

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

WATPRO SERVICES

and

Case 24--CA--7630

**FEDERACION CENTRAL
DE TRABAJADORES**

Harold E. Hopkins, Jr., Esq.

(San Juan, Puerto Rico)
for the General Counsel.

Yolanda V. Toyos Olascoaga, Esq.

(San Juan, Puerto Rico)
for the Respondent.

Juan Robles

(San Juan, Puerto Rico)
for the Union.

DECISION

I. Statement of the Case

1. **JERRY M. HERMELE, Administrative Law Judge.** This case presents the question of whether janitor Ramon Feliciano-Felix was terminated from his job in March 1997 because of his union affiliation, in violation of the National Labor Relations Act. The General Counsel alleges just this in its complaint issued on April 29, 1997. In its answer of May 20, 1997, the Respondent contends that Feliciano was terminated because he "failed to approve" his probationary period at work. The case went to trial on August 13, 1997, in San Juan, Puerto Rico, with four witnesses being called by the General Counsel and/or Respondent.¹ Finally, both parties filed their briefs on September 24, 1997.²

II. Findings of Fact

¹ At the hearing, only page 6 of Respondent's Exhibit 1(a) (the English translation of R. Ex. 1) was received. So, after the hearing, Respondent filed a motion to receive pages 1-5. But the General Counsel disagreed with Respondent's translation and filed its own version. Because it makes no difference to the outcome of this case, the Presiding Judge accepts both versions. Also, the General Counsel's unopposed motion to correct the transcript will be granted.

² Respondent's unauthorized reply brief, filed on October 14, 1997, was stricken, and not read, by the Presiding Judge.

2. In the early 1990s, janitorial services to various federal facilities in Puerto Rico were provided by Hispanic Maintenance Service, Inc. (Hispanic Maintenance). Ramon Feliciano-Felix started work for this company beginning in 1991. Feliciano also worked as a janitor for 10 years before that in New York (Tr. 41-42). Hispanic Maintenance had a collective-bargaining agreement with a union at this time (G.C. Ex. 3). In 1994, however, a new union--the Federacion Central de Trabajadores (the Union)--represented the Hispanic Maintenance employees (G.C. Ex. 4). Then, on November 1, 1995, Watpro Services (Watpro) took over the business of Hispanic Maintenance. Watpro is a sole proprietorship owned by Jose Cuadrado (Tr. 17). Watpro assumed the 1994 collective-bargaining agreement, as well as the old company's 37 employees, including Feliciano (G.C. Ex. 5; Tr. 91-92). Watpro also provides janitorial services to the Veterans Administration's nursing home in Rio Piedras, which is nonunion (Tr. 23). For all its operations, Watpro derives yearly gross revenues over \$500,000 and provides services valued at over \$50,000 a year (G.C. Ex. 1(c)).

3. As a union member working at the Federal Building, Feliciano earned \$8.45 per hour, plus medical benefits, sick leave, and vacation (Tr. 43). In October 1996, the Federal Building in Old San Juan closed for renovation, necessitating Feliciano's layoff based on his lack of seniority. More senior employees would be relocated to the new federal facility in Hato Rey. Cuadrado notified Feliciano of this layoff in a November 5, 1996 letter, which set November 8, 1996 as his final day of work (G.C. Ex. 15). Another Watpro employee, Danny Campos, was also laid off (Tr. 153-55). Because of the approaching holiday season, Feliciano asked Cuadrado for another job and Cuadrado offered a position at the VA nursing home, whose workers were not covered by the collective-bargaining agreement. Thus, the position entailed no benefits and a lesser hourly salary of \$6.50. According to Cuadrado, he told Feliciano that he was also subject to a probationary period for this new job (Tr. 44-46, 132-33).

4. James Morales supervised seven employees at the VA nursing home, including Feliciano (Tr. 49, 105-06). Feliciano started the new job on November 11, 1996 (G.C. Ex. 18). This new job also entailed basic janitorial duties such as cleaning floors and throwing out trash. However, part of the trash at this job was contaminated waste such as needles (Tr. 47-48). But the main part of the job was polishing floors (Tr. 128). Feliciano worked five days a week, Monday through Friday, from 2:30 p.m. to 11:00 p.m.. Morales, however, worked the first shift and left shortly after 2:30 p.m. each day (Tr. 50, 81).

