

Nathan and Miriam Barnert Memorial Hospital Association, d/b/a Barnert Memorial Hospital Center and District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale, Department Store Union, AFL-CIO.
Case 22-CA-10462

December 16, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND
MEMBERS JENKINS AND ZIMMERMAN

On August 9, 1982, Administrative Law Judge D. Barry Morris issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed a brief in response 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, and conclusions¹ of the Administrative Law Judge as modified herein and to adopt his recommended Order.

We find it unnecessary to rely on the Administrative Law Judge's finding that the General Counsel did not establish a *prima facie* case that union activity was a motivating factor in Respondent's failure to give Fitzgerald sick pay for a 1-day absence on Friday, October 17, 1980, because the General Counsel failed to show that Respondent was aware of Fitzgerald's recent union activities, or that Respondent harbored current union animus. Rather, in affirming the Administrative Law Judge's dismissal of this allegation, we conclude

¹ In affirming the Administrative Law Judge's dismissal of the complaint, we find it unnecessary to pass on the Administrative Law Judge's conclusion that the General Counsel did not establish a *prima facie* case. Even assuming, *arguendo*, that the General Counsel did establish that union activity was a motivating factor in Respondent's issuance of written warnings to, and subsequent discharge of, alleged discriminatee Sophie Fitzgerald, we conclude, in agreement with the Administrative Law Judge, that Respondent has established by a clear preponderance of the relevant evidence that it would have taken the same actions in regard to Fitzgerald even in the absence of union activity on her part. *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980).

Member Jenkins agrees with the Administrative Law Judge's finding that the General Counsel did not establish a *prima facie* case that protected activity was a motivating factor in Fitzgerald's discharge. He therefore finds it unnecessary to conclude that, even if a *prima facie* case had been established, Respondent would have taken the same actions in the absence of Fitzgerald's protected activity. Further, since it has not been demonstrated that Respondent acted with mixed motives, Member Jenkins would not apply the *Wright Line* analysis. In his view, that analysis is applicable only in cases involving mixed motives, where a genuine lawful reason and a genuine unlawful reason exists, and it would be misleading to apply it in this case.

that the General Counsel has failed to establish that Fitzgerald was *entitled* to sick pay. Specifically, we find that the record evidence is insufficient to establish that Fitzgerald in fact provided Respondent with the required proof of illness as an excuse for her absence.

Respondent's employee handbook contains the following rule:

4. To be eligible for sick leave benefits, employees who are absent due to illness or injury must notify their Supervisors at least one (1) hour before the start of their regularly scheduled work day, unless proper excuse is presented for the employee's inability to call. The hospital will require proof of illness (physician's note) for the following:

- a. After three (3) days of illness,
- b. For excessive absenteeism,
- c. For absences before or after scheduled days off. [Emphasis supplied.]

When Fitzgerald called her supervisor, Billing Department Manager Edwin Lawlor, on the morning of Friday, October 17, to advise him that she was unable to report to work because she was not feeling well, Lawlor advised her that she would "have to bring in a doctor's note."² Lawlor also told her, "You don't have to go to a doctor, you can go to the hospital clinic." Fitzgerald told Lawlor that, according to her understanding of the work rules in this regard, she was not required to bring in a doctor's note for a 1-day absence, but was only required to bring in a doctor's note for absences of at least 3 days. She told Lawlor, "You don't even know if I'm going to be out three days. I'm calling in sick today. I'm hoping that I will be well and be able to return . . . Even if I wanted to go to the doctor, there would be no reason to do it—but, I couldn't even get there, because I'm throwing up."

In any event, it is clear from the record that Fitzgerald did not bring a doctor's note with her when she returned to work on the following Monday. However, after she returned to work, she went to Respondent's clinic and "received a note from the doctor at the clinic." According to Fitzgerald, the doctor asked her how she felt and whether she could work. When Fitzgerald advised the doctor that she "felt better," the doctor gave her "a slip of paper that he gives—its just a routine thing, he puts his name on it and that's it." Fitzgerald testified that she "never even bothered to look" at this slip of paper, that she did not make a copy

² Fitzgerald's regularly scheduled days off were Saturdays and Sundays. Consequently, we find that rule 4(c) was applicable to her situation.

of it,³ and that she simply put it on Lawlor's desk, without subsequently advising him of its existence. When Fitzgerald was asked why, upon subsequently being informed by Lawlor that she would not receive sick pay for her absence, she did not protest to Lawlor that she had followed his instructions and obtained a note from the clinic, Fitzgerald testified, "I don't remember that conversation That was not the conversation I had with him I do not believe saying, in those words, anything like that to Mr. Lawlor." Rather, Fitzgerald testified that she did not believe there was any reason for her to have advised Lawlor that she had obtained a note from the clinic and left it on his desk; she testified that she had complied with "the policy" by going to the clinic, having the doctor "check" her, and putting the slip on Lawlor's desk. When asked what "policy" she was referring to in this regard, she replied, "The policy that when you're out sick, the next day you're required to go to the clinic," which policy Fitzgerald understood to be applicable for even 1-day absences. It appears that Fitzgerald is referring in this regard to the following requirement set forth in the employee handbook:

5. Any employee who has been on sick leave will be requested to have an examination by the hospital's Health Service Physician before being permitted to return to duty.

