

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

SMITH'S FOOD & DRUG CENTERS, INC.
d/b/a FRY'S FOOD STORES

and

Case No. 28-CA-109817

AMY PFEIFER, An Individual

William Mabry III, Esq., Counsel for the General Counsel.

Frederick Miner, Esq., Littler Mendelson, P.C., Counsel for the Respondent.

DECISION

Statement of the Case

Joel P. Biblowitz, Administrative Law Judge: This case was heard by me in Phoenix, Arizona on February 25, 2014. The Complaint herein, which issued on October 29, 2013¹ and was based upon an unfair labor practice charge and an amended charge that were filed on July 24 and September 25 by Amy Pfeifer, an individual, alleges that Smith's Food & Drug Centers, Inc., d/b/a Fry's Food Stores, herein called the Respondent, violated Section 8(a)(1) of the Act by denying Pfeifer her *Weingarten* rights. Specifically, it is alleged that on about July 16 the Respondent, by Greg Powell, its loss prevention specialist and an admitted supervisor and agent of the Respondent within the meaning of Section 2(11) and 2(13) of the Act, denied Pfeifer's request to be represented by a union representative of her choice during an interview when that representative was available, and denied her the opportunity to confer with shop steward, Marie Long, the union representative that she was supplied with, and ordered Long not to speak during the meeting. While denying that the conduct of the investigatory interview conducted on July 16 violated the Act, the Respondent admits that Pfeifer had reasonable cause to believe that the interview could result in disciplinary action being taken against her.

I. Jurisdiction and Labor Organization Status

Respondent admits and I find that it has been an employer engaged in commerce with the meaning of Section 2(2), (6) and (7) of the Act, and that United Food and Commercial Workers, Local 99, AFL-CIO, herein called the Union, has been a labor organization within the meaning of Section 2(5) of the Act.

II. The Facts

Pfeifer was employed as a barista at Tully's Coffee Counter located in Respondent's store No. 673 from 2011 to July 20, 2013. The Union and the Respondent are parties to a collective bargaining agreement covering store 673, herein called the facility, as well as other of Respondent's stores. There were two shop stewards at the store, Marie Long and Donna Millis; Kaitlyn Sullivan is employed by the Union as the lead union representative covering the store and Pfeifer was a member of the Union. Shortly prior to July 16 there had been allegations of

¹ Unless indicated otherwise, all dates referred to herein relate to the year 2013.

employee misconduct, including theft, that resulted in the termination of a number of employees at Tully's location at the facility and it was for that reason that Powell was at the facility on July 16 to meet with Pfeifer. The July 16 meeting took place in the manager's office at the facility, one flight up from the selling floor. Present at the meeting was Pfeifer, Powell, Sandra Lakso, the store's assistant manager and Long.

Pfeifer testified that in either June or July she called Sullivan and left a message for her that because of what had happened to other employees at Tully's, she was concerned that she was going to be disciplined as well. Sullivan left a message for her saying that if she is called up to the office, she should call her and she would be there right away. Pfeifer was working on July 16 when Lakso asked her to come up to the office with her; she told her that "loss prevention" was there and wanted to speak to her. She walked in to the office and Powell introduced himself, asked her to have a seat and to please turn her cell phone off, as she had it in her hand. She told him that she needed to have her union representative there and he shook his head signifying "no." She said that she understood that she was entitled to have her union representative with her during questioning; Lakso asked: "Do you mean Kaitlyn?" and Pfeifer said, "Yes, she is expecting my call." Powell again shook his head no and said that she could have the most available union person present, be it the steward or the representative. Powell then asked if the stewards were on the floor and Lakso said that Long was available. Pfeifer asked, "Are you kidding?" as she felt that Long lacked the knowledge or experience to assist her, and Powell said, "Well, that's who it is going to be" and told Lakso to have Long come to the office. Long came into the office and Lakso told her something to the effect of, "You just need to sit and observe." She was not given an opportunity to meet with, or talk to, Long prior to the meeting. Powell then began questioning Pfeifer; the meeting took about thirty minutes and as a result of the meeting, Pfeifer was suspended. During the meeting, Long did not say anything, or ask any questions.

