

**Alameda Technical College and Jimmie J. Smith
and Frances D. Smith.** Cases 32-CA-9946 and
32-CA-10174

June 11, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND RAUDABAUGH

On December 19, 1990, Administrative Law Judge Earledean V.S. Robbins issued the attached decision. The Respondent filed exceptions, a supporting brief, and a request that the Board take judicial notice of certain documents. The General Counsel filed a motion to strike the Respondent's exceptions and to disregard nonrecord evidence and a supporting brief. The Respondent filed an opposition to this motion.

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, motion to strike,¹ opposition, and supporting briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Alameda Technical College, Hayward, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹To the extent portions of the Respondent's exceptions and brief rely on nonrecord evidence, we grant the General Counsel's motion to strike.

²The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Daniel F. Altemus Jr., Esq., for the General Counsel.
Elaine W. Wallace, Esq. and *Jose Guerrero, Esq.*, of Oakland, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

EARLDEAN V.S. ROBBINS, Administrative Law Judge. This matter was heard before me on various dates in June and August 1989. The charge in Case 32-CA-9946 was filed by Jimmie J. Smith (Smith), and served on Alameda Technical College (Respondent or ATC), on October 20, 1988. On November 29, 1988, a complaint issued in Case 32-CA-9946 alleging that Respondent had violated Section 8(a)(1) of the National Labor Relations Act (the Act). The charge in Case 32-CA-10174 was filed by Frances D. Smith (F. Smith), and

served on Respondent on February 22, 1989. On March 30, 1989, a complaint issued in Case 32-CA-10174 alleging that Respondent had violated Section 8(a)(1) of the Act. On March 31, 1989, the complaints in Cases 32-CA-9946 and 32-CA-10174 were consolidated. The principal issue is whether Claudine Nuriddin and Smith were discharged because they, along with certain other employees, advised Respondent that they had formed a "labor group" and made complaints concerning their working conditions, and whether F. Smith was refused reinstatement because she engaged in the protected concerted activities and/or because she is married to Smith.

Based on the entire record, including my observation of the demeanor of the witnesses and after due consideration of the posthearing briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material Respondent, a California corporation with an office and place of business in Hayward, California, has been engaged in the operation of a private postsecondary vocational-technical educational institution. During the 12-month period preceding the issuance of the complaints, Respondent, in the course and conduct of its business operations, derived gross revenues in excess of \$500,000 and purchased and received goods or services valued in excess of \$5000 which originated outside the State of California.

Based on the above, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. UNFAIR LABOR PRACTICES

A. Introduction

Respondent ATC is engaged in providing training for various vocations. Dr. Arnold Chavez is president and chief executive officer of ATC. His assistant, David Huerta, is responsible for academic programs and student services. Prospective students are obtained through an aggressive marketing program headed by the marketing manager. During the time relevant, until mid-October 1988,¹ Raul Fuentes occupied this position. Victor Rice was his assistant and continued in that position until the end of November.

The marketing program is the only phase of Respondent's operation involved. This program consists of three steps: an initial contact with a prospective student made by a public relations representative (PR rep), and followup telephone calls made by the telemarketing staff in an effort to schedule registration appointments with admission clerks who attempt to complete the registration process and, if necessary, to arrange for financial aid. The only employees involved are the PR reps.

The PR reps station themselves at locations, such as welfare and unemployment offices, which are frequented by persons apt to be interested in the type of training offered by ATC. Prospects are approached by the PR rep and given a brief sales pitch. If a prospect seems to be interested, the PR rep records the name, address, and telephone number of the

¹All dates are in 1988 unless otherwise indicated.

prospect on a lead sheet. At the end of the day, the lead sheet is given to the marketing department where the leads are tabulated for daily and weekly totals and transmitted to the telemarketing staff for followup purposes. PR reps are assigned to one of three areas: Hayward, Fremont (also referred to as Tri-Cities), or Oakland. One of the PR reps assigned to an area is designated as team captain. However, it appears that the team captain has no additional responsibilities other than accepting daily lead sheets which were turned in to them by some of the PR reps.² According to Victor Rice, Fuentes' assistant, he was told that a team captain had no additional responsibilities, that the designation was simply Fuentes' way of giving additional pay to better workers.

