

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 25

COMPASS GROUP USA, INC. D/B/A
CHARTWELLS DINING SERVICES

and

Cases 25-CA-134883
25-CA-136328

UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL 700, a/w UNITED FOOD AND
COMMERCIAL WORKERS UNION, AFL-CIO

GENERAL COUNSEL'S BRIEF
TO THE ADMINISTRATIVE LAW JUDGE

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Comes now Counsel for the General Counsel and respectfully submits this General Counsel's Brief to the Administrative Law Judge in support of the General Counsel's position in the cause herein, and states as follows:

I. INTRODUCTION

These cases involve the General Counsel's allegations that Compass Group USA, Inc., d/b/a Chartwells Dining Services (herein called Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (herein called the Act). These violations occurred during an organizing campaign by United Food and Commercial Workers Union, Local 700, a/w United Food and Commercial Workers Union, AFL-CIO (herein called the Union), which culminated in an election on August 26, 2014. In response to the organizing, Respondent violated Section 8(a)(1) by, *inter alia*, interrogating employees and creating the impression among its employees that their union activities were under surveillance. Respondent further violated Section 8(a)(1) by informing employees that they were being disciplined for complaining about wages, hours, and

working conditions. Additionally, Respondent violated Section 8(a)(3) by disciplining its employee, Joyceanna Pettigrew, for concerted complaining to Respondent regarding employee wages, hours, and working conditions. Respondent disciplined Employee Pettigrew because she formed, joined, and assisted the Union and engaged in protected concerted activities, and in an effort to discourage its employees from engaging in union activities or other concerted activities.

II. STATEMENT OF FACTS

Respondent is a corporation with an office and place of business at Anderson University in Anderson, Indiana. Respondent is in the business of providing contracted food services. (TR 15). Respondent began its operations at Anderson University in July 2013. (TR 15). Prior to July 2013 another company, Creative Dining Services, was responsible for providing contracted food services. (TR 101). Respondent employs approximately 60 employees in different positions, including food service workers, dishwashers, cooks, bakers, and porters. (TR 20-21). The facility operates multiple employee shifts around Respondent's daily hours of operation, which are the following: Monday through Thursday from 7:15 a.m. to 11:00 p.m.; Friday from 7:15 a.m. to 10:00 p.m.; Saturday from 11:00 a.m. to 10:00 p.m.; and Sunday from 11:00 a.m. to 11:00 p.m. (TR 21).

Respondent's current Regional District Manager, Steve Bryant, oversees thirteen of Respondent's different accounts in different state locations. (TR 18). Prior to Bryant, Nick Macarelli held the position of Regional District Manager during 2014. (TR 18-19). Kellie Short, Respondent's Director of Dining Services, reports to the Regional District Manager and oversees all of the food service operations for Anderson University and is in charge of all financial aspects and employee relations. (TR 16, 18). Short has held this position since May 2014. (TR 32). Dusten Tryon is Respondent's Retail Manager, and he has held this position since July 2013.

(TR 17). Tryon reports to Short and is responsible for scheduling, food service ordering for retail, and he oversees employees. (TR 17). Bill Breslin is Respondent's Director of Labor Relations and he is not located at Respondent's Anderson University office; however, he interacts with Short about once a month. (TR 20).

The Union began an organizing campaign to seek representation of Respondent's employees sometime during December 2013. (TR 102). During the organizing campaign in the spring of 2014, Retail Manager Tryon approached Employee Patricia Carter about the Union. (TR 42). Tryon approached Carter around lunchtime in the stock area. (TR 42-43). Tryon told Carter that there was discussion going around about possibly starting a union. (TR 43). Tryon told Carter that he did not feel that the union was a good idea and that managers should be the ones to make decisions about employee relations. (TR 43-44). Carter responded that she believed having a union was a good idea because she felt the company needed supervision. (TR 44).

