

Lee's Industries, Inc. and Lee's Home Health Services, Inc. and Lee's Companies, Inc. (single employer) and Bernice Brown. Case 4-CA-36904

September 30, 2010

DECISION AND ORDER

BY MEMBERS BECKER, PEARCE, AND HAYES

On February 25, 2010, Administrative Law Judge Robert A. Giannasi issued the attached decision. The Respondent filed exceptions with supporting argument, and the General Counsel filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions¹ and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt his recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified below, and orders that the Respondent, Lee's Industries; Lee Home Health Services, Inc.; and Lee's Companies, Inc., a single employer, Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall take the actions set forth in the Order as modified.

1. Substitute the following as paragraph 1(a).

"(a) Discharging or otherwise discriminating against any employee for engaging in protected concerted activities."

2. Insert the following as paragraph 1(b) and reletter the subsequent paragraph accordingly.

"(b) Discharging or otherwise discriminating against any employee for supporting the SEIU or any other union."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE

¹ The General Counsel moves to strike the Respondent's exceptions with supporting argument on the ground that they do not satisfy Sec. 102.46 of the Board's Rules and Regulations. We find that the Respondent's exceptions with supporting argument are sufficient to satisfy the "substantial compliance" standard, and thus we have considered them. See, e.g., *Consolidated Bus Transit*, 350 NLRB 1064 fn. 2 (2007), enf'd, 577 F.3d 467 (2d Cir. 2009).

² We note that the judge inadvertently failed to find that employee Bernice Brown's discharge independently violated Sec. 8(a)(1), as well as Sec. 8(a)(3) of the Act. We have modified the judge's recommended Order to reflect the independent 8(a)(1) violation and we have substituted a new notice to comport with this modification.

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 discharge or otherwise discriminate against any of you for engaging in protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the SEIU, or any other union.

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.

WE WILL, within 14 days from the date of this order, offer Bernice Brown full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Bernice Brown whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this order, remove from our files any reference to the unlawful discharge of Bernice Brown, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

LEE'S INDUSTRIES; LEE'S HOME HEALTH SERVICES, INC.; LEE'S COMPANIES, INC.

Barbara C. Joseph, Esq., for the General Counsel.
Debra D. Rainey, Esq., of Philadelphia, Pennsylvania, for the Respondent.

Joshua P. Rubinsky, Esq. and *Amy Geller, Esq.*, of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on January 5, 2010. At the hearing, the parties stipulated that the three respondent corporations (the Respondent) constitute a single employer under the Act. The amended complaint alleges that Respondent vio-

lated Section 8(a)(3) and (1) of the Act by discharging employee Bernice Brown for engaging in union and other protected concerted activities. The Respondent filed an answer denying the essential allegations in the complaint. The General Counsel and the Respondent filed posttrial briefs, which I have read and considered. Based on the entire record in this case, including the testimony of the witnesses and my observation of their demeanor, I make the following¹

FINDINGS OF FACT

I. JURISDICTION

It is stipulated that Respondent is engaged in providing home health care, janitorial and pest control services, and is headquartered at 3858 Pulaski Avenue, Philadelphia, Pennsylvania. It is also stipulated that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, Respondent admits that the Service Employees International Union (SEIU) is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Pursuant to a contract with Pennsylvania Corporation for Aging (PCA), Respondent employs an unspecified number of home health aides, who work primarily at and out of the residences of its clients. President Nina Kinard and Coordinator and Supervisor Gwendolyn Brown work out of Respondent's headquarters. Bernice Brown (the Charging Party), was one of Respondent's most senior home health aides. She was employed for about 8 years before her termination in February of 2009. Her immediate supervisor, Gwendolyn Brown, joined Respondent 2 years after Bernice Brown began her tenure with Respondent. According to Supervisor Brown, Bernice Brown was one of Respondent's "better, dependable employees," who was often asked to fill in for other employees. Tr. 133.

On December 17, 2008, Respondent held one of its periodic "in service" meetings with all its home health care aides. On that date, Respondent met, at a location away from its headquarters, with home health care aides in four separate groups, to announce that it intended to convert their job status from employees to independent contractors, as of January 1, 2009. The change would mean that the employees would receive an Internal Revenue Service (IRS) Form 1099, instead of a Form W-2 for their pay, they would have to keep records of their deductible expenses, and the Respondent would no longer withhold income taxes or pay social security and other employment taxes on their behalf. At the December 17 meetings, Respondent distributed forms to the employees. Those forms confirmed that the signer agreed to become "self-employed," or a "statutory employee," essentially an independent contractor. The

¹ After the hearing was closed, the parties submitted an additional exhibit that was inadvertently omitted from the formal papers. In accordance with the stipulation of the parties, GC Exh.1(b)(1), a copy of the amended charge, is admitted in evidence. The General Counsel also filed an unopposed motion to correct transcript, which I hereby grant.

form also states that the signer is a "statutory employee, as per IRS definition and guidelines, of Lee's Industries, Inc." GC Exh. 6.