Compliance with rule 5 above, while apparently a condition for return to duty after illness, does not itself entitle an employee to sick pay. Only compliance with rule 4, set forth earlier, entitles an employee to sick pay.⁴

Based on the circumstances of her visit to the clinic and the extent of the examination by the doctor—"He asked me how I felt, could I work"—it is unlikely that the "routine slip of paper" which she obtained at Respondent's clinic after she returned to work was a medical excuse for that absence. Rather, it is more likely that the "routine slip of paper" which Fitzgerald obtained, and which she "never even bothered to look" at, was nothing more than a certification that Fitzgerald was fit for duty—a certification which, as seen, does not in itself entitle an employee to sick pay.

Thus, we cannot find, on the record before us, that General Counsel has established by a preponderance of the evidence that Fitzgerald did in fact present Respondent with a medical excuse for her absence on Friday, October 17. Accordingly, we further find that the General Counsel has failed to establish that Fitzgerald was in fact entitled to sick

pay, which entitlement is a necessary factual predicate to the General Counsel's allegation that Fitzgerald was unlawfully denied sick pay. Therefore, we dismiss this allegation of the complaint.

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

D. BARRY MORRIS, Administrative Law Judge: This case was heard before me at Newark, New Jersey, on March 4, 5, and 8, 1982. Upon a charge filed on November 28, 1980, a complaint was issued on June 25, 1981, alleging that Nathan and Miriam Barnert Memorial Hospital Association, d/b/a Barnert Memorial Hospital Center (Respondent), violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by the General Counsel and Respondent.

Upon the entire record of the case, including my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a New Jersey corporation, with its principal place of business in Paterson, New Jersey, is engaged in providing health and medical care and related services. During the 12 months preceding the issuance of the complaint, Respondent had gross revenues in excess of \$250,000. Respondent admits that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and I so find.

II. THE LABOR ORGANIZATION INVOLVED

District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale, Department Store Union, AFL-CIO (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The issues are whether Respondent:

(1) Assigned and threatened to assign its employee, Sophie Fitzgerald, with more arduous job tasks, and denied her the opportunity to work overtime to complete those tasks.

³ Neither the slip nor a copy of it was produced at the hearing.

⁴ The record evidence, as set forth by the Administrative Law Judge, shows that Respondent consistently enforced this policy.

(2) Issued written warnings and discharged Fitzgerald because of her union activities.

(3) Denied sick pay to Fitzgerald because of her union activities.

B. The Facts

1. Background

Sophie Fitzgerald returned to work at the hospital in May 1978 pursuant to a decision by Administrative Law Judge Nancy Sherman in *Barnert Memorial Hospital Center*, JD-106-78 (March 2, 1978), in which Administrative Law Judge Sherman found, *inter alia*, that Respondent violated the Act by discharging Fitzgerald because of her union activities. She returned to work in the billing department, in which Edwin Lawlor became manager, commencing November 1978. Fitzgerald testified that several weeks after Lawlor became manager he told her that "he had read about my NLRB case quite thoroughly. And, he went on to discuss that, and told me that he personally felt that unions had no place in the hospital." While Lawlor conceded that he knew Fitzgerald was returning to work because of an NLRB decision, he denied that he read the decision. He further denied that he told Fitzgerald that unions had no place in hospitals. With respect to this conversation I credit Lawlor's testimony. It is likely that Fitzgerald confused Lawlor with a prior supervisor. In the 1978 Decision it is pointed out that Fitzgerald testified that in February 1976 her then new supervisor said to her that he saw no necessity for unions in hospitals.¹

During the summer and fall of 1979 Fitzgerald invited the employees in the billing department to meetings in the park, in her home, and in the homes of several of the employees to discuss office problems. There is no evidence in the record that Respondent was aware of these meetings. Indeed, the General Counsel concedes that "there is no direct evidence of employer knowledge that Fitzgerald organized meetings of the billing department." (Br., p. 11.)

In March 1980² the lead biller, Susan Twyman, was planning to take maternity leave. In this connection, Lawlor called a meeting of the billing department to discuss who would take over the lead biller position on a temporary basis. Fitzgerald testified that Lawlor stated at the meeting that she could not be considered for the job because "it would be a conflict of interest, because of her union activity." Twyman's recollection of the words that Lawlor used was "that he didn't think she would want the position because of her interest in the Union." While Lawlor denied the conversation, I credit Twyman's testimony, which was largely corroborated by Fitzgerald.

