined as follows:

This means that you did not work at all during the week for which you are claiming benefits or, if you worked part-time, your total earnings (not just take-home pay) were less than your weekly unemployment rate.

Barczyk further testified without dispute that after she filed her application with MESC she discussed it with physical therapist Chuck Ekiert on one occasion and with Sally, who works in the office, on another occasion

³ Since neither Barczyk nor Roer disputed the testimonial account of the other, and since their respective accounts are not necessarily inconsistent or in conflict with each other, I credit both accounts because I was persuaded by their demeanor as well as all the evidence of record that they were testifying truthfully in this regard.

when she was requesting a copy of her working hours to complete her application with MESC.

Administrator Roer acknowledged that she received a form entitled "Request of Employer for Wage and Separation Information" from the MESC dated December 17, 1981 (R. Exh. 2), and she immediately thought that Barczyk was resigning from the Respondent's employ since she filed for unemployment compensation. She thereupon wrote a note on the bottom of the form (G.C. Exh. 2) as follows: "Please note: This employee is still employed by us, her hours were reduced as workloads fluctuate. There is *no reason* for her to obtain unemployment benefits at this time. Please note employee is not therapist but aide."

At the time she completed the form (R. Exh. 2) and returned it to MESC, Roer testified that she was unaware of any such thing as "underemployment."

C. Respondent Treated Barczyk's Application for Unemployment Compensation as Resignation from Respondent's Employ

At approximately 5:30 p.m. on January 29, 1982, Barczyk testified that she was called at home by Administrator Roer who said she was calling to let her know that her filing for unemployment compensation was her resignation, and that Roer's attorney had advised her to get rid of her because the Respondent's insurance would go up as a result of the application for unemployment benefits. She asked Roer if she had done anything wrong and Roer replied, "No." Barczyk informed Roer that she had filed because her hours had been cut and she needed the money. She was upset and her father took the telephone and tried to explain to Roer and she repeated to him what she had said to Barczyk. When Barczyk got back on the telephone Roer hung up.

Barczyk decided to call Roer 30 minutes later, this time using a tape recorder, to hear Roer confirm what she had told her during their prior telephone conversation. Their conversation continued as follows (R. Exh. 1(a)-(b)):

Diane: Um, I was just wondering if you could confirm what you had said earlier to me about what I had asked you about if I had done anything wrong and you said no I wanted you to understand

Dorothy: Well I tell you Diane, you know I've had various reports over the time that you've been working with us, but I've always felt that I've wanted to continue giving you a chance, I like to give people a chance when I can. But you know we've been getting reports at Abbey that you ah ah weren't at the vacility [sic] that you were sitting & smoking in the main lobby & things like that

Diane: No, that was I was already off work and waiting for my car because I could not get it started

Dorothy: Okay, but if you've noticed I've never pointed these things out anyway because I've always felt though that there was a reasonable answer to these things you know and that's you know, that's the way it is so that your [sic] not

being dismissed as I said *I'm accepting your resignation based on what, what it is that has hit my desk and I have [sic] to stick to the guns on that*

Diane: Could you explain what that is cause I really don't understand it

Dorothy: Okay, *I got a notice saying that you applied for unemployment and I got some more notices saying I have to go to a hearing because your [sic] applying for unemployment and therefore I assume that you have resigned and I accept your resignation and that's what it is*

Diane: Okay well I did not resign

Dorothy: Well I can only tell you what I have here dear and what I have to go by

Diane: And what about like what you said about the attorney and something about

Dorothy: *My attorney told me that when I get that kind of a thing in the mail and that kind of employee has filed for unemployment and that the employee obviously does not wish to continue working*

Diane: I did not resign!

Dorothy: I'm sorry Diane I didn't do it you did it I didn't

Diane: Yeah, but I did not resign

Dorothy: Well you should have discussed it with us first then

Diane: Well I'm gonna let you know that I did not resign, I did not quit

Dorothy: Well I accepted it as your resignation, I got hear [sic] on this desk about 28 pieces of paper that I've got to spend the weekend filling out now. It tells me that you are collecting and want to collect unemployment and therefore

Diane: It is under

Dorothy: And I assumed that you resigned

Diane: No, it is

Dorothy: Diane, please I have 2 more people standing here

Diane: Dorothy please please let me say one thing.

Dorothy: I'm sorry please excuse me I do have to go I have accepted what you have done

Diane: Can I say one thing please. Okay I am letting you know that I did not quit and I will be reporting to work on Monday & also

Dorothy: I am letting you know that you are not reporting to work on Monday

Diane: Yes I am!