Sullivan testified that Millis and Long are the union stewards and are the Union's "eyes and ears" in the store, but they do not have a role in investigatory interviews: "that's what we're [Union representatives] here for." For at least four years, stewards have received no training for investigatory interviews. In about June and July several employees at Tully's were terminated, and in July Pfeifer called her and told her that she was having problems with her manager and she was afraid that when she returned to work on July 16 she was going to be suspended. Sullivan responded (probably by voicemail) that if she felt that she was going to be disciplined that she should say that she wanted Union representation and "...let them know that she wants her Union rep present and then to contact me so I would be planning to be in the area on that day...to represent her during the meeting." She was at the store that morning and took Millis to breakfast at a restaurant adjacent to the store. After that she was in the parking lot doing some paperwork and then drove to some Safeway stores "down the road...in the area." The first that she heard from Pfeifer that day was a voicemail at 3:36 saying that she had been suspended. She had her phone on all that day in case Pfeifer called her, but she did not notify the Respondent that she was available on that day to attend an interview, if one was conducted with Pfeifer. She testified that there is no agreement between the parties that the Respondent can only use shop stewards as their union representatives in these interviews.

Lakso testified that the company policy is that employees are entitled to union representation during an investigatory meeting, and when an employee requests representation:

A We make sure we get them that request before any further proceedings go on.

Q And is that limited to one specific person?

A We have two stewards in our store.

A And there's other individuals that can act as union representatives during investigatory meetings, correct?

5

A Yes.

Q And you know Kaitlyn Sullivan?

10

A I have not met her.

On July 16 she asked Pfeifer to come upstairs with her to the manager's office; when they arrived at the office, Powell was the only other person present and he began questioning her about some alleged misconduct and she immediately asked for Union representation.

15

Q And, in fact, she asked to make a phone call, correct?

A I don't recall that.

20

Q Do you recall that she immediately asked to speak with Ms. Kaitlyn Sullivan?

A Yes.

25

Q And...the way she was going to speak to Ms. Sullivan was to make a phone call to Ms. Sullivan, isn't that correct?

A I don't recall that.

30

Q Did she indicate how she was going to contact Ms. Sullivan?

A She said she'd like to talk to Kaitlyn.

Q Isn't it true she had her cell phone out, ready to make a phone call?

35

A I don't remember seeing that.

Q But you are sure that she wanted Ms. Sullivan to represent her during the investigatory meeting, correct?

40

A She said Kaitlyn.

Q Okay.

45

A I'd like to talk to Kaitlyn...

Q Isn't it true that she indicated that Ms. Sullivan was expecting her phone call?

A I don't think so. No, sir.

50

Q She did not say that?

A No, sir.

Powell told Pfeifer that because there was a Union steward in the store, she would be called to come upstairs to represent her, and Long was called upstairs. Prior to Long entering the room, Lakso had not informed her of her purpose in being there, and Long did not have an opportunity to meet with Pfeifer prior to the meeting. Powell told Long. “We’d like you to sit in as a Union representative to be able to witness and be there for Ms. Pfeifer.” Powell then asked Pfeifer: “Will Marie be okay?” and she responded, “She’ll do.” Long and Pfeifer did not speak to each other during the meeting and Long did not say anything, or ask any questions, during the meeting, although Powell never told her that she could not participate in that manner.

Powell testified that he was at store 673 that day to investigate allegations of employee misconduct through theft by a number of employees at Tully’s, including Pfeifer. When Pfeifer came in to the office, he explained the purpose of the meeting to her and she immediately asked for a Union representative:

Q In fact, she asked to have Ms. Kaitlyn Sullivan present as her Union representative, correct?

A I don’t remember if she specifically asked for a specific person.

Q Do you recall her asking to make a phone call?

A I do not recall that.

After Pfeifer asked for a Union representative to be present with her, Powell asked Lakso to see which Union steward was present at the time, and Lakso said that Long was a Union representative and was at the facility, and she paged Long to come upstairs. When Long came into the room, he told her that “her presence was requested,” and that she would be the Union representative representing Pfeifer for the conversation that they were about to have, and “...that her job was to basically protect her rights, make sure that I wasn’t belligerent, mean or violated her rights in any way.” He was asked:

Q But isn’t it true that Ms. Pfeifer did not want Ms. Long to represent her?

A She did not indicate that to me.

Q So she never indicated that she wanted another Union representative present?

A I do not believe so.

Pfeifer and Long did not speak during this meeting and Long did not say anything, or ask any questions during this meeting. He testified that the company policy is that when an employee requests Union representation: “The procedure would be to stop any further questioning if we had started questioning and to find out who is most readily available, whether they be a Union steward or a business unit representative...”

Q So then you would get them a representative, correct?