PR reps are compensated through wages and commission. Wages are paid based on a 6-hour workday with team captains receiving an additional 2 hours' pay. However, it is undisputed that no daily time records are kept. Rather a minimum number of leads is considered an indication that one is entitled to 6 hours' pay. There is some dispute as to the minimum number of leads required. Chavez testified as to, and the job description signed by Smith in May 1988 sets forth, a 20-lead minimum. Rudder testified that he decreased the requirement from 20 to 12 leads. However, a job description signed in November sets forth 15 leads as a minimum. PR reps Marty Duarte and Lisa Grossetete testified that a 20-lead minimum was required except on Thursdays and Fridays when 15 leads were required. Duarte testified that he usually met these minimums. Grossetete testified that most of the PR reps met these minimums. However, the evidence shows that for the 57 workdays where daily totals are listed, Duarte and Grossetete each produced 20 leads on only 1 day. Further, a memo issued by Fuentes on June 13 states 10 leads were required in order to receive a day's pay. Accordingly, I do not credit Rudder, Chavez, Duarte, and Grossetete in this regard, and I find, despite the statement in the job description, that during the time material Respondent required a minimum of only 10 leads a day.

In addition to wages at the rate of \$36 a day, PR reps receive a commission of \$10 for each enrollment resulting from their leads and an additional \$25 if the enrollee remains in school for a week and a day. They are also expected to attend weekly staff/sales meetings during which individual and aggregate weekly work performance are reviewed and various techniques for performance improvement are discussed.

B. *The Alleged Discrimination*

1. Smith and Claudine Nuriddin

Smith commenced employment at ATC on May 16, as one of three PR reps in the Fremont area. On June 13, he was assigned as team captain in that area. Claudine Nuriddin commenced employment on July 22 as a PR rep in the Fremont area. She was trained by Smith and they worked as a team until Smith was transferred to Hayward on about August 25.

²The June 13 memo notifying the accounting department of Smith's new position as team captain states inter alia, "as team captain his responsibility is to see that his group is on time and at their posts and produce the required leads per day." However, it does not appear that team captains actually assumed these responsibilities. Further, although team captains sometimes train new employees, it appears that other PR reps also train new employees.

At some point prior to August, Smith began complaining to Fuentes that Hayward leads resulted in a substantially higher percentage of enrollments than did Oakland and Fremont leads. Smith suggested that PR reps should be rotated within the three areas in order to equalize the potential for commissions.³ A rotational system was not instituted. However, Smith was transferred to Hayward in August. Following his transfer, he continued to be paid as a team captain but performed no duties different from other PR reps. Alex Holguin was also paid as a team captain in the Hayward area. Lisa Grossetete and Marty Duarte also worked in that area at the time of Smith's transfer. Nuriddin was transferred to Hayward in mid-September after Grossetete was terminated. Thereafter she and Smith usually worked together as a team.

In August, Respondent hired Keith Rudder, a freelance consultant. It is undisputed that his responsibilities included evaluating the admissions and marketing programs, troubleshooting in problem areas, and making recommendations for changes to improve the performance of those departments. Specifically, ATC wanted to increase the percentage of enrollments generated from PR rep leads and other sources.

Both Chavez and Rudder testified that Rudder's only role was to evaluate and make recommendations, that he had no authority to implement changes, could not hire or fire, and had no authority over employees. However, it is quite clear from the record that Rudder's role was not that restricted or, at the very least, he was not presented to the employees as occupying such a limited role. Thus, on October 11, with Chavez' approval, Rudder issued a memo to the admissions and marketing staff notifying them of certain reorganization changes. The memo states, inter alia:

[T]he following changes have occurred:

Raul Fuentes will serve in the capacity as Director of Admissions and will be responsible for the production of enrollments and class starts exclusively until further notice. In addition, he will assist Anita in interviewing prospective students targeting recruitment. Mr. Fuentes will report directly to Keith Rudder. This move will assist us in maximum coverage of leads to increase starts.

Telemarketing and Public Relations Representatives will interface with Victor Rice who will report to Keith Rudder until further notice.

We will be streamlining office operations in an effort to improve reporting methods. This will assist you in maximizing work performance for all.

As we re-organize for the betterment of the training facility I will focus on three major areas of accountability:

1. PUBLIC RELATION REPS—Quality of leads generated, level of work performed.
2. TELEMARKETING—Quantity and quality of appointments set, interviews conducted.
3. ADMISSIONS—Applications "written" to percentage of those enrolled to actual "starts." Let me men-

³Chavez initially testified that 80 percent of the enrollments were from the Hayward area. Later, he testified that 40 percent of the enrollments were from Hayward, 25 to 28 percent from the Fremont area, and 20 to 22 percent from the Oakland area; and that only 60 percent of the ATC enrollment was generated from PR rep leads.

tion admissions will also be held accountable for "pendings."

