East 74th Street Restaurant Corp. d/b/a Adam's Rib Restaurant *and* Oliver Trowell. Case 34–CA–4403

September 14, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On March 14, 1990, Administrative Law Judge Howard Edelman issued the attached decision The Charging Party filed exceptions

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 has decided to affirm the judge's rulings, findings as modified,[1] and conclusions and to adopt the recommended Order

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed

Catherine M Roth, Esq, for the General Counsel
Louis Charles Fink, Esq, for the Respondent

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge This case was tried before me on September 27 and 29, 1989, in New York, New York

On October 13 and 19, Oliver Trowell, an individual, filed charges against East 74th Street Restaurant Corp d/b/a Adam's Rib Restaurant (Respondent) On December 29, 1988, a complaint issued alleging that Respondent discharged Trowell in violation of Section 8(a)(1) of the Act The case was filed and docketed in Region 2, and the complaint which issued set forth the case number as 2–CA–23104 Because of certain allegations concerning fairness, a motion with the consent of all parties was made before me on September 27, during the opening of the trial, that the case be transferred to Region 34 Such motion was granted

Briefs were filed by counsel for General Counsel and by counsel for Respondent On my consideration of the entire record, the briefs, and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

Respondent is a New York State corporation located in New York, New York, engaged in the business of operating a public restaurant In the operation of such business, Respondent annually derives gross revenues exceeding $500,000 Respondent annually purchases and receives at its New York City facility goods, products, and materials valued in excess of $5000 from other enterprises located within the State of New York, each of which other enterprises has received the goods, products, and materials directly from points located outside the State of New York

It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act

It is admitted, and I find, that Local 100 Hotel Employees & Restaurant Employees' Union (the Union) is a labor organization within the meaning of Section 2(5) of the Act

The Restaurant League of New York, Inc (the League) is an organization composed of employers in the restaurant industry The League exists for the purpose of representing its employer-members in negotiating and administering collective-bargaining agreements with labor organizations, including the Union

Respondent has been for a period of well over 4 years a member of the League and through the League a party to a collective-bargaining agreement with the Union cov-

[1] The Charging Party 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

The Charging Party's exceptions may be read to contend that the judge was biased against the Charging Party's case We are satisfied that any such contention is without merit Careful review of the record and the judge's decision shows no statements or other evidence indicating bias

In par 13 of his "Findings of Fact," the judge indicated that Charging Party Trowell had testified that, shortly after he had a conversation with various waiters about his wage claim, the Respondent's manager, Donald Rolando, came to the rear of the restaurant and "simply told Trowell he was being discharged" According to Trowell's testimony, however, Rolando did make a general mention of a wage claim in the conversation in which Trowell was fired Trowell's testimony, however, was generally discredited by the judge

In par 14 of his "Findings of Fact," the judge stated that "Rolando denied having any conversation with French concerning Trowell's filing a claim with any governmental agency or having any knowledge from any source that Trowell had filed a wage claim with any governmental agency" We find no such denials in the record Nonetheless, we are satisfied that the credited evidence does not show Rolando's knowledge of the wage claim prior to his firing Trowell In that regard, as the judge noted, Trowell himself testified that he did not see French talking to Rolando after Trowell told French of his wage claim and French, though he testified, was never asked if he spoke to Rolando about the wage claim Also, it is undisputed that the Respondent was never notified by the state agency of the wage claim that Trowell had filed Further, the judge noted Rolando's testimony that he decided to fire Trowell before Trowell appeared for work on the day of his discharge In such circumstances, the General Counsel did not establish Rolando's predischarge knowledge of the wage claim nor, based on the judge's credibility resolutions, can such knowledge be inferred

