

**Northwest Florida Legal Services, Inc. and National  
Organization of Legal Services Workers, Local  
Union No. 2320, UAW. Case 15-CA-12871**

December 18, 1995

**DECISION AND ORDER**

BY CHAIRMAN GOULD AND MEMBERS BROWNING  
AND COHEN

On July 31, 1995, Administrative Law Judge Albert A. Metz issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs, and the Respondent filed a brief in response to the General Counsel's exceptions.

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 exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.<sup>1</sup>

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Northwest Florida Legal Services, Inc., Pensacola, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

<sup>1</sup>The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge states incorrectly that the second year of the Florida Bar Foundation environmental law grant was optional. The second year was not optional. Rather, the only contract with an optional second year was Myers' employment contract. This correction has no effect on the judge's analysis.

The Respondent, as the party seeking to establish that Sherri Myers is a supervisor within the contemplation of the statute, bears the burden of proving that she possessed and exercised at least one of the authorities delineated in Sec. 2(11) of the Act. See, e.g., *Dickinson-Iron Agency*, 283 NLRB 1029, 1034 (1987). In agreement with the judge, we find that the Respondent has failed to present sufficient evidence to establish that Myers was a supervisor within the meaning of the Act.

*Andrea Goetze, Esq.*, and *Zoe Panarites, Esq.*, for the General Counsel.

*Michael Mattimore, Esq.*, and *Mark Levitt, Esq.*, for the Respondent.

*Barbara Evans*, for the Charging Party.

**DECISION**

**STATEMENT OF THE CASE**

ALBERT A. METZ, Administrative Law Judge. This case was heard at Pensacola, Florida, on May 11-12, 1995. A complaint issued against Northwest Florida Legal Services, Inc. (Respondent), on October 31, 1994.<sup>1</sup> The complaint is based on charges filed by the National Organization of Legal Services Workers, Local Union No. 2320, UAW (Union). The primary issues are whether Respondent violated Section 8(a)(1) of the Act by engaging in interrogation, threats, and surveillance of employees relating to their union activities; and whether it violated Section 8(a)(3) by changing the job duties and discharging Sherri Myers, and changing timekeeping practices regarding Gayle Speed Ringo.

On the entire record,<sup>2</sup> including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by counsel for the General Counsel and Respondent, I make the following

**FINDINGS OF FACT**

**I. JURISDICTION AND LABOR ORGANIZATION**

Respondent is a Florida corporation with an office and place of business at Pensacola, Florida where it is engaged in the business of providing legal services. During the past 12 months, Respondent derived gross revenues in excess of \$250,000 from its operations. During the same period the Respondent purchased and received goods valued in excess of \$5000 at its Pensacola, Florida facility directly from points outside the State of Florida. The complaint alleges, Respondent admits, and I find that Respondent has been at all times material an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The complaint alleges, Respondent admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

**II. THE ALLEGED UNFAIR LABOR PRACTICES**

**A. Introduction**

The Employer provides civil legal assistance for indigent clients. Its main office in Pensacola, Florida, is supplemented by a small branch in Milton, Florida. The corporation is headed by an executive director who is answerable to a board of directors. The Employer has a staff of approximately nine lawyers who are assisted by support staff, paralegals, and secretaries. The legal functions of the office are broken down into five "units."

In 1992 a vacancy occurred in the executive director's position. Attorney Sherri Myers, who was working for the Employer at the time, was appointed acting executive director while a search was conducted to permanently fill the job. Myers was one of the applicants for the permanent position. After a 6-month search, the board of directors appointed Clay Ford as executive director. Ford had not worked for the Respondent before his appointment.

<sup>1</sup> All dates refer to 1994 unless otherwise indicated.

<sup>2</sup>The General Counsel's June 9, 1995 unopposed motion to correct certain errors in the transcript is granted. The motion is received into evidence as G.C. Exh. 22.

Myers was dissatisfied with the board of directors' decision to hire Ford. As a result she filed a gender discrimination charge against the board. This charge was later withdrawn by Myers.

#### B. Sherri Myers' 1992 Resignation

From the start Ford and Myers had difficulty working together. In the fall of 1992 this disharmony led to Myers tendering her resignation to be effective on December 31, 1992, or before should she find other employment. Ford readily accepted the resignation. In the meantime Myers was instrumental in applying for a 2-year grant from the Florida Bar Foundation for environmental law work. This grant was awarded to the Respondent in approximately October 1992.

Myers was interested in the environmental work and in November 1992 applied for the job. Executive Director Ford had sought a candidate to fill the position but was not having success. As a result he agreed Myers could have the job but under the terms of an employment contract. Such an agreement was eventually negotiated by Myers and Ford, and they signed it on January 7, 1993. (R. Exh. 6.) The grant was to run for 2 years, the second year being optional. The terms of Myers' contract were conformed to the grant's duration which was to end on September 30, 1994. Myers' pay was reduced under the terms of the employment contract.