4. INTANGIBLES—Continuous training of all departments.

To insure success, periodically, I will perform audits (quality control) within certain levels of the admissions staff. In addition, I will intermittently conduct performance reviews on individual staff members to maintain level of production. The following areas will be significant to your success:

The ability to listen.

The ability to follow directions.

Attitude—(Are you a team player?).

Level of work performed—(Results oriented, goal setters and achievers).

I am committed to our success . . . YOU MAKE THE DIFFERENCE . . . LET'S SEE WHAT YOU CAN DO!

Rudder also conducted the weekly Friday afternoon meetings with the PR reps. The record is not clear as to everything that occurred during these meetings. However, he did introduce a dress code, and reviewed performance statistics and techniques for approaching prospects. He also made various remarks, some abusive, expressing his opinion that PR reps were easily replaceable.

The changes and remarks made by Rudder apparently intensified the dissatisfactions felt by certain employees which they began discussing among themselves. Smith drafted a letter to Chavez dated October 11 which was signed by employees Smith, F. Smith, Holguin, Duarte, Nuriddin, Robert Fisher, and Kevin Washington. The letter states:

You are hereby notified that Alameda Technicals Colleges's perminate Public Relations Representatives employee's have joined together and organized a labor group. Our groups purpose is to improve our working conditions, pay, and benefits. The Federal Board of National Labor Relations and the California labor code section 923 provides a legal basis and protection for our labor group. [Sic]

We are also notifying you that a "labor dispute" exists between our labor group and Alameda Technical College.

Included in our issues of dispute are various unfair acts that Consultant Keith Rudder and manager Raul Fuentes have taken against your schools female employees. During a recent meeting held for Public Relation Representatives, Consultant Rudder and manager Raul Fuentes threat [sic] to fire and replace each of us. A few weeks earlier manager Raul Fuentes fired Public Relation Representative Lisa Grosette [sic] and replaced her with a temporary agency employee. Consultant Keith Rudder and manager Raul Fuentes are in the process of using a highly subjective and biased employee performance evaluation system as a basis of discipling and firing employees. Our concerns also include several other job related matters. [Sic]

We are presently making arrangements for the issues of our labor dispute to be resolved in a timely fashion.

Enclosed you will find information relating to "guide lines" that the State of California has set for the conduct of an employee involved in a labor dispute. We will provide you with three working days from the

day that you receive this notice to comply with the "guide lines" associated with the publishing of employee wanted advertisements and the employment of temporary employees. Immediate complaints will be filed against you for any violations of those guide lines.

It is undisputed that the letter was given to Chavez on October 14 during, or at the end of, a scheduled PR rep meeting. Smith gives the only detailed account, which is undenied, of what was said when the letter was given to Chavez. However, according to him and Nuriddin, Nuriddin gave Chavez the letter. According to Chavez, Smith handed him the letter. Duarte testified that he thinks Smith handed Chavez the letter but admits he is not certain. It is undisputed that Smith and Nuriddin were together when one of them delivered copies of the letter to Chavez and Rudder and that Smith did the talking. Chavez admits that he assumed Smith was the instigator of the protected activity.

According to Smith, he said Nuriddin had a document to deliver to Chavez. Nuriddin handed the October 11 letter to Chavez and handed copies to Rudder and Rice. Chavez, Rudder, and Rice read the letter. Rudder then asked "What are you guys doing starting a union?" Fisher replied, "No, we are just starting a little labor group to try to protect our rights." Rudder said "Well, I'll have to get together with Dr. Chavez on this and we'll get back to you on Monday about this." I credit Smith in this regard. On the next day, according to Victor Rice's undenied and credited testimony, Rudder told him Smith was a troublemaker and he wanted to get rid of him.

On Monday, October 17, Chavez held a meeting in his office with PR reps. According to Smith, Chavez said Rudder and Fuentes were no longer at ATC, and Chavez would be personally taking over the marketing operation. Smith asked why Rudder and Fuentes had left ATC. Chavez said it was personal and he did not want to discuss it. After some discussion of changes to be implemented, Chavez said he wanted to speak to Smith privately. Smith said anything work related was not private and that Chavez was free to discuss it openly. Chavez said he was demoting Smith from team captain to PR rep. Chavez also announced a meeting for the following day. According to Nuriddin, he further stated he was working to try to settle some of the disputes the PR reps had.