2. More arduous job tasks

Paragraph 9 of the complaint alleges that during August Respondent assigned Fitzgerald more arduous job tasks and denied her the opportunity to work over-

time to complete those tasks. Fitzgerald testified that prior to August she was doing New Jersey and New York Blue Cross billing and that in August Lawlor gave her the additional assignment of doing Medicaid billing. On cross-examination, however, she conceded that in June and July she also worked on Medicaid. Twyman credibly testified that Fitzgerald's replacement, Cindy Reimen, was assigned New York and New Jersey Blue Cross and Medicaid. Similarly, Reimen's replacement, Agnes Piard, was assigned New York and New Jersey Blue Cross and Medicaid. A showing has not been made that Fitzgerald was assigned tasks more arduous than assigned to others. With respect to overtime, Fitzgerald conceded that at a prior unemployment hearing she testified that she told Lawlor on several occasions that she was not anxious to work overtime. Nevertheless, the record shows that Fitzgerald did work overtime during the pay periods ending September 16 and October 1. This occurred subsequent to the alleged additional assignment of Medicaid.

Accordingly, I find that the General Counsel has not proven, by a preponderance of the evidence, that Respondent assigned Fitzgerald more arduous job tasks in August and denied her the opportunity to work overtime to complete those tasks. The allegation is dismissed.

Paragraph 12 of the complaint alleges that on November 10 Respondent threatened Fitzgerald with a more onerous job and forced resignation if she did not accept. Fitzgerald testified that on November 10 or 11 Lawlor called her into his office and told her that she was going to be transferred to a new job in the emergency room. She conceded on cross-examination that the details concerning the new job were indefinite and that Lawlor was not sure about the hours and about the location where she would be working. Lawlor, in testimony which was for the most part not contradicted, testified that Fitzgerald was chosen for the job because "she was a personable kind of individual who could talk with people" and that the rate of pay for the new job would be the same as for her present job. As Fitzgerald had conceded, Lawlor testified that at the time of his conversation with her, the exact location of the new position and the hours had not been set. Based on the evidence, I find that the General Counsel has not shown by a preponderance of the evidence that the new job was more "onerous" than her present position. Accordingly, the allegation is dismissed.

3. Written warnings and discharge

Lawlor credibly testified that he had a conversation with Fitzgerald on July 3 concerning her production reports. He indicated to her that he was not satisfied with the way she was completing the reports. He asked her to make sure that she filled in all the blanks. On September 10 he had another conversation with her concerning the production reports at which time he again spoke to her about her failure to complete all the items on the reports and gave her the reasons why he needed those items completed. On September 29 he had a further conversation with Fitzgerald, telling her once more that it was important that she filled in all the blanks. Following his

¹ It is unlikely that Lawlor would have made such a remark to Fitzgerald, knowing her union sympathies and further knowing that Respondent had just concluded an unfair labor practice proceeding with respect to her. See *Neely's Car Clinic*, 249 NLRB 471, 474 (1980).

² All dates refer to 1980 unless otherwise specified.

review of Fitzgerald's September 29 and 30 production reports, Lawlor had a further conversation with her on October 1, at which time he gave her a written warning for failure to complete the production reports.³ Lawlor continued to review Fitzgerald's production reports and on October 20 had another conversation with her, when he presented her with a second written warning.

On November 17 Fitzgerald was not at work. Lawlor had occasion to look on Fitzgerald's desk, at which time he discovered 60 claims which had remained unbilled. The fact that 60 accounts remained unbilled was not indicated on the production reports for the preceding several days. At this point, Lawlor had a conversation with Stephanie Morello McKenna, Respondent's business manager. In testimony corroborated by McKenna, Lawlor testified that he advised McKenna of the fact that the production reports had not been completed and that he had been unaware of the 60 unbilled claims. He recommended that Fitzgerald be terminated. Fitzgerald was discharged on November 20 and Lawlor testified that the reason was "that after three months of counseling and warnings . . . she still could not manage to fill out the production report. She could not follow my instructions."

It is necessary to examine certain established criteria to determine whether the General Counsel has made a *prima facie* showing that union activity was a motivating factor in the actions taken by Respondent. These elements are knowledge of union activity, animus, and timing. With respect to knowledge, Lawlor knew of Fitzgerald's prior involvement with the Union and he knew that she was reinstated pursuant to the 1978 decision. In addition, at the meeting called in March to discuss a replacement for Twyman, Lawlor again indicated that he was aware of Fitzgerald's union sympathies. However, there is no indication in the record that Respondent was aware of the meetings held during the summer and fall of 1979 and October and November 1980. With respect to animus, there is no credible evidence of any current feeling of animus on the part of Respondent.⁴ Finally, concerning timing, Respondent was aware of Fitzgerald's sympathies when she returned to her job in May 1978. Yet the first written warning did not occur until October 1980. Accordingly, I believe that the General Counsel has not made a *prima facie* showing that the warnings and discharge were motivated by union activity.

