

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

LINDA LEWIS AND ROGER WEEKLY,
INDIVIDUALLY AND AS A PARTNERSHIP,
d/b/a IRON GRIDDLE RESTAURANT

and

Case 6-CA-28767

LYNETTE FERRARI, An Individual

David G. Shepley, Esq., of Pittsburgh,
Pennsylvania, for the General Counsel.

Thomas G. Lemons, Esq., of McMurray,
Pennsylvania, for the Respondent.

SUPPLEMENTAL DECISION

Statement of the Case

JAMES L. ROSE, Administrative Law Judge: This matter was remanded to me by Order of the Board dated July 29, 1998, to reconsider certain credibility resolutions I made in my decision of October 16, 1997.¹

As more fully set forth in my initial decision, this matter principally involves the discharge of Lynette Ferrari on January 23, 1997. Early that day Ferrari had approached Linda Lewis, the Respondent's principal partner, to discuss a pay issue on behalf of herself and another employee. On consideration of the whole record, including my observation of the witnesses, I concluded that Lewis terminated Ferrari because of this protected, concerted activity; and I discredited the assertion by Lewis that she had made the discharge decision on January 22.

In addition to a multitude of problems Lewis professed to have had with Ferrari from the time she bought the restaurant in 1995, Lewis testified that the final act meriting termination was Ferrari's refusal to meet with her as directed on January 22.

It is, of course, critical whether the discharge decision was made on January 22 and before Ferrari engaged in the protected, concerted activity. In discrediting Lewis (and crediting

¹ Counsel for the General Counsel filed a motion to submit a brief on this remand, to which he attached a brief. Counsel for the Respondent objected and moved that Counsel for the General Counsel be sanctioned for having submitted a brief without authorization to do so. Both motions are hereby denied. I have not considered the brief submitted by Counsel for the General Counsel as the only issue on remand concerns reevaluating credibility resolutions.

Ferrari where there were factual disputes) I relied in part on demeanor. In addition, I stated, with regard to the asserted failure of Ferrari to meet with Lewis on January 22:

5 However this alleged act of insubordination was not given as a reason on any of the forms Lewis filled out in defense of Ferrari's unemployment compensation nor testified to by Lewis at the unemployment compensation hearing.

10 The Board found that in fact Lewis did testify about Ferrari's alleged refusal to meet her on January 22. The Board therefore remanded the case that I "reconsider (my) credibility determinations and to prepare a supplemental decision in light of the erroneous basis (I) asserted for discrediting Lewis' testimony."

15 The statement in my decision that the alleged act of insubordination was not "testified to by Lewis at the unemployment compensation hearing" was probably incorrect. Although a transcript of the proceedings was not offered into evidence, certain portions were read into this record. In answer to a question by the Referee, Lewis said, "I waited until the shift was over and then I wanted to talk to her. I was going to give her a written reprimand." Further, Ferrari did testify in this proceeding that "the first (she) ever knew" about the Respondent's contention
20 that supervisor Melba Custer (then Nichols) had told her to report to Lewis on January 22 was at the unemployment hearing.

25 Nevertheless, the rest of my finding concerning this issue was correct -- that the refusal to meet was not given as a reason on any of the forms Lewis filled out in defense of Ferrari's unemployment compensation. Further, Lewis offered into evidence a paper on which she had written a list Ferrari's many faults and which she claims she intended to read to Ferrari on January 23 when discharging her. Not meeting with Lewis on January 22 was not listed. Finally, Lewis testified that her purpose in wanting to see Ferrari on January 22 was to give her a written reprimand she had prepared (or possibly discharge her). She did not produce the
30 written reprimand at the hearing in this case because, she testified, she threw it away, notwithstanding that she kept a file of every other note she had made concerning Ferrari. I do not believe there was ever such a document.

35 Ferrari testified that near the end of her shift on January 22 she told Custer that she needed to leave promptly at 1:00 p.m. as she had "some place I have to go. And she said no problem." Ferrari testified that Custer did not tell her to see Lewis after her shift. This version was corroborated by then cashier Heidi Conrad, who appeared credible, who is no longer an employee of the Respondent and who has no apparent stake in the outcome of this matter. Conrad did testify that earlier on January 22, following appearance at the restaurant by Ferrari's
40 husband, Lewis told her to tell Ferrari she wanted to see Ferrari. In fact Ferrari did meet with Lewis as requested.