5. According to Cuadrado, all Watpro employees are subject

to the maximum 90-day probationary period as provided by Puerto Rico law (G.C. Ex. 20). According to Feliciano, though, nobody ever told him that he was subject to a probationary period at the new job (Tr. 65). Rather, the only probationary period he knew
5 of was his initial three-month period of working for Hispanic Maintenance (Tr. 67). Watpro also has a progressive disciplinary system (Tr. 25-27). For example, in 1996, Watpro issued five disciplinary actions against various employees, ranging from warnings to suspensions, for such things as prohibited smoking,
10 failure to wear a proper uniform, and absenteeism (G.C. Exs. 10-14). Also, on Morales' recommendation, two employees at the VA nursing home were terminated for failing the probationary period (Tr. 107, 117, 126-27).

15 6. Feliciano considered himself Cuadrado's right-hand man at the VA nursing home. Indeed, Cuadrado occasionally offered Feliciano special jobs to earn extra money (Tr. 160-61). Although Feliciano testified that Morales "has a temperment," he rarely saw Morales because of their different work schedules. In
20 his four months at the new job, Feliciano estimated that he had only two or three problems with Morales, including a disagreement regarding Morales' treatment of another janitor at the nursing home. But overall, Feliciano considered his relationship with Morales to be good (Tr. 74, 81, 88). Whenever Feliciano had a
25 problem with Morales, he would talk to Cuadrado about it. Feliciano estimated about five or six such conversations. According to Feliciano, Cuadrado told him not to pay too much attention to Morales (Tr. 160, 162). As for his work performance, Feliciano believes it was excellent (Tr. 66).
30 Moreover, he testified that he never received any complaints from Cuadrado or Morales, and that Cuadrado never visited him at work to talk about his work performance or relationship with Morales (Tr. 50, 65, 158, 161).

35 7. According to Morales, Feliciano's work was "deficient" and he told Feliciano and Cuadrado about these deficiencies. For example, Feliciano once failed to clean a doctor's office when told to, and failed to clean up trash outside the nursing home. Further, Morales viewed Feliciano as "reticent" in following his
40 orders and Feliciano told him that he would go over his head and talk to Cuadrado about any disagreements (Tr. 108-111). However, Morales conceded that he had very little day-to-day contact with Feliciano, that Feliciano often showed up early for work, and that Feliciano performed the main part of his job--polishing the
45 floors--very well. Further, Morales could only remember the one instance involving the doctor's office where Feliciano failed to polish the floors. Morales also testified that cleaning the trash outside the nursing home was a very minor part of Feliciano's duties (Tr. 115-16, 123-26). Finally, Morales never recommended that Feliciano be fired during the 90-day "probationary period" (Tr. 120). As for Cuadrado, he was told by

Morales that Feliciano wanted to perform the job Feliciano's way. But Cuadrado viewed Feliciano's performance as acceptable. Because of Morales, however, Cuadrado met with Feliciano to tell him that he should obey Morales (Tr. 133-35). Indeed, Cuadrado testified that he met with Feliciano four or five times to discuss his job performance (Tr. 148).

8. Samuel Quiles Nazario was one of the more senior Watpro employees who retained his job at the Federal Building. Quiles, however, never returned to his job after leaving because of illness in December 1996. So, Watpro wrote a January 17, 1997 letter to Quiles notifying him of his termination (G.C. Exs. 6-7). Feliciano soon learned of Quiles' departure and the apparent opening at the Federal Building. Because he wanted to return to his better job, and believed he was next in line to return, Feliciano called Juan Robles, the Union's business representative, and asked Robles to talk with Cuadrado about his returning (Tr. 52-55, 90, 93). Robles then spoke with Cuadrado, who told Robles that Feliciano was happy with his new job at the VA nursing home. Robles then called Feliciano, who repeated his wish to return to the Federal Building (Tr. 94-95). Cuadrado then visited Feliciano at work and asked him why he had brought the Union into the matter of the vacancy at the Federal Building. Then, according to Feliciano, Cuadrado told him to stay at the nursing home or be fired (Tr. 56-57).