In the third paragraph of his "Analysis" section, the judge inadvertently stated that the Respondent had failed to establish her *Wright Line* burden, it is clear from the judge's decision that he meant to say that counsel for the General Counsel had failed to establish her *Wright Line* burden

ering a unit which includes all waiters, bartenders, and kitchen employees

Respondent operates a rather small expensive upper east side steak house Respondent is owned by Bess Nicholas The manager is Donald Rolando and the maitre d' is Mario Paezi All of the above individuals are admittedly supervisors within the meaning of Section 2(11) of the Act

There are approximately 10 waiters who service the restaurant The collective-bargaining agreement between Respondent and the Union provides certain minimum wages for waiters, but a large portion of their earnings is derived through customers' tips

Trowell was an experienced waiter with periods of employment at some of New York City's fine restaurants In September 1988 he was unemployed Upon a visit to the New York State Employment office Trowell was given an employment slip which indicated Respondent was looking for an experienced waiter The slip set forth a starting rate of pay of $3 35 per hour, plus tips However, the collective-bargaining agreement between Respondent and the Union provides for an initial starting rate for waiters of $3 20 per hour, plus tips

On September 14, 1988, Trowell was interviewed by Owner Nicholas who agreed to hire him as a waiter Wages were not discussed Trowell assumed his starting rate was $3 35 as set forth on the employment office slip

On September 16, Trowell began his employment His working hours were from about 4 p m to 10 p m For the first 3 to 4 days Trowell underwent a training period He followed waiters who had relatively lengthy employment with Respondent to become familiar with the procedures of Respondent's restaurant During this period he did not come into close contact with Respondent's customers

On or about September 22 Trowell began waiting on customers On September 30, Trowell received his first salary check from Respondent The check in handwritten form was in the amount of $46 15 and did not set forth a breakdown of deductions Other employees received computerized checks with the deductions set forth on the check Trowell calculated that he was not being paid the $3 35 per hour rate he believed to be his starting rate of pay Trowell was aware that Respondent was a "union house" As a result Trowell spoke with Manager Rolando and complained about the rate of pay and the failure of his check to set forth the deductions Rolando told him it would take a few weeks to place him on the payroll computer but that he was getting the starting rate provided by the union contract Trowell was not satisfied with this explanation

On October 4 Trowell contacted the New York State Bureau of Labor Standards and filed a claim against Respondent For reasons not relevant to this decision, notification of this claim was not served upon Respondent

On October 6 Trowell reported for work at about 4 p m Trowell testified that at about 4 p m while working in the back of the restaurant with several of the waiters performing the "side duties," i e , folding napkins, cutting lemons, etc , prior to opening the restaurant to serve customers, he told the waiters that he had filed a wage claim with the New York State Bureau of Labor Standards and there would be an investigation According to Trowell, waiter Eugene French left the table when Trowell completed his remarks and walked toward the front part of the restaurant where Rolando was working He did not see French talking to Rolando, but testified that a few minutes later Rolando came to the rear of the restaurant and simply told Trowell he was being discharged

Rolando denied having any conversation with French concerning Trowell's filing a claim with any governmental agency or having any knowledge from any source that Trowell had filed a wage claim with any governmental agency [1]

Rolando testified that throughout Trowell's short period of employment he received several complaints from customers, about Trowell's bad breath, attributable to his smoking, and offensive body odor He received similar complaints from maitre d' Mario Paezi and other waiters Further, he had observed Trowell lounging around the pantry area when he should have been attending to customers In addition there were several instances where customers complained to him that Trowell had failed to serve them items ordered Rolando testified that he spoke to Trowell several times about these shortcomings, but that they continued It appears that Trowell's bad breath and offensive body odor were the most troublesome problems because of the customer complaints

Rolando testified that on October 6, he discussed his problems concerning Trowell with Nicholas and it was decided to terminate him that day When Trowell came to work Rolando was busy with other matters, a short time later Rolando approached Trowell and told him his services were not the caliber required by Respondent and he was being terminated