45 It is unclear exactly when the Respondent first raised Ferrari's alleged failure to meet with Lewis as a defense to the unemployment claim (and the allegations here). While Lewis did testify, in answer to a question by the Referee, that she wanted to see Ferrari to give her a reprimand, Ferrari's failure was not addressed in the Referee's decision, suggesting it was not asserted as a defense at that stage. Only at the appeal level was this alleged act of insubordination considered. The appeal panel found this defense credible and dispositive.

50 Regardless, the fact that Lewis may have testified to this alleged act of insubordination at the unemployment hearing, and raised it as a defense even before the Referee, does not

prove it happened. I conclude it did not. I credit Ferrari and Conrad and discredit Lewis and Custer.

5 Having reviewed the record, I find no basis to revise my evaluation of the demeanor of
 the witnesses, to reverse my credibility resolutions or to change my ultimate conclusion that
 Lewis discharged Ferrari on January 23, 1997, because Ferrari wanted to discuss a pay issue
 on behalf of herself and another employee. Specifically, I discredit Lewis' testimony that she
 made the decision to discharge Ferrari on January 22, after Ferrari failed to meet with her as
 10 directed. I believe this was false testimony offered for the purpose of proving that the discharge
 decision was made prior to Ferrari having engaged in protected concerted activity on January
 23. Again, I base this in part on my perception of Lewis' demeanor, but also on the inherent
 incredulity of her testimony. For instance, Lewis gave no plausible explanation of why, if the
 discharge decision was made on January 22, Ferrari was allowed to work a full shift on January
 15 23; or why, as Lewis admitted, she even discussed the pay issue with Ferrari on January 23; or
 why this alleged act of insubordination was absent from the list of misdeeds Lewis intended to
 read to Ferrari when discharging her and the unemployment compensation forms.

20 I therefore adopt and reaffirm the Findings of Fact and Conclusions of Law in my initial
 decision and recommend that the Respondent be ordered to cease and desist from engaging in
 the unfair labor practices found and take certain affirmative action designed to effectuate the
 policies of the Act, including reinstating Lynette Ferrari to her former job, or if that job no longer
 exists, to a substantially identical position of employment and make her whole for any loss of
 wages or other benefits she may have suffered in accordance with the formula set forth in *F.W.*
Woolworth Co., 90 NLRB 289 (1950) and *New Horizons for the Retarded*, 283 NLRB 1173
 25 (1987):²

ORDER

30 The Respondent, Linda Lewis and Roger Weekly, Individually and as a Partnership
 d/b/a Iron Griddle Restaurant, their officers agents, successors and assigns, shall:

35 1. Cease and desist from:

a. Discharging or otherwise discriminating against employees because they
 engage in concerted activity protected by the National Labor Relations Act.

40 b. Threatening employees with discharge should they engage in concerted
 activity protected by the National Labor Relations Act.

c. Interfering with employees rights under the National Labor Relations Act by
 telling them that an employee has been discharged for contacting the National Labor Relations
 Board.

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²If 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.

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.

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

10 a. Offer Lynette Ferrari immediate and 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, and make her 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.

15 b. Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against her in any way.

20 c. Preserve and, within 14 days of a 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.

25 d. Within 14 days after service by the Region, post at its facility copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 6, 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed its 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 the date of this Order.

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40 e. 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.

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45 Dated, Washington, D.C.
November 6, 1998

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50 ³ If this Order is enforced by a Judgment of the 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."

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James L. Rose
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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 or otherwise discriminate against employees because they engage in concerted activity protected by the Act.

WE WILL NOT threaten our employees with discharge should they engage in concerted activity protected by the Act.

WE WILL NOT interfere with our employees rights under the Act by telling them that an employee has been discharged for contacting the National Labor Relations Board.

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 Lynette Ferrari immediate and full reinstatement to her former job, or if that job no longer exists, to a substantially equivalent position of employment and we will make her whole for any loss of wages or other benefits she may have suffered as a result of our discrimination against her, with interest.

Linda Lewis and Roger Weekly, Individually and as
a Partnership, d/b/a Iron Griddle Restaurant

(Employer)

Dated _____ By _____
(Representative) (Title)

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 with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1000 Liberty Avenue, Room 1501, Pittsburgh, Pennsylvania 15222-4173, Telephone 412-644-2969.

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