A Yeah. And then we would provide who was most available.

Q So if you had two representatives available, what would the procedure be?

A To choose one of them, I guess.

Q You would choose the representative?

5 A I guess I would.

The Respondent does not have any written policy on what to do if more than one representative is readily available. In addition, to his knowledge, Long was the only Union representative available at that time. Although Long did not speak during the meeting, he did not tell her that she could not ask questions or object to anything that she observed.

10

Long has been employed by the Respondent for about twenty four years and has been a member of the Union since about 1990. On July 16, Lakso told her that she was needed in the office upstairs, without any further explanation. Long testified, "I thought I was in trouble," and asked, "What did I do now?" and Lakso said, "Nothing." When she entered the room she saw Pfeifer as well as Powell, who she knew was from the loss prevention department. He asked Long if she knew Pfeifer and Lakso and she said that she did and then he said that he was going to ask Pfeifer some questions:

15

20 Q What happened next?

A Nothing really. He was asking questions and she was answering.

25 Q Did he say anything to you what your role would be in the meeting?

A No.

Q Did he say anything in regard to whether or not you can ask questions?

30 A No.

Q Did he say that you could meet and confer with her?

35 A No.

Q Did anyone mention the word "observer" during this conversation?

A Yes.

40 Q Who mentioned that?

A Sandy.

45 Q And...how did that word come about?

A She told me that I was there to observe and listen...

Q Now, did you ask any questions in this meeting?

50 A No.

Q Why didn't you ask any questions.

A I was not permitted to.

Q And why do you believe that?

5

A They told me I was just to be quiet. I was not to ask questions...I was there to listen and observe only.

10 On cross examination, she testified that she was never specifically told not to ask any questions, but she inferred that from Lakso's comment that she was there to observe and listen. Prior to July 16, she participated in two or three other investigatory meetings since about 1990.

III. Analysis

15 It is clear that under the Supreme Court's decision in *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1971), an employee, upon request, is entitled to have union representation at an investigatory meeting where she has reasonable grounds to fear that the meeting may result in disciplinary action being taken against her, and Respondent admits that Pfeifer did have reasonable grounds to fear that discipline could result from the July 16 meeting. The issue
20 herein is whether the Respondent satisfied this *Weingarten* obligation by providing Long to represent Pfeifer on July 16.

25 There is credibility issue between the testimony of Pfeifer and that of Lakso and Powell. Pfeifer testified that after she learned the purpose of the meeting and entered the office, Powell told her to turn her cell phone off; she told him that she needed to have her Union representative there and when Lakso asked if it was Sullivan, Pfeifer said, "Yes, she is expecting my call." Powell shook his head no, and said that she could have the most available Union person present and in that situation, it was the steward, Long. Powell asked, "Are you kidding?" because she felt that Long lacked the knowledge or experience to assist her, but
30 Powell responded, "Well, that's who it is going to be." Lakso supports Pfeifer's testimony in that upon entering the office she stated that she wanted to speak to Sullivan, while Powell denied that she asked to have Sullivan represent her, or that she wanted to make a phone call; he also denied that Pfeifer objected to Long representing her or indicated that she wanted to have another Union representative rather than Long. I found Pfeifer's testimony, supported by
35 Sullivan's testimony and Lakso's testimony in one respect, to be totally credible and I have no trouble crediting her testimony over that of Powell. Pfeifer told Powell and Lakso that Sullivan, who she wanted to represent her, was expecting her call. Rather than allowing Pfeifer to call Sullivan to determine her availability, Powell told her that she would have to have Long as her representative, and continued with the meeting.

40

In *Pacific Gas & Electric Co.*, 253 NLRB 1143 (1981), the employer had two facilities, each with a steward, separated by about twenty minutes. Although the employee requested that the steward at the other plant represent him in an investigatory interview, the employer refused, and provided him with the steward at the plant in which he was employed. The Board found this
45 action lawful stating that *Weingarten* "...neither stated nor suggested that an employee's interests can only be safeguarded by the presence of a *specific* representative sought by the employee." In *Coca-Cola Bottling Co. of Los Angeles*, 227 NLRB 1276 (1977), the employee requested representation by a certain steward to represent him at an investigatory meeting on a Friday; however, because that steward was on vacation and would not return to work until
50 Monday, the employer denied the request and conducted the interview without a steward present. The Board found no violation. In *New Jersey Bell Telephone Co.*, 308 NLRB 277, 282 (1992), the Board stated: "When two union officials are equally available to serve as a