Dorothy: I am letting you know that you are not reporting to work and that I accepted your resignation

Diane: But I did not resign!

Dorothy: I am Hey

Diane: You have nothing in paper and I am saying right now that I did not resign!

Dorothy: Hey Diane Barczyk, Aah this is my company and I am telling you that I am accepting your resignation

Diane: You cannot tell me that I resigned!

Dorothy: I am telling you that I'm accepting your resignation Do not report to work because I

have accepted your resignation, thank you and good night. [She hung up.]

Barczyk explained that the smoking incident to which Roer referred occurred when she was off duty and in the lobby, but not near the oxygen where smoking is prohibited.

Roer testified that she knew from the time Barczyk was hired that she preferred not to work in Detroit. She acknowledged that Barczyk accepted work assignments in Detroit (Hamtramck) but it was not certain areas in Detroit where there was significant physical and social deterioration where she preferred not to go, and the Respondent did not assign her to such areas. She said Barczyk was flexible.

Roer admitted on cross-examination that Barczyk told her she was not resigning but she nevertheless told her she was accepting her resignation.

Subsequently, in a letter dated February 4, 1982, addressed to MESC, the Respondent advised as follows:

Gentlemen:

We are in receipt of your letter of February 1, 1982 were [sic] you have allowed unemployment compensation to Diane Barczyk. We want to unequivocally contest this decision since we have now and have had sufficient work for Miss Barczyk but *she chose* not to go to work in Detroit in the nursing homes where we had work. It was made very clear to Miss Barczyk upon being hired that aides are to go wherever they were needed and she agreed to this when she accepted the position.

In another letter dated February 9, 1982 (G.C. Exh. 6), addressed to MESC, the Respondent advised that Barczyk resigned from the Respondent when she refused to work in those locations where she was needed; that the Respondent accepted her request for underemployment as the specific decision from her that she did not want to work for the Respondent. Barczyk informed her supervisor that she did not want to go to Detroit, where the Respondent needed her and therefore the Respondent took her refusal to work and her filing for unemployment as a resignation.

In a final letter dated March 5, 1982, addressed to the MESC, the Respondent again advised as follows:

Gentlemen:

In response to your letter dated February 16, 1982 I wish to repeat again to you that Diane Barczyk quit on her own volition. She did not want to work at the nursing homes where we had the work and she filed for unemployment. She said her father would not allow her to go to our Detroit Homes.

Finally Roer testified that she learned what underemployment meant sometime between January 29 and February 9, 1982. After she learned this, she said her reaction was that the Respondent does not offer full-time employment to anyone because it cannot do so. There was no lack of work with the Association, but only lack of work in certain geographical areas, because at that time

Director Maczei was adding two aides in the Detroit area facilities.

Analysis and Conclusions

On the credited evidence summarized under topic B, I conclude and find that since therapist aide Barczyk did not have work for 40 hours each week but nevertheless worked several 40-hour weeks, and several 35-or-more-hour weeks before her work hours were reduced, her job with the Respondent was full time, and not part time in character.

Early in her employment, Barczyk made the Respondent aware that she preferred not to work in high crime rate areas of Detroit, and she refused to accept one such assignment. The Respondent respected and agreed to accommodate her preference by not assigning her to facilities in Detroit if at all possible. However, Barczyk was given a few assignments in Detroit and she nonetheless did perform the assignments.

As a result of a decline in the workload in facilities where Barczyk worked in early December 1981, her hours of work were reduced from 35-40 to 18-21 hours per week. When Barczyk spoke to Administrator Roer about her reduced hours of work, she explained that she needed to earn the money. Roer told her there was no place to assign her at the time; that she would just have to wait for more work; and that "work might be available, but it would probably be in Detroit." Barczyk, now 22 years of age, undeniably told Roer that Barczyk's father did not want her working in Detroit. It is particularly noted, however, that Roer simply said work might be available in Detroit, but neither she nor Director Maczei promised, offered, or assigned Barczyk work in Detroit. Correspondingly, nor did Barczyk inquire about or request work in Detroit. There were no further conversations between Barczyk and the Respondent regarding her reduced hours of work and Barczyk continued to work her assigned reduced hours as scheduled.