9. Robles contacted Cuadrado again, on February 27, 1997, to request a meeting with all three men. Cuadrado denied Robles' request (Tr. 96-98). So, on March 4, 1997, Robles wrote a letter to Cuadrado invoking arbitration, as stipulated by the collective-bargaining agreement (G.C. Ex. 19). According to Feliciano, Cuadrado visited him again, on March 6, 1997, asking what Feliciano was going to do next. Feliciano replied that the arbitration would have to go forward. Then, Cuadrado reminded him that he had been fair in the past by paying him for some accumulated sick leave. Feliciano told Cuadrado, though, that this was something Cuadrado was required to do. Further, Feliciano thought that Cuadrado seemed "bothered" by the Union's intervention (Tr. 57-59, 162).

10. On March 7, 1997, Morales told Feliciano that Cuadrado had fired him. Immediately, Feliciano went over to the Federal Building to talk to Cuadrado, who according to Feliciano said that he was being fired because "I couldn't have my head in two places." (Tr. 60-63). Cuadrado then gave him a letter dated March 7, 1997, stating:

We regret to inform you that we have evaluated your work during this probationary period of three months and the same does not meet our company's expectations. Therefore we have decided to terminate

you, today March 7, 1997, and not grant you a permanent work appointment.

5 (G.C. Ex. 17). But Cuadrado testified that he wrote a letter to the local unemployment office in August 1997 that Feliciano was let go for lack of work, in order to improve Feliciano's chances of collecting unemployment benefits (G.C. Ex. 25; Tr. 150-52). Cuadrado also told Feliciano that the vacant position at the Federal Building went to someone with more seniority than 10 Feliciano (Tr. 134). But Cuadrado denied that he terminated Feliciano because of the latter's efforts to obtain that vacant position (Tr. 143). In this connection, Cuadrado testified that he did not learn of the Union's March 4 letter invoking 15 arbitration until March 11, 1997. Specifically, Cuadrado explained that his wife went to the post office to check the mail on Tuesday, March 11, 1997, and received the March 4 letter only then. Then, according to her customary practice of noting when letters from the Union were actually received, she wrote the 20 March 11 date on top of the March 4 letter (R. Ex. 2; Tr. 135-38). However, Cuadrado also received letters from the Union, regarding other matters, dated February 25 and February 26, 1997, and neither of those letters was written on to indicate the actual date of receipt (G.C. Exs. 23-24; Tr. 144-45).

25

30

35

40

45

III. Analysis

5 11. The standards of Wright Line, 251 NLRB 1983 (1980),
provide the path for resolving the central issue of this case:
was Feliciano terminated because he sought the Union's help in
returning to his old, and better, union job at the Federal
Building. Thus, the General Counsel must establish, by a
preponderance of the record evidence, that the employer's union
10 animus was a motivating factor in the decision to terminate
Feliciano. If this is so established, then the burden shifts to
the Respondent to show, also by a preponderance of the evidence,
that the termination occurred for a lawful reason unrelated to
Feliciano's union membership or activities.

15

12. Upon a thorough review of the record evidence, the
Presiding Judge concludes that the General Counsel has easily met
its Wright Line burden. To do so, the General Counsel must show
(1) that the employee was engaged in protected activity, (2) that
20 the employer was aware of the activity, and (3) that the
employer's union animus was a substantial or motivating reason
for the employer's action. FPC Holdings, Inc. v. NLRB, 64 F.3d
935 (4th Cir. 1995), enfg. 314 NLRB 1169 (1994). All three
factors have been established here. Initially, the chain of
25 events leading to Feliciano's termination was triggered by
Feliciano's efforts, beginning in January 1997, to return to his
old job by contacting union official Robles. And this effort is
clearly the type of protected activity covered by Section 7 of
the Act. Next, it is likewise clear that Cuadrado was aware of
30 Feliciano's efforts, as evidenced by Robles' two conversations
with Cuadrado concerning Feliciano's request.

35

13. Regarding union animus, there are two main indicia
thereof. First, the timing of Robles' efforts and Feliciano's
35 abrupt termination is highly suspicious and, therefore, is
persuasive evidence of Watpro's bad motive. See NLRB v.
Montgomery Ward & Co., 242 F.2d 497, 502 (2d Cir.), cert. denied,
355 U.S. 829 (1957). Indeed, Robles invoked arbitration over
40 Feliciano's request in a March 4 letter to Cuadrado and Feliciano
was fired on March 7. As for Cuadrado's testimony that he only
received the arbitration letter on March 11--the date handwritten
by his wife thereon--the Presiding Judge flatly rejects this
self-serving position. Indeed, Cuadrado's explanation that his
45 wife always hand-dates the receipt of union letters is at odds
with the evidence establishing that the March 4 letter from
Robles was the only union letter that received such "special"
treatment. The plain fact is that Cuadrado manufactured this so-
called business practice for use on the witness stand, and that
he probably manufactured the March 11 handwritten received date
on the arbitration letter as well in a pathetic effort to deny
knowledge of the March 4 letter before firing Feliciano on March