During the meeting she attended, Bernice Brown expressed repeated objections to the conversion. At the end of the meeting, she nevertheless signed the conversion form, as did all but four of the home health care aides.

Sometime after the meeting described above, Respondent's president, Nina Kinard, decided to talk to the employees who had expressed concerns over the conversion and not signed the conversion form. On December 29, 2008, she met with those employees at Respondent's headquarters so that she could address their concerns and get them to sign the forms. Bernice Brown was one of five employees directed to meet with Kinard. Although Kinard had attended most of the employee meetings on December 17, she was absent from the group meeting Bernice Brown had attended that day and had no first hand knowledge of the objections Bernice Brown had voiced at the meeting. Nor did Kinard know that Bernice Brown had already signed a conversion form at the end of the meeting, despite her stated objections. Kinard learned of Bernice Brown's objections to the conversion from Human Resources Manager Barbara Wright, who did attend the group meeting that Bernice Brown attended. Kinard testified that Wright took a list of "anyone who was confused" and that is how she obtained Bernice Brown's name. (Tr. 136.)

All five employees who attended the December 29 meeting with Kinard signed the conversion form, including Bernice Brown, who signed a second form, since she had already signed a conversion form at the end of the December 17 meeting. Bernice Brown testified that Kinard threatened to discharge her if she did not sign the form. When testifying on direct, Kinard did not deny, and indeed was not asked to deny, making such a threat. But, on cross-examination, counsel for the General Counsel asked her if she had made the threat and she denied she had (Tr. 145). Kinard, however, had testified earlier that she "wanted everyone to sign" the form (Tr. 102). Another employee at that meeting, Sandra Watson, who was still employed when she testified and appeared reluctantly pursuant to a subpoena, testified that she did not recall Kinard threatening to fire employees who did not sign the form. Nonetheless, Watson testified that she signed the form because "I need my job." (Tr. 84.)

The complaint does not allege that Kinard made a threat in violation of the Act. Thus, I am not called upon to make a specific finding as to whether the explicit threat Bernice Brown testified about was uttered during the December 29 meeting. There is no doubt, however, that both Bernice Brown and Watson felt compelled to sign the form and also felt that their jobs depended on their signing the form. Based on their testimony, as well as my negative assessment of Kinard's demeanor and testimony, which included emotional outbursts and autocratic references to employees, I find that she conveyed to employees, either implicitly or explicitly, the message that they had to sign the forms to retain their jobs.

According to Bernice Brown's uncontradicted testimony, notwithstanding the purported conversion to independent contractor status and the fact that no taxes were withheld from her

pay, the substance of her job did not change in any way after January 1, 2009. She did the same things she did before the conversion. Nor did Respondent submit any evidence that the jobs of the other home health care aides changed after January 1.²

Bernice Brown did not, however, abandon her objections to the independent contractor conversion. On February 26, 2009, at about 8 p.m. in the evening, Bernice Brown called her immediate supervisor, Gwendolyn Brown, at the latter's after-hours job for another employer. In that call, Bernice Brown complained about President Kinard's decision to convert the employees to independent contractors and said she would invite a representative of the SEIU to the next service meeting of home health care aides to address the conversion issue. Bernice Brown also mentioned Human Resources Manager Barbara Wright, who had recently left Respondent's employ. Except in one respect, Bernice Brown's testimony about her telephone discussion with Supervisor Brown was essentially corroborated by Supervisor Brown. Indeed, Supervisor Brown testified that the discussion began with Bernice Brown expressing her displeasure about "the 1099," and also "talked about the Union and talked about Barbara Wright." (Tr. 117.) But, contrary to Bernice Brown, Supervisor Brown also testified that Bernice Brown speculated that Wright had quit because she "was probably tired of taking [Kinard's] shit." (Tr. 117–118.)³ According to Supervisor Brown, the conversation lasted about 5 or 10 minutes.

The SEIU had made several efforts to organize the Respondent in the past few years. On the witness stand, President Kinard expressed disgust and disapproval of those efforts. The record reveals that the SEIU is responsible for a still-ongoing wage class action suit against the Respondent on behalf of Respondent's employees. Tr. 104. The record also contains memos from Respondent and President Kinard asking employees not to respond to SEIU's efforts to talk with them. Although those memos go back to 2006, it is clear from Kinard's testimony and demeanor that she still harbors strong animosity toward the SEIU. For example, she explained her opposition to the SEIU in terms of her employees being "weak," unable to "think for themselves" or needing to "have the company explain things to them." (Tr. 91–92.)