The Union filed a petition for an election on June 10, 2014. (G.C. Exh. 1(k)). After the Union filed the petition, Respondent conducted mandatory summer training meetings for all employees on June 25 and 26, 2014. (TR 31). Various topics were discussed during the June 25 meeting, including a review of work policies and discussions about the Union. (G.C. Exh. 6, TR 55). At the June 25 meeting, Director of Dining Services Short ran the portion of the meeting reviewing work policies and Director of Labor Relations Breslin ran the portion of the meeting discussing the Union. (G.C. Exh. 6, TR 56-57).

During Short's presentation about work policies, the topic of scheduling was discussed. (TR 58). An employee brought up that she was initially scheduled to work, but she came in and the schedule was gone and she was not contacted about the change in schedule. (G.C. Exh. 3A pgs. 1-2, TR 58-59, 105). Short stated that the supervisor should have let the employee know

about the schedule change, but that it was ultimately the employee's responsibility to check his or her schedule. (G.C. Exh. 3A pg. 2, TR 58-59). Short told employees that if they needed to call every day or come in to make sure the schedule was correct then they could do that. (G.C. Exh. 3A pg. 2). Employee Joyceanna Pettigrew then commented that the schedules will state one thing on one day and then the next day it is completely different and nobody from management would tell employees. (G.C. Exh. 3A pg. 2). Short responded to Pettigrew's comment that the schedule is the employee's responsibility to check and that employees could call before coming in to make sure that the schedule is right. (G.C. Exh. 3A pg. 2, TR 58-59). Pettigrew and another employee, Sybilla Bryson, asked for clarification whether employees needed to call every day to ask if they are still on the schedule when the schedule changes. (G.C. Exh. 3A pg. 3, TR 58-59, 105). Short responded that schedules are subject to change at the last minute and that they should do that if the employees wanted to work. (G.C. Exh. 3A pg. 3). Short noted that she had asked managers and supervisors to call employees and let them know when the schedule changed and if that is not happening then it could be discussed. (G.C. Exh. 3A pg. 3). Short reiterated that it was the employee's responsibility, not management's, to check employee schedules. (G.C. Exh. 3A pg. 3). Pettigrew stated that employees were already taking responsibility by looking at the time clock and finding out what times they were supposed to work. (G.C. Exh. 3A pg. 3, TR 59). Pettigrew asked if the schedule is then changed two days later whether employees are supposed to call every day or go check the schedule every day to make sure it has not been changed. (G.C. Exh. 3A pg. 3). Short said that she did not recommend that employees go to the facility every day but that employees should call. (G.C. Exh. 3A pg. 3). Short then said that the schedule is more standard during the school year, but during the summer it was out of management's control. (G.C. Exh. 3A pg. 3). Pettigrew responded that even during the school year the schedule

changed all of the time. (G.C. Exh. 3A pg. 4). When Pettigrew and Bryson asked if a manager does not call regarding a schedule change would it count against employees and would they be responsible for checking the schedule, Short said that if the two of them wanted to take it out of the room and talk about it that they could but that they would not discuss it in the meeting anymore. (G.C. Exh. 3A pg. 4). Pettigrew then asked what was the point of the meeting and asked, "That's what this is for, right?" (G.C. Exh. 3A pg. 4). Short responded that it was but that "we are not going to battle back and forth between you two." (G.C. Exh. 3A pg. 4). Bryson then asked if anybody else wanted to hear the answer. (G.C. Exh. 3A pg. 4). At that point in the meeting, another employee asked for clarification about if managers changed the schedule in the middle of the night. (G.C. Exh. 3A pgs. 4-5). Short responded that she had asked managers and supervisors to call people, but ultimately it was the employee's responsibility to check the schedule. (G.C. Exh. 3A pg. 5). That portion of the meeting regarding work schedules then concluded.

Also during the June 25 meeting, Breslin provided a presentation to employees about the Union. Breslin told employees reasons why they should not join the Union. (TR 57). Short was also present during Breslin's presentation. (TR 57). During this meeting Employee Joyceanna Pettigrew made comments about her good experiences with the Union. (TR 58).