Barczyk filed an application for unemployment compensation on December 14, 1981, because her hours of work were reduced by one half. The MESC classified her as "underemployed." On December 17, 1981, the Respondent received a form (R. Exh. 2) from the MESC requesting wage and separation information from the Respondent for the period July 1, 1981, to the present, but the Respondent (Roer) said it immediately thought Barczyk's application for unemployment benefits meant she had resigned her employment with the Respondent. The word "underemployed" does not appear on the form (R. Exh. 2) and Administrator Roer undisputedly testified that she was unaware of any such thing as "underemployed."⁴ Thereupon, the Respondent (Administrator

Roer) wrote on the form that the applicant was still employed by the Respondent even though her hours of work were reduced as a result of a fluctuating workload, and there was no reason for the applicant to receive benefits. The Respondent signed, dated, and returned the form (R. Exh. 2) to MESC on the same date (December 17, 1981). The Respondent did not discuss or mention the application for unemployment benefits to Barczyk and Barczyk continued to work her reduced-hours assignments.

The termination of Diane Barczyk

The precise factual question presented by the evidence for determination is whether the Respondent's termination of Barczyk's employment as a resignation was motivated by Barczyk's having filed for and received unemployment compensation.

It may be reasonably inferred from the Respondent's February 4 letter (R. Exh. 3), in response to a letter from MESC to which the Respondent refers, but which letter is not in evidence, that the MESC letter advising the Respondent that unemployment benefits were awarded to Barczyk, and later a letter notifying the Respondent of a hearing, were received by the Respondent before or on January 29, 1982. Although Roer testified that she first learned what MESC meant by "underemployed" between January 29 and February 9, 1982, the evidence of record clearly shows that she knew what "underemployed" meant before she held her first telephone conversation with Barczyk on January 29, 1982. More specifically, on and before January 29, Roer knew that Barczyk was still working 18-21 hours per week in spite of the fact that MESC notified her on December 17, 1981, that Barczyk had applied for unemployment benefits. Even though Roer protested the application on the same date, she was nevertheless notified of the award of benefits and a scheduled MESC hearing about January 29, 1982. Additionally, since Roer had been in contact with her lawyer who advised her that her insurance would increase as a result of the award of benefits, Roer had to know at that time that an employee working reduced hours could be a recipient of unemployment compensation. About 5:30 p.m. on that same day (January 29), the Respondent (Roer) called Barczyk and advised her that the Respondent deemed her application for unemployment compensation to be her resignation from its employ; and that the Respondent's attorney had advised that it get rid of Barczyk because its "insurance would go up" as a result of her application for unemployment (underemployment) benefits.

I credit Barczyk's testimony that she asked Roer if she had done anything wrong, and Roer said "no," because Roer had already explained why her attorney told her to terminate Barczyk. Also, Roer seemingly commenced her first telephone conversation with Barczyk in a calm and dispassionate tone of voice. However, when Barczyk started to ask questions about what she had done wrong

⁴ Roer is a highly educated psychiatric social worker and administrator. As I observed her testify, I was persuaded that she manifested the sensitivity so essential in rendering the kinds of services provided by the Respondent; that she tries to be considerate in dealing with her employees; and that she is a very professional person who is very much dedicated to rendering the best possible services in the business in which she is engaged. However, I was persuaded that she was not so well acquainted with the rules and regulations of unemployment compensation, to the extent that she was familiar with the term "underemployed" as an eligibility factor for unemployment benefits. This conclusion is especially true since the form (R. Exh. 2) which the Respondent received from MESC

referred to a claim filed for unemployment benefits, while the term "underemployed" did not appear on the form. I therefore credit Roer's testimony that she was unaware of the term "underemployed" as an eligibility factor for benefits.

and proceeded explaining that she filed the application because she needed the money, Roer then appeared to become somewhat provoked and eventually hung up the telephone. This conclusion is further supported by listening to the tape recording and reading of the transcribed tape recording of the second telephone conversation between Roer and Barczyk, 30 minutes later.

The transcription of the tape recording of the second telephone conversation (R. Exh. 1(a) and (b)) between Roer and Barczyk reveals the most explicit explanation why the Respondent (Roer) construed Barczyk's application as a resignation, in the face of Barczyk's repeated declarations that she had not resigned. That record shows that Roer said, "I'm accepting your resignation based on what, what it is that hit my desk" (referring to the MESC notice of benefits having been awarded to Barczyk); and that she received a notice that Barczyk had applied for unemployment benefits and a notice of a hearing at which Roer must appear as a result of the application. Barczyk told Roer that she had not resigned. Both Roer and Barczyk then engaged in a verbal exchange, Roer repeatedly telling Barczyk she had accepted her resignation, and Barczyk insisting that she had not resigned. Near the end of the exchange Barczyk told Roer she was reporting to work and the latter told her she was not reporting to work. Finally, Roer said, "This is my company and I'm telling you I am accepting your resignation." Barczyk said, "You cannot tell me that I resigned," and Roer said she was accepting her resignation and hung up the telephone.