The morning after the Bernice Brown–Supervisor Brown telephone discussion, Supervisor Brown reported the substance of that discussion to President Kinard at Respondent's headquarters. Supervisor Brown testified that she told Kinard that "Bernice had been talking with the Union and she told me they were going to be at the next in-service [meeting]." (Tr. 124.) Immediately after hearing Supervisor Brown's report, Kinard directed that Bernice Brown be terminated. Bernice Brown was called in to Respondent's headquarters and given a termination slip that reflected her discharge for "insubordination." No further elaboration was given. Neither Kinard nor Supervi-

sor Brown talked to Bernice Brown; she was given her termination slip by a staff employee.

Both Kinard and Supervisor Brown testified that Supervisor Brown initially reported only Bernice Brown's statement about Manager Wright's probably having quit because she was tired of taking Kinard's "shit," and, immediately after hearing that report, Kinard directed Bernice Brown's discharge. They both testified that the remainder of the telephone discussion—that dealing with Bernice Brown's continued complaints about the independent contractor conversion and her intention to bring the SEIU into the dispute—was not mentioned until after Kinard directed that Bernice Brown be terminated. I reject that testimony. It was implausible and contrived, obviously concocted in a lame effort to clothe the discharge with the cloak of legitimacy. Nor was I impressed with the demeanor of either witness. Kinard was a completely unreliable witness with palpable union animus, as I have indicated above. I also thought her professed outrage over Bernice Brown's alleged offensive remark was insincere and theatrical. Bernice Brown's remark, as related by Supervisor Brown was made while both were off-duty and was not made in the presence of Kinard. It was far short of insubordination, which is defined as an intentional refusal to follow a lawful order of a superior. See *Phillips v. General Services Administration*, 878 F.2d 370, 373 (Fed. Cir. 1989). For her part, Supervisor Brown seemed unable to testify against her employer's interests; she admitted on cross-examination that she felt she "needed" to tell Kinard about Bernice Brown's reference to the SEIU. (Tr. 124–125.) As the Supreme Court has stated, the demeanor of a witness may satisfy the trier of fact not only that the witness's testimony is not true, but that the truth is the opposite of his or her story. *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962), quoting from *Dyer v. MacDougall*, 201 F.2d 265, 269 (2d Cir. 1952).⁴

B. Discussion and Analysis

There is no dispute that Bernice Brown was fired as a result of her discussion with Supervisor Brown on the evening of February 26. Supervisor Brown reported the discussion to President Kinard the next morning and Bernice Brown was summarily discharged. That discussion involved union and other protected concerted activities. Bernice Brown continued her earlier complaints about Respondent's conversion of employees to independent contractor status, a matter that clearly involved a change in terms and conditions of employment and spawned a group concern, with several employees objecting to the conversion and initially refusing to sign conversion forms offered by Respondent. In addition and significantly, in her February 26 discussion with Supervisor Brown, Bernice Brown

² Respondent conceded that Bernice Brown was an employee within the meaning of the Act for the purposes of this case.

³ Bernice Brown denied, on cross-examination, that she had said anything "not nice" about Kinard (Tr. 69).

⁴ The self-serving attempts of Kinard and Supervisor Brown to create an artificial distinction between Bernice Brown's complaint about the independent contractor conversion and her stated intention to bring the SEIU into the dispute, on the one hand, and her alleged offensive remark on the other is, in any event, unavailing. As shown below, the discussion between Bernice Brown and Supervisor Brown cannot be parsed into separate elements as a matter of law. Even assuming that Bernice Brown made the offensive remark, it was part and parcel of her objection to Kinard's role in trying to convert the employees to independent contractors and her intention to bring the SEIU into the matter.

also threatened to bring the SEIU into the dispute. That amounts to union activity, which is clearly protected by the Act. For the purposes of this analysis, I will assume that, in criticizing Kinard for her role in the conversion, Bernice Brown made the remark attributed to her by Supervisor Brown—that Human Resources Manager Wright had probably quit because she was tired of taking Kinard’s “shit.” That alleged remark was clearly part of Bernice Brown’s protest against the conversion of the employees’ jobs and her expressed intent to bring the SEIU into the dispute. And, as shown below, the discharge for engaging in that protest and expression of intent was violative of the Act.