On the second day of employee meetings on June 26, 2014, at around 9:00 a.m., Employee Joyceanna Pettigrew spoke with Short in the meeting room. (TR 60). Pettigrew handed Short a letter that stated Pettigrew was involved in organizing. (G.C. Exh. 5, TR 61). Pettigrew told Short that it was nothing personal against her or then-Regional District Manager Nick Macarelli, but she felt that Respondent did not treat its employees right and that the Union would help employees and management. (TR 61).

On June 27, 2014, Short pulled Pettigrew into Short's office. (TR 62). Also present was Retail Manager Dusten Tryon. (TR 62). Short told Pettigrew that she was giving Pettigrew a verbal warning because she was rude and made everyone feel uncomfortable in the employee training meetings. (TR 62). Pettigrew responded that she did not think she made everyone feel uncomfortable, and she was sorry if she made Short feel uncomfortable, but the employees never got answers to questions they were asking about scheduling. (TR 63). Short responded that it was the employee's responsibility and if they have to check their schedule every day then that is what they have to do. (TR 63). During the disciplinary meeting Short did not provide Pettigrew with any other reason for her discipline. (TR 63). Short memorialized Pettigrew's verbal warning in a written document. (G.C. Exh. 2, TR 25). Right after receiving discipline on June 27, Pettigrew spoke with other employees about her discipline and asked them if she had made them uncomfortable during the June 25 meeting, as Short had told Pettigrew during her disciplinary meeting. (TR 118-119).

An election was held on August 26, 2014. The result of that election was 18 votes for the Union and 25 votes against the Union.¹ The Union filed objections to the election, which are also the subject of the instant proceedings. (G.C. Exh. 1(k)).

¹ The Union and Employer entered into a Stipulation for Resolution of Challenged Ballots, which was approved by the Regional Director on December 17, 2014. The Revised Tally of Ballots showed that the four unresolved challenged ballots were not sufficient in number to affect the outcome of the election.

III. ARGUMENT

A. Respondent Violated Section 8(a)(1) When It Created an Impression of Surveillance and Interrogated Employees About Their Union Membership, Activities, and Sympathies

In April 2014, Respondent, by its Retail Manager Dusten Tryon, created an impression of surveillance and interrogated employees about their union membership, activities, and sympathies, in violation of Section 8(a)(1). In determining whether an interrogation violates the Act the basic test is whether under the totality of the circumstances the interrogation reasonably tends to restrain, coerce or interfere with rights guaranteed by the Act. Rossmore House, 269 NLRB 1176, 1177 (1984). Among the factors that may be considered in determining whether an interrogation is unlawful are the identity of the questioner, the place and method of the interrogation, the background of the questioning and the nature of the information sought, and whether the employee is an open union supporter. Scheid Electric, 355 NLRB 160 (2010).

Employee Patricia Carter testified that her immediate supervisor, Tryon, approached her about the Union. During the conversation, Tryon told Carter that there was discussion going around about possibly starting a union. (TR 43). Tryon told Carter that he did not feel that starting a Union was a good idea. (TR 43). In addition, Tryon told Carter that decisions regarding employee benefits and hours should stay in “managers’ hands.” (TR 43-44). Carter responded that she believed having a Union was a good idea because she felt Respondent needed supervision. (TR 44). During the conversation Carter noted how she did not like how Respondent treated its employees and did not listen to its employees. (TR 44). Tryon’s statements to Carter were coercive in that as her supervisor he caught Carter off guard in the stock room, Tryon told her that he heard discussion about employees starting a union, and he then proceeded to make statements designed to elicit her response confirming or denying her union sympathies. All of

this was done at a point when Carter was not an open and notorious supporter for the Union. Respondent's coercive acts against Carter are a violation of Section 8(a)(1) of the Act.