After the meeting Smith and Nuriddin proceeded to a work location outside the Hayward unemployment office. While they were there, according to Smith's undenied testimony, Duarte came by and said Chavez was promoting Duarte and Holguin to higher positions and one of the things they would be doing was speaking to employees individually to identify their individual complaints so they could be resolved. Later that day, Chavez visited Smith and Nuriddin at their work station. He asked how things were going and if there were any complaints. About an hour and a half later Holguin came by and told them he and Duarte had been offered supervisory positions and they would be trying to resolve the problems the employees had.

On that same day Chavez instructed Huerta to give the following letter, dated October 17 and signed by Huerta, to Smith:

ATC P.R. Rep.
Employee Labor Group
21192 Hesperian Blvd.

Hayward, CA 94541

ATT: Smith

Dear Reps:

Your letter and attachment have been received and are being reviewed. Please be advised, however, that your attachment describing Basic Organizing Rights and Protections was put together piecemeal and is incomplete. We are requesting a full copy of the appropriate regulations from Employment Development Department (EDD) and will be glad to comply with their limitations and allowances as soon as we know completely our rights and protections as an employer.

For future reference, if you wish to cite regulations and sections of an Act, do not delete portions, but present the section in whole.

Chavez admits the letter was given to Smith because Smith did most of the talking when the October 14 letter was presented to Chavez and because of this, he assumed Smith "headed the whole thing up." A copy of this letter was placed in Smith's personnel file. However, there is nothing in the record to establish that similar letters were placed in the files of other employees who signed the October 14 letter.

During a meeting with PR reps on the following day, October 18, Chavez announced that Duarte and Holguin were being promoted to supervisory positions. At this same meeting Smith asked why he had been demoted. Chavez said there had been a systems change.

On October 20, Nuriddin telephoned Rice and told him she and Smith were taking care of some business at the Labor Commission and did not know exactly what time they would finish. Rice said, "fine." On their return to ATC that afternoon, Holguin and Duarte questioned their being absent that day. When they explained that they had reported to Rice, either Holguin or Duarte said they were not to deal with Rice any longer but rather should deal directly with Holguin and Duarte. According to Nuriddin, one of them also said that new contracts were being prepared which would include new rules and that disciplinary measures would be employed if they did not adhere to these rules. He further asked what was their business with the labor relations board. Smith replied that as management, Holguin and Duarte could no longer ask certain questions and would have to be careful that any disciplinary action could not be interpreted as harassment or retaliation.

Smith corroborates Nuriddin that Duarte and Holguin asked why they were absent. To which he replied that they had gone to several agencies to file complaints, without specifying any particular agency. Smith further testified there was some discussion about Holguin's and Duarte's intent to ensure that everyone received their proper commission. However, his account does not include any reference to new contracts and/or rules or to possible disciplinary measures.

On October 21, according to the undenied testimony of Smith, Holguin approached Smith at his work location and told him he wanted him and Nuriddin to accompany him to another location for training purposes. Smith said he would not go. Holguin inquired as to why. Smith said it was unfair, he did not think it would serve any purpose and referred to an earlier refusal by Holguin to go to his work location.

Holguin expressed some displeasure at Smith's reference to what had happened in the past, and left. Shortly thereafter Duarte came by and asked Smith if Holguin had been there. When Smith said he had, Duarte asked why Smith has not accompanied Holguin. Smith gave him basically the same reply he gave Holguin. Nuriddin testified that although she was present during the Holguin conversation, she was talking to another PR rep so the only portion of the conversation she heard was Smith saying he and Nuriddin were going to remain there. According to her, she was not present during the conversation with Duarte.⁴

According to Smith and Nuriddin, later that day at a PR rep staff meeting conducted by Holguin and Duarte, either Holguin or Duarte said that Holguin was the top producer and Claudine was the second top producer. They congratulated her on doing a very good job. Near the end of the meeting Smith turned to Chavez who was sitting behind him and asked if he would voluntarily recognize the employees as a labor group. Chavez said he did not have to give Smith an answer, and left. At the conclusion of the meeting, Chavez gave Smith and Nuriddin individual letters dated October 20, the body of which read:

This letter is official notification that your services to Alameda Technical College are to be terminated, effective immediately.

The reason for this termination is that you did not meet the standards during the probationary period.⁵

Pending commissions will be paid following normal procedures. All ATC commission liability will terminate no later than November 2, 1988.