Contrary to Respondent’s contention, the discussion that prompted the discharge must be considered in its entirety. An employee’s right to engage in union and other protected concerted activity permits “some leeway for impulsive behavior.” *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 586–587 (7th Cir. 1965). In *Thor Power*, an employee participated in a tense grievance meeting between his union representative and a management official. As he was leaving the meeting, which took place in the manager’s office, the employee referred to the management official as a “horse’s ass,” after which the employee was summarily discharged. The court upheld the Board’s finding that the discharge was violative of the Act. It rejected the employer’s contention that the employee’s derogatory term could be separated from the protected activity to which it was related. As the court stated, “the remark cannot be considered in a vacuum,” and “not every impropriety committed during [concerted or union] activity places the employee beyond the protective shield of the act.” *Id.*

This case presents a similar issue, even though Bernice Brown’s alleged offensive remark was nowhere near as offensive as the remark made in *Thor Power*. The analytical model in this type of case was described in *Stanford Hotel*, 344 NLRB 558 (2005), as follows:

When an employee is discharged for conduct that is part of the *res gestae* of protected concerted activities, the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act. *Aluminum Co. of America*, 338 NLRB 21 (2002). In making this determination, the Board examines the following factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s outburst; and (4) whether the outburst was, in any way, provoked by an employer’s unfair labor practice. *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979).⁵

⁵ Where, as here, there is no dispute as to the reason for the discharge and the reason implicates concerted protected or union activity, there is no need to apply the burden shifting analysis for dual motive cases set forth in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). See *American Steel Erectors, Inc.*, 339 NLRB 1315, 1316 (2003); and *Felix Industries*, 331 NLRB 144, 146 (2000), *remanded* 251 F.3d 1051 (D.C. Cir. 2001), *on remand* 339 NLRB 195 (2005). In any event, Respondent’s attempt to show that Bernice Brown was or would have been discharged solely because of a uniform policy against her alleged “insubordination” is undercut by the following: (1) I have discredited the testimony of President Kinard and Supervisor Brown as to their as-

Applying the above principles, I find that Bernice Brown’s alleged outburst or offensive remark was not sufficiently egregious to render her otherwise protected discussion with her supervisor unprotected. First, the discussion did not take place in the workplace or in Kinard’s presence. The discussion took place during a telephone conversation between Bernice Brown and her supervisor while neither was on duty. Secondly, the discussion essentially involved Bernice Brown’s criticism of Kinard’s employment policies, which she thought warranted the intervention of a union. And thirdly, Bernice Brown’s outburst, which was not addressed to Kinard, was intimately connected with the above subject matter. In colloquial terms or slang, the word “shit” is defined as “pretense, lies, exaggeration or nonsense.” *Random House Webster’s Unabridged Dictionary* (Second Edition, 1998). See also *The American Heritage Dictionary of the English Language* (William Morris, Editor, 1969) whose slang definition of the word includes “worthless matter; junk” and “foolish or misleading talk; nonsense.” In effect, Bernice Brown was saying that a manager had probably quit because of the same kind of “junk” or “nonsense” that Kinard was putting the employees through on the conversion issue—an issue that, according to Bernice Brown, warranted union intervention. The word Bernice Brown used is certainly less offensive—more tangential and less personal—than calling a manager a “horse’s ass,” the term that was found not to justify termination in *Thor Power*. Finally, as I have indicated above, Bernice Brown’s outburst did not amount to insubordination and Respondent’s calling it so does not make it so. Consideration of the above factors strongly supports the conclusion that Bernice Brown’s outburst did not render her discussion with her supervisor unprotected. The remaining factor—whether the outburst was prompted by an unfair labor practice—is not present in this case. But the absence of that factor here does not change the result.

In these circumstances, I find that Respondent discharged Bernice Brown for engaging in union and other protected concerted activity. Respondent thus violated Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. By discharging employee Bernice Brown for engaging in union and other protected concerted activity Respondent violated Section 8(a)(3) and (1) of the Act.

2. The above violation is an unfair labor practice affecting commerce within the meaning of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I conclude that it should be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having discriminatorily discharged Bernice Brown, Respondent must offer her reinstatement

reason for the discharge; and (2) Respondent failed to comply with the General Counsel’s subpoena requesting records concerning similar discharges (Tr. 6–18, GC Exhs. 3, 4). See, with respect to the failure to comply with subpoenas, *McCallister Towing & Transportation*, 341 NLRB 394, 394–397 (2004), *enfd.* 156 Fed. Appx. (2d Cir. 2005).

ment and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of discharge to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

ORDER

The Respondent, Lee's Industries; Lee Home Health Services, Inc.; and Lee's Companies, Inc., a single employer, Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for engaging in protected concerted activities or supporting the SEIU or any other union.

(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.

(a) Within 14 days from the date of the Board's order, offer Bernice Brown full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Bernice Brown whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of the Board's order, remove from its files any reference to the unlawful discharge,

⁶ 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.

and, within 3 days thereafter, notify Bernice Brown in writing that this has been done and that the discharge will not be used against her in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide, at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this order.

(e) Within 14 days after service by the region, post at its facility in Philadelphia, Pennsylvania, copies of the attached Notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 4, 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 17, 2009.

(f) 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.

⁷ 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."