After the contract was executed the relationship between Ford and Myers continued on a shaky foundation. Indicative of this discord was Ford's habit of calling Myers' attention to job opportunities at other employers.

When the September 30, 1993 anniversary date came for the start of the optional year of Myers' contract there were no discussions about the option. Myers continued doing her same work at the same pay. Eighty percent of her salary continued to be paid from the grant moneys.

#### C. Employees' Union Activity

In May 1994 some of Respondent's employees became interested in union representation. A preliminary union meeting was held June 16. Union authorization cards were distributed and a subsequent general meeting was arranged for all employees on June 30 with union representative, Barbara Evans. Myers and legal assistant, Gayle Speed Ringo, actively participated in this union activity.

Ultimately Respondent's board of directors voluntarily agreed to recognize the Union as the collective-bargaining agent for a unit of Respondent's nonprofessional employees. Bargaining over a contract in that unit continues.

#### D. Respondent's Supervisory Structure

The supervisory composition of Respondent's work force at the time of the initial union activity is in contention. Respondent admits that Executive Director Ford is a supervisor and agent of the Respondent. The Government asserts that Frank DiMaggio is a supervisor within the meaning of the Act, and that Myers was not. The Respondent's answer denies that DiMaggio is a supervisor, but it contends that Myers was a supervisor within the meaning of the Act.

##### 1. Frank DiMaggio

Frank DiMaggio received the title managing attorney in early 1994. He is responsible for overseeing the largest unit,

family law, and the Respondent's Milton, Florida satellite office. DiMaggio serves as acting executive director during Ford's absences from the office. Along with Ford, he is a management negotiator in collective bargaining with the Union.

With regard to the family law unit, DiMaggio evaluates attorneys and staff. He suspended secretary Kathy Valetto and recommended the discharge of another clerical employee. He approves attorneys' leave slips and evaluates attorneys and others working under him. He receives a \$3000 per year salary premium for his duties. He attends supervisory meetings.

Because of the breadth of his responsibilities in overseeing the work of others, the fact that he is regularly in charge of Respondent's operations when Ford is absent and because of his direct participation on behalf of management in union negotiations, I find that DiMaggio is a supervisor and agent of the Respondent within the meaning of Section 2(11) and (13) of the Act.

##### 2. Sherri Myers

Myers was classified as a senior attorney until April 1994 when she was given the title of supervisory attorney for litigation. This change of title included a \$1000 per year supervisory pay supplement pro rated for her remaining tenure in 1994. Myers served as head of the environmental/impact litigation unit. Before early summer 1994 this unit also included Attorney Ed Quinones, paralegal David Massey, and secretary Jackie Webster. However, Massey was terminated by Ford, without input from Myers, and Quinones was transferred to another unit. Thus only Myers and secretary Webster remained.

Prior to his transfer, Quinones was normally occupied doing cases assigned to him by Ford in areas exclusive of the environmental unit. She did not become involved in the legal work of Quinones to any significant degree while he was in her unit. She did not assign cases to attorneys or review their work.

Myers would initially sign unit employees' payroll time-sheets and requests for leave before they were sent to Ford for final approval. Myers did not do written evaluations of Quinones or any other attorney. She did do an evaluation of paralegal Massey in 1993 and one for secretary Webster in early 1994. On one occasion she and DiMaggio were asked by Ford to give a second opinion on the files of one attorney. Myers attended supervisory meetings with Ford, DiMaggio, and other unit heads. These meetings generally dealt with administrative matters.

Myers would review files before they were closed. This involved routine checks to see that four signed forms were contained in the files. She never substituted for Ford during any of his absences. As a professional she did direct the work of her unit secretary, but this secretary also did work for others that Myers did not control.

The record as a whole does not establish that Myers had the authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward, discipline, or adjust grievances of other employees, or to effectively recommend such actions. As of the spring of 1994 Myers' exercise of responsibilities in relation to other employees was routine in nature. Her direction of work of nonprofessional employees was that common in a professional situation. I find that at all relevant

times Myers was not a supervisor within the meaning of the Act. *Neighborhood Legal Services*, 236 NLRB 1269 (1978).

#### E. Ford and Myers Discuss the Union

On June 29 Myers was told by Ford's secretary that he wanted to see her in his office. Only Ford and Myers were present when they met. According to Myers, Ford appeared angry, and immediately asked her what she was doing involved in union organizing activities. This was the first time that Myers was aware that Ford had any knowledge of her union activity. He told her that she was a supervisor and had no business being involved in union organizing. Myers replied that she had researched the subject and felt comfortable with the conclusion that she was not a supervisor as contemplated by the National Labor Relations Act.