Neither Smith nor Nuriddin has worked at ATC since that day.

2. Frances Smith

F. Smith was hired by ATC on May 24 as a PR rep and assigned to work with Holguin in the Hayward area. On her second day of employment she injured her ankle and did not report for work again until February 6, 1989. During this interval her doctors on several occasions changed the dates for her return to work. Smith gave Respondent copies of each of these release slips which stated variously that she could return to work on May 31, June 13, July 28, September 15, November 7, and 4 weeks from December 20.

On February 6, 1989,⁶ F. Smith and Smith went to ATC and spoke to John Picket, director of marketing at ATC. According to F. Smith, she gave him a letter from her doctor, dated January 24, stating that she was being released to return to work as of February 6, 1989. Picket read the letter and said "Oh, you're back to work. Fine, I'll call Marty."

⁴Smith places her at the Duarte conversation but not at the Holguin conversation.

⁵This apparently refers to the minimum performance requirements in the PR rep job description. The one signed by Smith states:

MINIMUM REQUIREMENTS

1. The PR Rep is required to report daily and to submit a lead sheet with a minimum of twenty (20) leads per day.
2. Attend meetings every Friday at 2:30 p.m.
3. If a lead sheet is not handed in or authorized by a supervisor, on time and on the same day, NO PAY will be authorized for that day.

⁶All dates hereinafter in this section are in 1989.

He then paged Duarte. When Duarte did not answer the page, Picket left the room for a few minutes. When he returned, he said there were no openings. F. Smith asked if he was sure. Smith said since his wife had been injured on the job, the law required ATC to reinstate her. Picket again said there were no positions open. Smith said they would take the matter to a higher authority and they left.

It is undisputed that Respondent hired, through contractor Job Source, a PR rep on that same day. Duarte testified that he placed the job order prior to 9 a.m. when F. Smith requested reinstatement, but the job order does not list a time. The person hired that day, Moreno, did not testify. It is also undisputed that several other PR reps were hired within the following month. However, F. Smith never checked again to see if a position had become available, nor did Pickett refer her to Job Source. There is no evidence in the record to establish whether Respondent had a practice of referring to Job Source applicants for whom it had no available position or of keeping a list of applicants or employees wishing to return from leave from which it contacted these persons when a vacancy occurred.

C. Conclusions

1. Smith and Claudine Nuriddin

The complaint alleges that Smith and Nuriddin were discharged because they signed the letter advising Respondent that the eight employees who signed the letter had organized a "labor group" for the purpose of improving their working conditions. Respondent contends (1) that there was no protected concerted activity and (2) that Smith and Nuriddin would have been discharged regardless of their alleged protected activity. The basis for Respondent's argument that there was no protected concerted activity is somewhat unclear. It appears that Respondent is simply arguing that it has certain management prerogatives to establish working conditions and that the employees who signed the letter did not intend to form a union. Neither of these arguments are material. Protected concerted activity does not have to be union activity. If two or more employees band together to better their working conditions, the activity is protected. Here, several employees signed a letter protesting their working conditions, which letter was delivered to Respondent. While not artfully written, nothing in the letter or the circumstances of its delivery is sufficient to remove the activity from the protection of the Act. Accordingly, I find that Smith and Nuriddin were engaged in protected concerted activity.

The principal issue is whether they were discharged for such activity. On October 14, Smith and Nuriddin presented the letter to Chavez and copies to Rudder and Rice. On the next day, Rudder told Rice that Smith and Nuriddin were troublemakers and he wanted to get rid of them. On October 20, Smith and Nuriddin were discharged allegedly because they failed to meet "standards during the probationary period." In its posthearing brief Respondent argues that the discharges would have occurred, regardless of any protected activity, based on substandard job performance and insubordination. Specifically, Chavez testified that Nuriddin was discharged because of poor work performance and Smith was discharged because of the low percentage of enrollments resulting from leads turned in by them and his refusal to work at assigned sites and geographical areas and refusals to come

to work, but seeking pay for such absences. I find these reasons to be pretextual. Respondent presented no documentary evidence to establish that the ratio of enrollments to leads submitted by Smith and Nuriddin were any lower than those submitted by other PR reps working in the same area. They were never disciplined for substandard performance. Smith was promoted to team captain and retained that title and pay even after he was transferred to an area which already had a team captain and was demoted only after the October 11 letter was delivered. During the weekly meetings, neither Smith nor Nuriddin were singled out for criticism any different in kind or quantity from that of other PR representatives. Nor is there any credible evidence that the quantity of leads produced by them were substandard. As noted above, I do not credit the testimony that Respondent actually required 20, or even 15, leads a day. Furthermore, in one of the last weekly meetings attended by them, Nuriddin was praised as being the number two producer. As to the alleged insubordination, employees in the past, including Holguin and Duarte, had refused, on occasion, to go to a particular location and were not discharged.