Even, however, were I to find that the General Counsel did make a *prima facie* showing, I believe that under *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), Respondent has demonstrated that "the same action would have taken place even in the absence of the protected conduct." The record abounds with evidence that Fitzgerald failed to complete the pro-

duction reports. She was told of this as early as July and again in early September. Her termination followed two written warnings in which she was specifically reprimanded for failing to complete the reports. The record is replete with exhibits which show that continuously during June through October Fitzgerald failed to complete her production reports, even though she testified that she understood that the completion of the production sheets was a requirement of her job. While the General Counsel attempted to show disparate treatment concerning the production reports, when he asked his own witness, Cindy Reinman, "Did you fill out every single line in every single column in that report?", she answered, "To the best of my knowledge, I did." There is no credible evidence in the record that others in Fitzgerald's position were not required to, and did not, complete the production reports.

Accordingly, I find that Fitzgerald received the two written warnings and was discharged because of her persistent failure to follow her supervisor's instructions and complete the daily production reports. The allegations contained in paragraphs 10 and 13 of the complaint are, therefore, dismissed.

4. Denial of sick pay

Paragraph 11 of the complaint alleges that on or about October 24 Respondent denied sick pay to Fitzgerald. Fitzgerald testified that on Friday morning, October 17, she telephoned Lawlor and told him that she was unable to come to work because she was ill. Lawlor replied, "You will have to bring in a doctor's note." Fitzgerald answered Lawlor, "I'm not required to bring a doctor's note. I'm only required when I'm going to be out for three days." Fitzgerald conceded that Lawlor told her, "You don't have to go to a doctor, you can go to the hospital clinic."

Fitzgerald credibly testified that on Monday morning she went to the clinic, got a note, and placed it on Lawlor's desk. She remembered placing it on his desk but did not remember whether or not he was there at the time. She never mentioned to Lawlor that she obtained the note from the clinic and placed it on his desk. She was not paid for the day she was absent. In addition, Fitzgerald was out sick from November 3 to 10. There is no allegation in the complaint, nor is there any evidence in the record, that she was not paid for that period of time.

Respondent's employee handbook states that "the hospital will require proof of illness (physician's note) for . . . absences before or after scheduled days off." Twyman testified that when she was out sick for 1 day she was not required to bring a doctor's note. However, when asked if she were out sick on a Friday, she testified, "Before I went on maternity leave . . . it was never brought up. And when I came back after maternity leave, it was told me that if you're out on a Friday or a Monday, the supervisor has the right to ask for a doctor's note." Normie Feliciano Reyes testified that if she was out sick on a Friday or a Monday, "You had to report to the clinic and get an excuse for that day."

Based on the above testimony, I find that on October 17 Fitzgerald called in sick at which time Lawlor told

³ Fitzgerald credibly testified that on approximately October 13 some of the billing department employees met at the home of one of the employees, to discuss, among other matters, Fitzgerald's written warning. A further meeting was held in Fitzgerald's home during the second week of November.

⁴ The fact that animus may have been present prior to the 1978 decision does not, without more, indicate that it continued through the events of this proceeding. See *Murray Ohio Manufacturing Company*, 207 NLRB 481, 483 (1973); *Neely's Car Clinic*, *supra*, at 474.

her to bring in a doctor's note. She stated that she did not plan to see a physician, at which point Lawlor told her "You don't have to go to a doctor, you can go to the hospital clinic." When Fitzgerald returned on Monday she went to the clinic and obtained the note which she placed on Lawlor's desk. The record does not indicate that Lawlor saw the note. Fitzgerald did not bring to his attention the fact that she obtained such a note and put it on his desk.

Under *Wright Line, supra*, it is required that the "General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision."

As discussed above, there is no credible evidence in the record that Respondent was aware of the meetings in which Fitzgerald participated. While Respondent knew of her union sympathies, this was known when she returned to her job in May 1978. In addition, as pointed out above, the record contains no credible evidence of current union animus on the part of Respondent. While Fitzgerald did not receive the day's pay even though she obtained a note from the clinic, the record does not indicate that the reason she was denied the day's pay was because of her Union activities. Indeed, several weeks later, Fitzgerald was out sick for an entire week. There is no indication in the record that she was not paid for that time.

Accordingly, based upon the record, I find that the General Counsel has not made a *prima facie* showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision to deny Fitzgerald sick pay for October 17. The allegation is therefore dismissed.

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 unfair labor practices within the meaning of the Act.

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:

ORDER⁵

The complaint is dismissed in its entirety.

⁵ 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.