I credit Barczyk's undisputed explanation that the smoking incident, mentioned by Roer during their first telephone conversation, did in fact occur on Barczyk's own time in a lobby not near the oxygen, where smoking was prohibited. I credit Barczyk's testimony because the incident occurred several weeks before the January 29 telephone conversation and the evidence fails to show that the Respondent at any time had warned or even spoken to Barczyk about the smoking incident, or about any other incident for which disciplinary action might have been warranted or appropriate.

Although the Respondent (Roer) stated or implied that initially it believed Barczyk had filed a fraudulent application for benefits, it is noted that the Respondent did not even question Barczyk about the application or independently investigate the claim. In any event, it is clear from the evidence that the Respondent had no reasonable basis for believing the claim was improper after it was notified, on or before January 29 by MESC, that the claim was granted over the Respondent's protest. The Respondent did not appear to be too concerned about Barczyk's application for compensation until after it was advised by its attorney that its insurance would increase as a result of Barczyk's entitlement to benefits.

It should be noted that the right of the Respondent to reduce the work hours of an employee is not in dispute here. Nor is the right of the Respondent as an employer to terminate an employee who expressed a preference not to work in certain geographical locations of the city in dispute. The Respondent herein had agreed to honor and did in fact honor that preference to the extent that it could, and the employee (Barczyk) did work some as-

signments in unpreferred geographical locations. The only legal questions remaining for resolution are

1. Whether an employee who legitimately files for unemployment compensation because his or her hours of work are reduced is engaged in activity protected by the Act?

2. Does an employer who terminates an employee because he or she legitimately files for and receives unemployment compensation violate Section 8(a)(1) of the Act?

In this regard, the Board has held that an employee's pursuit of unemployment compensation is "protected concerted activity." The Board also said, certainly, ". . . the employee's dispute with the employer over her entitlement to unemployment compensation benefits would be a matter of common interest to other employees, since they might find themselves faced with a situation similar to hers in the future." By discharging the employee for filing a claim for unemployment compensation, the employer violated Section 8(a)(1) of the Act. *Self Cycle & Marine Distributor Co.*, 237 NLRB 75 (1978); *Krispy Kreme Doughnut Corp.*, 245 NLRB 1053 (1979); and *Air Surrey Corp.*, 229 NLRB 1064 (1977).

Since the discharge of therapist aide Diane Barczyk by the Respondent, herein, was clearly motivated by her having filed for and received unemployment compensation, the discharge was discriminatory and constituted an interference with, restraint upon, and coercion against employees in the exercise of their Section 7 rights, in violation of Section 8(a)(1) of the Act. *Self Cycle & Marine Distributor Co.*, supra; *Krispy Kreme Doughnut Corp.*, supra. Although the evidence indicated Barczyk was actually entitled to benefits, such ultimate disposition of her application was not necessary to protect her act of filing the application. *Country Club of Little Rock*, 260 NLRB 1112 (1982).

Finally, since the record is barren of any evidence that Barczyk committed any flagrant and egregious wrongs for which disciplinary action (discharge) by the Respondent would have been appropriate and justified, the Respondent has not demonstrated that it discharged Barczyk for cause. *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287, 293 (1941); *Johnston-Tombigbee Furniture Co.*, 243 NLRB 116, 121 (1979).

While I was convinced that the Respondent (Roer) did not intend to violate the National Labor Relations Act, unfortunately the Respondent's conduct, without knowledge of the requirements and obligations under the Act, did result in its violation. A careful review of the cases cited by counsel for the Respondent reveals that they are not applicable to the facts as found herein.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in close connection with its operations as described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices within the meaning of Section 8(a)(1) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

It having been found that the Respondent interfered with, restrained, and coerced its employees in the exercise of their Section 7 rights by discharging an employee because she filed for and received unemployment compensation, the recommended Order will provide that the Respondent cease and desist from engaging in such unlawful conduct, and that it take certain affirmative action necessary to effectuate the purposes and policies of the Act.

Because of the character of the unfair labor practices herein found, the recommended Order will provide that the Respondent cease and desist from or in any like or related manner interfering with, restraining, and coercing

employees in the exercise of their rights guaranteed by Section 7 of the Act. *NLRB v. Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941).

On the basis of above findings of fact and on the entire record in this case, I make the following

CONCLUSIONS OF LAW

1. D & D Health Associates, Inc., the Respondent herein, is and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By discriminatorily discharging an employee because she filed for and received unemployment compensation, the Respondent has interfered with, restrained, and coerced its employees in the exercise of their Section 7 rights, in violation of Section 8(a)(1) of the Act.

3. The conduct described in paragraph 2, above, is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]