Weingarten representative...the decision as to who will serve is properly decided by the union officials, unless the employer can establish special circumstances that would warrant precluding one of the two officials from serving as representative.” In the instant situation, there were no special circumstances that would allow Powell to appoint Long to represent Pfeifer. Clearly, Sullivan was more experienced in representing employees in these situations than Long, who participated in two or three such meetings over a twenty year period. *IBM Corp.*, 341 NLRB 1288, 1292 (2004). Counsel for the Respondent, in his brief, refers to an “unknown period of delay necessary...” for Williams to get to the facility and that *Weingarten* rights do not apply where the employee’s preferred representative is not available. While it is true that they did not know how long it would take Sullivan to get to the facility, and, therefore, for how long the interview would have to be delayed, the matter could easily have been resolved by a phone call to Sullivan to determine her location at the time. They would have easily learned if Sullivan was readily available to come to the store to represent Pfeifer, as she and Pfeifer testified, or whether she was unavailable, and if she was not readily available, the choice of Long as her representative would have been permissible. However, Powell was unwilling to let her do that. I therefore find that the Respondent violated Section 8(a)(1) of the Act by denying Pfeifer the Union representative of her choice, Sullivan.

The evidence is clear that although Long had no idea what Pfeifer’s situation was, Pfeifer was not given an opportunity to discuss it with her prior to the meeting. Representative status is more than a mere presence. The representative must be familiar with the facts in order to properly represent the employee. By not allowing Pfeifer to discuss the facts with Long prior to the meeting, the Respondent violated Section 8(a)(1) of the Act. *Colgate Palmolive Company*, 257 NLRB 130, 133 (1981). Lakso told Long that she was there “to listen and observe.” When those words are spoken by the assistant manager of the store to an employee unfamiliar with representing employees in these situations, in the presence of the loss prevention representative, one can easily and reasonably interpret that to mean that you must remain silent. Respondent therefore violated Section 8(a)(1) of the Act in this regard as well. *Barnard College*, 340 NLRB 934 (32003); *Washoe Medical Center, Inc.*, 348 NLRB 361 (2006).

Conclusions of Law

1. Respondent, Smith’s Food & Drug Centers, Inc., d/b/a Fry’s Food Stores., has been engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. United Food and Commercial Workers Local 99, AFL-CIO, the Union, has been a labor organization within the meaning of Section 2(5) of the Act.

3. By denying Pfeifer the representative of her choice at the investigatory interview conducted on July 16, and but denying her the ability to discuss the situation with Long, whom the Respondent chose to be her representative, and by implying that Long must remain silent during the interview, the Respondent violated Section 8(a)(1) of the Act.

The Remedy

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

5

The Respondent, Smith’s Food & Drug Centers, Inc., d/b/a Fry’s Food Stores, its officers, agent, successors and assigns, shall

1. Cease and desist from

10

(a) Denying its bargaining unit employees the right to be represented on request by a representative of his/her own choosing at any investigatory interview that the employee reasonably believes might result in disciplinary action, as long as that representative is available to participate at that time.

15

(b) Denying its employees at investigatory interviews that they believe might result in disciplinary action the right to confer with their representative prior to the interview.

20

(c) Denying the employees’ representative at the investigatory interview the right to speak and participate freely in the interview.

(d) 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.

25

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

30

(a) Within 14 days after service by the Region, post at each of its stores in Phoenix, Arizona copies of the attached notice marked “Appendix.”³ Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 16, 2013.

40

45

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.

50

³ If 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.”

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

5 **Dated, Washington, D.C. April 1, 2014**

Joel P. Biblowitz
Administrative Law Judge

10

15

20

25

30

35

40

45

50

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 Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities

WE WILL NOT deny to any of our bargaining unit employees the right to be represented on request by a representative of his/her choosing at any investigatory interview that the employees reasonably believe could result in disciplinary action, as long as the chosen representative is available to participate at that time.

WE WILL NOT deny to our bargaining unit employees the opportunity to confer with his/her chosen representative, prior to the investigatory interview, and **WE WILL NOT** deny the chosen representative the opportunity to speak at, and to participate in, the interview.

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

SMITH'S FOOD & DRUG CENTERS, d/b/a FRY'S FOOD STORES

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

2600 North Central Avenue, Suite 1800
Phoenix, Arizona 85004-3099
Hours: 8:15 a.m. to 4:45 p.m.
602-640-2160.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 602-640-2146.