Since two of Respondent's stated motives for the discharges are false, the inference is that Respondent wishes to conceal an unlawful motive. Further, the third reason for Smith's discharge was his refusal to come to work while requesting to be paid for his absence. The only evidence of such an incident is when Smith and Nuriddin went to various governmental agencies to check on their employee rights and so notified Respondent. In all the circumstances, including the pretextual reasons given for the discharges and the timing of the discharges a week after the Respondent learned of their protected concerted activity and 1 day after Smith and Nuriddin visited governmental agencies, I find that in discharging Smith and Nuriddin Respondent was motivated by their protected concerted activities. I further find that Respondent has failed to establish that they would have been discharged absent such protected activity. Accordingly, I find that by discharging Smith and Nuriddin, Respondent has violated Section 8(a)(1) of the Act.

2. Frances Smith

Respondent argues that it had no obligation to F. Smith because she did not return to work at the earliest possible date. I find no merit in this position. Although F. Smith was given several earlier dates for her return to work, each time there was some medical reconsideration and her return to work date was extended. It is undisputed that Respondent was notified of these changes and raised no objections. However, the General Counsel has failed to establish that there was a position available at the time F. Smith requested reinstatement. It is undisputed that Duarte hired, and telephoned a job order to Job Source for, a new PR representative on the same day that F. Smith requested reinstatement. Duarte testified that he telephoned the job order prior to F. Smith's requested reinstatement. Although I found Duarte to be a generally incredible witness, there is no evidence to contravene his testimony since no time appears on the job order and Moreno did not testify. The General Counsel has the burden of establishing that there was a job opening at the time F. Smith requested reinstatement. The General Counsel has not met this burden. As to later vacancies, the record does not establish that Respondent had either an obligation

to reinstate F. Smith or a practice of seeking out prior employees or applicants when job vacancies occurred. There is no evidence that F. Smith requested reinstatement on more than the one occasion. Accordingly, I find that the General Counsel has failed to establish that Respondent unlawfully refused to reinstate F. Smith.

CONCLUSIONS OF LAW

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

2. By discharging Jimmie J. Smith and Claudine Nuriddin because of their protected concerted activity, the Respondent has violated Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

4. The Respondent has not violated Section 8(a)(1) of the Act by refusing to reinstate Frances D. Smith.

THE REMEDY

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

Having found that Respondent unlawfully discharged Jimmie J. Smith and Claudine Nuriddin, I shall recommend that Respondent offer them immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them. All backpay shall be computed with interest on a quarterly basis, in the manner described by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest thereon computed in the manner and amount prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See also *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Additionally, in accordance with *Sterling Sugars*, 261 NLRB 472 (1982), I shall recommend that Respondent expunge from its files any reference to the discharge of Jimmie J. Smith and Claudine Nuriddin and to notify them in writing that this has been done and that evidence of same will not be used as a basis for future personnel actions against them.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

ORDER

The Respondent, Alameda Technical College, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they engage in protected concerted activities.

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

2. Take the following affirmative action necessary to effectuate the policies of the Act.

⁷If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Offer Jimmie J. Smith and Claudine Nuriddin immediate and full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges and make them whole for any loss of earnings they may have suffered in the manner set forth in the remedy section of this decision.

(b) Expunge from its files any references to the discharges of Jimmie J. Smith and Claudine Nuriddin and notify them in writing that this has been done and that evidence of the discharges will not be used as a basis for any future personnel actions against them.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

⁸If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge our employees because they concertedly complain about, or attempt to better, their wages, hours, or other terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer reinstatement to Jimmie J. Smith and Claudine Nuriddin and make them whole for any loss of earnings they may have suffered because of their discharge.

WE WILL expunge from our files any references to the discharges of Jimmie J. Smith and Claudine Nuriddin and notify

them in writing that this has been done and that evidence of the discharge will not be used as a basis for any future personnel action against them.

ALAMEDA TECHNICAL COLLEGE