7. Ironically, this deceitful effort was needless because the record is clear that Cuadrado knew of Robles' efforts to help Feliciano as early as January or February 1997. Second, the credible and unrebutted testimony of Feliciano provides a wealth of evidence showing Cuadrado's union animus. Thus, notwithstanding Cuadrado's highly generalized denial that the fired Feliciano because of the latter's effort to obtain the vacant job at the Federal Building (Tr. 143), Feliciano testified that Cuadrado visited him at work, after Robles' first conversation with Cuadrado, to ask why Feliciano brought the Union into the matter. Likewise, Feliciano's testimony about the events of March 6 is unrebutted, in which an upset Cuadrado visited Feliciano again, shortly after his second conversation with Robles about the job vacancy, to ask Feliciano what Feliciano's next move would be. Also, Watpro did not specifically rebut Feliciano's testimony that Cuadrado told him to stay at the VA nursing home or be fired. Further, it is clear that Cuadrado lied to Robles by telling him that Feliciano was happy at the VA nursing home, in a hapless attempt to derail Robles' efforts. Thus, the preponderance of the evidence establishes that Cuadrado exerted considerable effort to stop Feliciano from engaging in protected union activity and, when that effort failed, he fired Feliciano solely because of Feliciano's lawful efforts.

14. Turning to Watpro's proffered explanation at trial for Feliciano's termination, the Presiding Judge finds it entirely pretextual. In short, Watpro has woefully failed to establish that Feliciano was a "deficient" employee. On the contrary, Morales conceded that Feliciano performed the main part of the job--polishing the floors--very well and that Feliciano was usually early for work. And as for substantive deficiencies, Morales could only remember a minor problem regarding Feliciano's outside trash removal and one incident about failing to clean a doctor's office, the circumstances of which Feliciano adequately justified in his testimony. Finally, Morales testified that he did not recommend Feliciano's termination. Likewise, Cuadrado conceded that his only problem with Feliciano was the latter's failure to obey Morales. But Cuadrado could point to no specific failure by Feliciano to follow Morales' orders. Moreover, it is telling that Watpro never issued any progressive discipline against Feliciano, such as warnings which it issued against other employees.³ In short, Watpro's reason for terminating Feliciano, as opposed to Feliciano's job performance, is deficient.

³ Watpro contends that the evidence of warnings to other employees only involved the unionized workers at the Federal Building, and thus is irrelevant to establish disparate treatment. But the General Counsel is correct that "at no time did Respondent present evidence that it had two different sets of work rules and personnel systems."

15. As for Watpro's explanation, in its March 7, 1997 letter to Feliciano and May 20, 1997 answer to the General Counsel's complaint, that Feliciano flunked the probationary period, the Presiding Judge concludes that there was no such thing covering
 5 Feliciano's job at the VA nursing home. First of all, even accepting Watpro's characterization of the VA nursing home as a "new job," thus subject to a probationary period, Feliciano satisfied that 90-day period as of February 11, 1996. Yet Watpro failed to take any adverse action against Feliciano until nearly
 10 one month later. Second, Watpro fudged the relevant dates to add credence to its probation theory. Specifically, Watpro's answer to the General Counsel's complaint stated that Feliciano was hired in December 1996. But after the evidence at trial clearly established November 1996 as the correct starting date, Watpro
 15 conceded that the date in its answer was wrong (Tr. 85).⁴ Third, as noted above, Feliciano credibly testified that he was never told that he was on probation at the VA nursing home job. Finally, the VA nursing home job involved unskilled janitorial duties similar to that of the Federal Building job. Hence, there
 20 was logically no reason for Watpro to place an experienced employee such as Feliciano on probation. In sum, Watpro concocted pretextual reasons, before the hearing and during the hearing, to terminate Feliciano to hide the true reason, which was just as the General Counsel alleges. See Limestone Apparel Corp., 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).
 25