Ford stated he had been a Communications Workers shop steward for 9 years at the telephone company in Arkansas. He related there were good and bad things about unions. According to Myers, Ford opined that if Respondent's employees had a union their salaries would "probably" have to be negotiated downward. Ford told her that they would not be able to hire an additional lawyer to work in the environmental unit. He also told Myers: "Now, you know that I don't look over people's shoulders, but I may have to start doing that." (Tr. 187.)

The conversation continued with the two discussing why employees were interested in the Union. Myers observed that there was a lack of communication at the office and staff meetings might improve the situation.

Ford's version of the conversation was similar in many respects. He admitted that he called Myers in to discuss her union activity after overhearing employees say that she was organizing a union. He agreed that the point of this meeting was to tell her that as a supervisor she should not be involved in union activity. Ford denied he said that salaries would be reduced, that he would not be able to hire an environmental lawyer, and that he would more closely scrutinize people if the union represented employees.

Myers, by her demeanor and detailed description of this meeting, gave a credible recitation of this incident. In contrast Ford's demeanor in denying the threats about raises, hiring, and scrutiny of employees did not appear as candid. I credit Myers' report of the meeting as being the most accurate. Ford may have sincerely believed he was addressing a supervisor. However, that mistaken belief does not insulate his remarks from being a violation of the Act. I find that Ford's interrogation of Myers and his threats made in the June 29 meeting were a violation of Section 8(a)(1) of the Act.

#### F. Interrogation Concerning the Union Meeting

On June 30 Managing Attorney DiMaggio had a conversation in Ford's office with Staff Attorney Quinones. DiMaggio admitted he said: "I understand that there is an informational meeting tonight." He asked Quinones did he know where it was. Quinones said he did and that DiMaggio could follow him to the meeting.

As DiMaggio has previously been found to be a supervisor within the meaning of the Act, I find that his interrogation of Quinones about the union meeting is a violation of Section 8(a)(1) of the Act.

#### G. DiMaggio's Attendance at the June 30 Union Meeting

The union meeting on June 30 took place after work at a local restaurant. Many employees attended, including Gayle Speed Ringo and Sherri Myers. DiMaggio also came to the meeting. He took notes of some of the discussions and was present for about an hour. Finally his presence was challenged when his questioning of the need for a union offended some of the employees. Union Agent Barbara Evans upon finding out DiMaggio's job was managing attorney, said he should not be there.

DiMaggio testified that Evans pointed out: "I would be in violation of certain NLRB rules and regulations, that injunctions could be obtained and charges filed, that I really shouldn't be there, and to the best of my recollection, I said, if someone asks me to leave, I will. And at that point at least one person—I think two—said, We want you to leave, and I left." (Tr. 100.)

The Respondent asserts that DiMaggio's presence at the meeting was innocent and that there were no restrictions placed on who could attend. The Government's witnesses described DiMaggio's presence as coercive. Ringo characterized his attendance as an effort to "divide and conquer" because of his position that a union was not needed. Pamela Stadelmaier noted that his demeanor and comments got more intimidating and disruptive as the meeting progressed. Myers testified DiMaggio was confrontational and disruptive in the meeting.

DiMaggio imposed himself on the union meeting after his unlawful interrogation of Quinones disclosed its location. He was not at the meeting because of a specific invitation from the Union but as a self-invited "gate crasher." He ignored the union representative's entreaty that he should not be present. Only when asked by two employees did he agree to leave. His presence, active participation and antiunion statements during the meeting interfered with, restrained, and coerced the employees in attendance. I find that Supervisor DiMaggio's attendance at the union meeting was unlawful surveillance and a violation of Section 8(a)(1) of the Act. *Gary Aircraft Corp.*, 190 NLRB 306, 311 (1971); *Colo. Well Service, Inc.*, 163 NLRB 707, 712-713 (1967).

#### H. Alleged Timekeeping Policy Change—Gayle Speed Ringo

The Government alleges that on July 25 the Respondent changed its time keeping practices to the detriment of legal assistant Gayle Speed Ringo, and the motivation for the change was Ringo's union activities. Respondent denies any change in its time accounting or that Ringo was disparately treated.

On July 25 Ringo was 30 minutes late reporting for work. Ringo had in the past signed for leave when taking extra time off. Respondent's records likewise show examples of other employees being charged leave time for being late. Ringo conceded that she did not expect to be paid for being late or when taking time off. The record shows that the Respondent did not charge her when on July 12 she was 11 minutes late for work.

There is insufficient evidence that Respondent singled Ringo out because of her union activities. The record as a whole shows that the Respondent acted according to policy

when it required her taking leave for the time she did not work. I find that the evidence does not sustain a violation of Section 8(a)(1) and (3) the Act in this treatment of Ringo.