Although Respondent may argue that in Carter's initial testimony she recalled her conversation with Tryon taking place maybe at the end of March 2014 (TR 42), which places the interrogation and creation of impression of surveillance outside of Section 10(b) of the Act, Carter later admitted that she told a Board Agent in a sworn witness affidavit that she provided on September 25, 2014, that Tryon approached her in April 2014. (TR 50). Carter's affidavit states the incident occurred in April 2014, and this account should be credited since her affidavit was provided closer in time to Tryon's interrogation. In addition, Respondent provided no evidence to refute Carter's testimony or provide an alternative finding regarding what was said during this conversation. Therefore, by Tryon telling Carter that he heard there was discussion going on about a Union and making statements to elicit Carter's sympathies about the Union, Respondent illegally interrogated Carter and created an impression of surveillance of employee union activities and violated Section 8(a)(1) of the Act.

B. Respondent Violated Section 8(a)(1) and (3) of the Act When It Disciplined Joyceanna Pettigrew for Raising Concerted Complaints and Informed Her That Her Discipline Was for Raising Concerted Complaints

On June 27, 2014, Respondent, by Director of Dining Services Short, disciplined Employee Joyceanna Pettigrew for raising concerted complaints about Respondent's employees' work schedules during the June 25 employee training meeting. Short further informed Pettigrew that she was being disciplined for raising complaints about employee working conditions. Respondent's actions by Short against Pettigrew violated Section 8(a)(1) and (3) of the Act.

Under established Board law the General Counsel has the initial burden of establishing that union or other protected concerted activity was a substantial or motivating factor in the

Respondent's action alleged to have violated Section 8(a)(1) and (3). Wright Line, A Division of Wright Line, Inc., 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in NLRB v. Transportation Management Corp., 462 U.S. 393 (1983). Under Wright Line, the General Counsel must first demonstrate, by a preponderance of the evidence, that the employee's protected conduct was a motivating factor in the adverse action. The General Counsel satisfies this initial burden by showing: (1) the employee's protected activity; (2) employer knowledge of such activity; and (3) animus. Proof of animus and discriminatory motivation may be based on direct evidence or inferred from circumstantial evidence. Robert Orr/Sysco Food Services, LLC, 343 NLRB 1183, 1184 (2004). The Board has long held that the timing of adverse action shortly after an employee has engaged in protected activity, or close to the filing of an election petition, may raise an inference of animus and unlawful motive. Lucky Cab Co., 360 NLRB No. 43, slip op. at 4 (Feb. 20, 2014). Once such unlawful motivation is shown, the burden of persuasion shifts to the Respondent to prove its affirmative defense that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. Wright Line, 251 NLRB at 1089; Manno Electric, 321 NLRB 278 (1996).

The record clearly establishes that Employee Pettigrew engaged in protected activity. In response to an employee's question to Short about management changing the employee's work schedule and not contacting the employee about the change, Pettigrew questioned whether employees were responsible for calling in every day to check if management had changed their work schedules after the schedules were already posted. (G.C. Exh. 3A, TR 58-59). After Pettigrew asked questions about the work schedules, other employees also started asking similar questions as Pettigrew. (G.C. Exh. 3A, TR 59). As Pettigrew and another employee, Sybilla

Bryson, continued asking questions to clarify the employees' concerns about the work schedules, Short said that the two of them could take the discussion out of the room and that it would no longer be discussed in the meeting. (G.C. Exh. 3A pg. 4). Pettigrew testified that she did not use foul language, yell, or throw anything during the meeting. (G.C. Exh. 3A, G.C. Exh. 3B, TR 59-60).

In addition, Pettigrew was an active supporter of the Union. (TR 54). The record clearly shows that Respondent was well aware of Pettigrew's union organizing efforts in addition to her protected concerted activities at the time of her discipline on June 27. On June 25, Pettigrew actively expressed her support for the Union during Breslin's presentation to employees against the Union. (TR 57-58, 112). In addition, on June 26, the day after Pettigrew raised concerted complaints about employee work schedules, Pettigrew gave Short a letter identifying Pettigrew as a supporter of the Union's organizing efforts. (G.C. Exh. 5, TR 22, 60-61).