Paezi, the maitre d', corroborates Rolando's testimony He testified that he personally received several customer complaints about Trowell's bad breath and offensive body odor and spoke to him about it On a number of occasions he gave him mints for his bad breath Trowell admitted that on one occasion Paezi spoke to him about his breath and gave him a mint but denied that he was spoken to more than this one time Paezi testified that he spoke to Nicholas about Trowell's odors and wanted to fire him but Nicholas wanted to give him some time to improve

Waiters Eugene French, Manual Bondi, and Shawn Ali all testified that Trowell had offensive breath and body odor and that they brought it to the attention of Rolando and Paezi several times

Analysis

General Counsel contends Trowell was discharged because he filed charges with the New York State Bureau of Labor Standards in an attempt to require Respondent to pay him what he believed to be the contract rate of pay between Respondent and the Union Such activity is

[1] As set forth above Trowell's claim with the New York State Bureau of Labor Standards was not processed and Respondent was not notified of this claim by the Bureau

protected concerted activity In *NLRB v City Disposal Systems*, 465 U S 822 (1984), the Supreme Court enforced the Board's *Interboro* doctrine (*Interboro Contractors*, 157 NLRB 1295 (1966)) which recognizes that an employee's "honest and reasonable invocation of a collectively bargained right constitutes concerted activity, regardless of whether the employee turns out to have been correct in his belief that his right was violated " In order to establish General Counsel's contention General Counsel has the burden of proving that Trowell's protected concerted activities were a motivating factor in such alleged discrimination Once such motivating factor is established, the burden of proof shifts to Respondent to establish the same action would have taken place in the absence of the employees' protected concerted activities *NLRB v Transportation Management Corp*, 462 U S 393 (1983), *Wright Line*, 251 NLRB 1080 (1980), enfd 662 F 2d 899 (1st Cir 1981), cert denied 455 U S 989 (1982)

In order to establish a prima facie case that Trowell's protected concerted activities were such motivating factors, one must credit Trowell's testimony that he told several waiters, including Eugene French, about his wage complaint to the New York State Bureau of Labor Standards, that French left thereafter and went to the front where Rolando was working and that shortly thereafter Rolando came back and told Trowell he was fired Such testimony if credited would establish knowledge, an essential element, and timing However, I do not credit Trowell's testimony in this connection Such testimony was not corroborated by a single witness Although French was present at the trial, called as a witness for Respondent to testify as to Trowell's bad breath and body odor, and cross-examined by General Counsel, he failed to corroborate Trowell's testimony Moreover, my general impression of Trowell's credibility is not favorable, Trowell denied that Rolando or Paezi ever complained to him about his bad breath or body odor, which is the reason advanced by Respondent for his discharge However, the mutually corroborative testimony of Rolando and Paezi, Respondent's supervisors, supported by the additional corroborative testimony of employees French, Bondi, and Ali contradict Trowell's testimony While it could be argued that Rolando and Paezi, as agents of Respondent, are witnesses who might be expected to testify favorably for Respondent, I do not believe that neutral employees French, Bondi, and Ali would give untruthful testimony In this regard Trowell admitted he was a smoker and reluctantly admitted during cross-examination that Paezi had on one occasion given him some mints to conceal his smoker's breath

In view of my credibility resolution, I conclude counsel for the General Counsel has failed to establish Respondent's knowledge of Trowell's concerted activity or timing, and therefore conclude that Respondent has failed to establish her *Wright Line* burden Moreover, in view of the credited testimony of Respondent's witnesses, I would conclude that such discharge would have taken place in the absence of Trowell's concerted activity Accordingly, I conclude there is insufficient evidence to establish that Trowell was discriminatorily discharged as alleged, and recommend dismissal of the complaint in its entirety

Conclusions of Law

1 Respondent is an employer engaged in commerce within the meaning of Section 2(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, by discharging Oliver Trowell, did not violate Section 8(a)(1) as alleged in the complaint

In view of my findings and conclusions set forth above, and the entire record in these proceedings, I hereby issue the following recommended[2]

ORDER

The complaint is dismissed in its entirety

[2] If 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