#### I. *The Termination of Sherri Myers*

The Government contends that Respondent violated the Act when it changed Myers' assignments and terminated her because of her union activity. The Respondent argues that Myers was terminated at the expiration of her contract term and that the transfer of cases to other attorneys was an outgrowth of her leaving employment.

On May 18, 1994, Myers' \$1000 supervisory pay supplement was processed. This action precedes Myers' union activity. The payroll documentation enacting the pay supplement is enlightening in that it notes that the raise is "Pro rated for balance of contract until 9/30/94." (R. Exh. 27.)

By memo dated July 8, Ford notified Myers that any family law cases she had were to be transferred in coordination with DiMaggio. (G.C. Exh. 11.) On July 19 Ford directed a memo to Myers which says in part:

Please analyze your remaining caseload and plan to complete transfer memos to other staff or as a basis for a pro bono referral if you are unable to complete the client service work in early September.

. . . .

You will either need to complete them (assigned cases) or make a recommendation on disposition of the cases prior to the end of your contract period at September 30, 1994. [G.C. Exh. 14.]

Myers testified she was shocked by the memo because the changes had not been discussed with her. She called Ford and complained about the matter and the changes were not effectuated at that time. Part of the reason appears to be that one of the attorneys to whom cases were transferred refused the reassignment because he felt insecure in handling some of the matters.

As time grew near to the end of the Myers' contract term Respondent placed an advertisement in the local bar association's publication seeking an attorney to work in the areas of "employment/ADA and federal practice." (R. Exh. 12.) Myers became aware of the ad and thought it was her job that was being published. Myers did not apply for the job.

Ford finally decided that Myers was being unproductive in her last days on the job so he terminated her effective September 14. She was paid through the end of the September 30 contract period. On February 27, 1995, Myers filed a Florida Commission on Human Relations claim against the Respondent alleging her termination was based on sex and race considerations.

The General Counsel has the initial burden of establishing a prima facie case. There must be sufficient evidence to support an inference that union or other protected activity was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3). The elements commonly required to support a prima facie showing of discriminatory motivation under Section 8(a)(3) are union activity, employer knowledge, timing, and employer animus. Once such prima facie unlawful motivation is shown, the burden shifts to Respondent to demonstrate that the alleged discriminatory conduct would have taken place even in the

absence of the protected activity. If Respondent goes forward with such evidence, General Counsel "is further required to rebut the employer's asserted defense by demonstrating that the [alleged discrimination] would not have taken place in the absence of the employee[s] protected activities." *Wright Line*, 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).

The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). "A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enfd. sub nom.* 705 F.2d 799 (6th Cir. 1982).

The Government asserts that the Respondent seized on the contract expiration as a convenient excuse to terminate Myers' employment. The evidence does not support that conclusion. At no time did Ford and Myers discuss that her contract was no longer applicable to her employment tenure. Myers did not seek to extend her employment with Respondent beyond the contract's expiration date.

The Respondent has shown that Myers' case reassignments and termination would have happened despite her union activities. Because of the long standing discord between Ford and Myers the record as a whole establishes that, regardless of union activity, Ford intended that Myers' employment would end with the expiration of the environmental law grant. I find that the Government has failed to show by a preponderance of the evidence that the change in assignments or the termination of Myers' employment would not have occurred but for her union activities. *Wright Line*, *supra*.

#### CONCLUSIONS OF LAW

1. Respondent Northwest Florida Legal Services, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. National Organization of Legal Services Workers, Local Union No. 2320, UAW is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct:

(a) Interrogating employees about their union activities;

(b) Surveilling of union meetings;

(c) Threatening employees that additional employees will not be hired, pay may be diminished, and close scrutiny of employees will result if employees select a union to represent them.

4. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent has not violated the Act except as specified.

#### THE REMEDY

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

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended<sup>3</sup>

ORDER

The Respondent, Northwest Florida Legal Services, Inc., Pensacola and Milton, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union activities.

(b) Surveilling of union meetings.

(c) Threatening employees that additional employees will not be hired, pay may be diminished, and close scrutiny of employees will result if employees select a union to represent them.

(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.

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

(a) Post at its facilities in Pensacola and Milton, Florida, copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on 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.

<sup>3</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommend 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.

<sup>4</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated 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:

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 interrogate our employees about their union activities.

WE WILL NOT threaten our employees that additional employees will not be hired, that their pay may be diminished, and that they may be subject to closer scrutiny if our employees select a union to represent them.

WE WILL NOT surveil our employees' union meetings.

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.

NORTHWEST FLORIDA LEGAL SERVICES, INC.