16. As a final matter, Watpro contends that it is "highly unbelievable that an employer that hires all of his predecessor's employees, recognizes the incumbent Union, and assumes the
 30 Collective Bargaining Agreement, and hires a unionized employee for a nonunion facility, would fire the employee because of a potential arbitration case." Based on the overwhelming weight of the record evidence as discussed above, however, the Presiding Judge believes it. Thus, because it is concluded that Watpro
 35 violated Section 8(a)(1) and (3) of the Act, Feliciano is entitled to reinstatement with backpay. Also, Watpro will be required to post appropriate remedial notices, in English and Spanish.
 40

IV. Conclusions of Law

1. The Respondent, Watpro Services, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
 45

⁴ In its brief, Watpro contends that Feliciano's "official date of employment was December 16, 1996, thus the 90-day period extended until March 15, 1997. However he had started working on November 11, 1995." As can be seen, Watpro's position on this entire matter is, at a minimum, utterly incomprehensible.

2. The Union, Federacion Central de Trabajadores, is a labor organization within the meaning of Section 2(5) of the Act.

5 3. Respondent violated Section 8(a)(1) of the Act in threatening Ramon Feliciano-Felix with discharge in February 1997.

10 4. Respondent violated Section 8(a)(3) of the Act in terminating Feliciano on March 7, 1997.

15 5. The unfair labor practices of Respondent described in paragraphs 3 and 4, above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

15 **ORDER**

20 Accordingly, **IT IS ORDERED** that the Respondent, Watpro Services, San Juan, Puerto Rico, its officers, agents, successors, and assigns, shall:⁵

25 1. Cease and desist from discriminatorily terminating any employees because of their union activity, threatening employees with termination because of their union activity, and, in any like or related manner, interfering with, restraining, or
30 25 coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

35 (a) Within 14 days from the date of this Order offer Ramon Feliciano-Felix the job he was terminated from or, if that job no longer exists, a job at a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

40 (b) Make Ramon Feliciano-Felix whole for any loss of pay and benefits he may have suffered by reason of his unlawful termination to be computed as set forth in F. W. Woolworth Co., 90 NLRB 289 (1950), with interest as computed in New Horizons for the Retarded, 283 NLRB 1173 (1987).

45 (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,

⁵ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

5 (d) 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 former employee in writing that it has done so and that it will not use the discharge against him, in any way.

10 (e) Within 14 days after service by the Region, post at its facility in San Juan, Puerto Rico, and all other places where notices customarily are posted, copies of the attached notice marked "Appendix," in English and Spanish.⁶ Copies of the
15 notice, on forms provided by the Regional Director for Region 24, 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
20 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
25 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 February 1997.

30 (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.

35 3. **IT IS FURTHER ORDERED** that Respondent's September 12, 1997 motion to submit Exhibit 1(a) is **GRANTED**, and that Exhibit 1(a), pages 1-5 **ARE RECEIVED**.

40 4. **IT IS FURTHER ORDERED** that the General Counsel's September 25, 1997 motion to accept the translation of Respondent's Exhibit 1(a), pages 1-5 **IS GRANTED**, and that this version of Exhibit 1(a), pages 1-5 **IS ALSO RECEIVED**.

45 5. **IT IS FURTHER ORDERED** that the General Counsel's September 25, 1997, motion to correct the transcript **IS GRANTED**.

⁶ 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."

Dated, Washington, D.C. December 5, 1997

Jerry M. Hermele
Administrative Law Judge

5

10

15

20

25

30

35

40

45

APPENDIX

NOTICE TO EMPLOYEES

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

10 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.

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

25 WE WILL NOT discharge or threaten to discharge our
employees for engaging in these protected, concerted
activities.

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.

30 WE WILL within 14 days from the date of this Order offer
RAMON FELICIANO-FELIX full reinstatement to his former
job or, if that former job no longer exists, to a
substantially equivalent position without prejudice
35 to his seniority or any other rights or privileges
previously enjoyed.

40 WE WILL make him whole for any loss of earnings and
other benefits resulting from their discharge, less
any net interim earnings, plus interest.

45

5

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

10

WATPRO SERVICES

(Employer)

15

Dated _____

By _____

(Representative)

(Title)

20

25

This is an official notice and must not be defaced by anyone.

30

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, **La Torre de
Plaza, Suite 1002, 525 F. D. Roosevelt Avenue., San Juan, PR 00918-1002, Telephone.
787-766-5426.**

35

40

- II -

45