There can be no doubt as to Respondent's anti-union animus. Short testified that she considered Pettigrew to be "disruptive" when Pettigrew made "little snide comments" that "she can't wait until the Union is here" at the June 25 meetings. (TR 30). Additionally, timing alone has been found to suggest anti-union animus as a motivating factor for an employer's actions. Masland Industries, Inc. & Masland Transportation, Inc., 311 NLRB 184, 197 (1993). In this case, an inference based on timing could be drawn based on Pettigrew expressing her support for the Union during the June 25 meeting conducted by Breslin, providing Short on June 26 a letter identifying her as a Union supporter, and then Pettigrew being disciplined the next day on June 27.

Because Pettigrew raised concerted complaints about work schedules during the June 25 meeting, Respondent disciplined her for these very acts on June 27. Turning to Respondent's

reasons for disciplining Pettigrew, the disciplinary form documenting Pettigrew’s verbal warning states that the work rules that were violated were “Abusive language and interfering and disruptive behavior during a meeting.” (G.C. Exh. 2). Respondent’s Employee Handbook identifies the following work rules as “Examples of Serious Offenses Which Will Normally Result in Stern Progressive Counseling, Possible Suspension, or Termination”:

- ...
- 2. Swearing or use of other abusive language;
- 3. Threatening, intimidating, or interfering with fellow Associates on Company and/or client premises;
-

(G.C. Exh. 4, pg. 22). Short testified that she consulted the handbook when making the decision to discipline Pettigrew and that these two work rules were relied upon as the “two main reasons” for disciplining Pettigrew. (TR 28-30). Short even went so far as to testify that there were no other reasons for Pettigrew’s discipline. (TR 26). However, Short’s testimony made it evident that was not the case. For instance, Short testified that she consulted with Respondent’s Director of Labor Relations Breslin regarding Pettigrew’s warning. (TR 25). In e-mails exchanged between Short and Breslin, Breslin told Short to give both Pettigrew and Employee Sybilla Bryson verbal warnings for “use of abusive language and interfering and disruptive behavior during a meeting.” (Union Exh. 4). However, Short admitted that she was the one who ultimately decided to discipline Pettigrew (TR 24), and only Pettigrew, who was the most vocal participant in raising concerted complaints during the June 25 meeting (G.C. Exh. 3A and B) and who submitted a letter on June 26 supporting the union (G.C. Exh. 5). There is no evidence that Employee Bryson also submitted a letter in support of the union, which further demonstrates that Short disciplined only Pettigrew because she engaged in protected concerted activity *and* because of her union activity.

In addition, Short could not provide a single example of Pettigrew using abusive language and eventually admitted that Pettigrew did not use abusive language during the meetings. (TR 27-28, 34). Short also admitted during her testimony that Pettigrew's comments, which Short felt were "disruptive," concerned employee schedules and meals and break times. (TR 34-35). Short testified that another reason she felt Pettigrew was "disruptive" throughout the day of the meetings was because Pettigrew made "little snide comments" such as how "she can't wait until the Union is here." (TR 30). Further evidencing that Respondent disciplined Pettigrew because she engaged in protected concerted activities on June 25 is the conversation between Pettigrew and Respondent's Regional District Manager, Nick Macarelli, on August 18, 2014. Pettigrew testified that just before Respondent's captive audience meeting about the Union started she asked Macarelli if she could speak up during the meeting, and Macarelli responded that Pettigrew would not be disciplined as long as she was not "rude or impolite." (TR 113). Macarelli's statement to Pettigrew demonstrates that Respondent's discipline of Pettigrew was because of her protected concerted activity of raising concerted complaints and not because she was "disruptive" or used "abusive language."

Based on the totality of the evidence, it is clear that Respondent violated Section 8(a)(1) and (3) of the Act when it disciplined Pettigrew. The evidence demonstrates that Respondent disciplined Pettigrew for engaging in protected concerted activity by raising concerted complaints about employee work schedules at the June 25 meeting, in violation of Section 8(a)(1). As Short testified, she considered Pettigrew "disruptive" and "disrespectful" because she raised concerted complaints about work schedules and meal and break times. In addition, Short could not identify any abusive language used by Pettigrew during the meetings even though Short relied on Pettigrew's alleged "abusive language" as a reason for her discipline. Respondent

was also well aware of Pettigrew's union and protected concerted activity and disciplined her within just a few days of Pettigrew raising concerted complaints and engaging in open union activity, in violation of Section 8(a)(3). Further, Respondent did not satisfy its burden to prove that it would have disciplined Pettigrew even in the absence of her union or protected concerted activity. No evidence was presented of Respondent disciplining employees for similar conduct in the past, and Pettigrew testified that she was not aware of any other employees being disciplined for the same reasons she was disciplined. (TR 63). Therefore, based on the evidence presented, Respondent violated Section 8(a)(1) and (3) of the Act by disciplining Pettigrew.

Furthermore, Respondent informed Pettigrew that her discipline was for engaging in protected concerted activities, in violation of Section 8(a)(1). As Pettigrew testified, when Short called Pettigrew into her office with Retail Manager Dusten Tryon also present, Short told Pettigrew that she was giving Pettigrew a verbal warning because she was rude and made everyone feel uncomfortable in the employee safety meetings. (TR 62). Short even testified that a verbal warning was used with Pettigrew to let her know that if her actions continued then she would be issued progressive counseling. (TR 121-122). Consequently, Short's statements informing Pettigrew of her discipline are coercive because they convey to Pettigrew that if she continues to make concerted complaints she will receive progressive discipline, they were made in Short's office in the presence of another supervisor, and they were made close in time to Pettigrew being outspoken about her support for the Union at the June 25 meeting and in her June 26 letter. The totality of the evidence at the hearing establishes that in the context and circumstances in which Short's statements were made during Pettigrew's June 27 disciplinary meeting, Respondent's statements were coercive and tend to discourage employees from engaging in protected concerted activities and constitute a violation of Section 8(a)(1).

Thus, based on the totality of the evidence it should be found that the Respondent violated Section 8(a)(1) and (3) of the Act by disciplining Pettigrew for raising concerted complaints about work schedules and for informing Pettigrew that her discipline was for raising concerted complaints. Such discipline was clearly meant to discourage and deny employees organizing efforts.

IV. CONCLUSION AND REMEDY REQUESTED

For the reasons stated above, and based on the record as a whole, the General Counsel respectfully submits that Respondent has violated Section 8(a)(1) and (3) of the Act as alleged in the Consolidated Complaint. The Administrative Law Judge is requested to find the aforementioned conduct to be in violation of the Act and to recommend an appropriate remedy for said violations including an order that Respondent: (1) cease and desist from all of its unlawful conduct; (2) remove from its files any reference to disciplining Joyceanna Pettigrew on June 27, 2014; and (3) post an appropriate notice to its employees. The Judge is further requested to grant all other appropriate relief.

V. PROPOSED NOTICE

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 do anything to prevent you from exercising the above rights.

WE WILL NOT make it appear to you that we are watching out for your union activities.

WE WILL NOT ask you about employee support for a union.

WE WILL NOT discipline employees because they exercise their right to discuss wages, hours and working conditions with other employees.

WE WILL NOT discipline you because of your union membership or support.

WE WILL NOT tell you that you are being disciplined because you discussed your wages, hours and working conditions.

YOU HAVE THE RIGHT to discuss wages, hours and working conditions with other employees and WE WILL NOT do anything to interfere with your exercise of that right.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL remove from our files all references to the June 27, 2014 discipline of Joyceanna Pettigrew and WE WILL notify her in writing that this has been done and that the discipline will not be used against her in any way.

COMPASS GROUP USA, INC., D/B/A CHARTWELLS DINING SERVICES

SIGNED at Indianapolis, Indiana, this 29th day of April 2015.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing General Counsel's Brief to the Administrative Law Judge has been filed electronically with the Division of Judges through the Board's E-Filing System this 29th day of April 2015. Copies of said filing are being served upon the following persons by electronic mail:

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