McKesson Drug Company *and* Teamsters, Local 667 International Brotherhood of Teamsters, AFL–CIO. Case 26–CA–18721

July 31, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND BARTLETT

On September 29, 2000, Administrative Law Judge Pargen Robertson issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief. The Respondent also filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this decision, and to adopt the recommended Order as modified and set forth in full below.[1]

We affirm the judge's finding that the Respondent violated Section 8(a)(1) and (4) of the National Labor Relations Act by its suspension and discharge of employee Walter Hammond. We agree with the judge that the Respondent's discharge of Hammond on June 16, 1998,[2] was "intertwined" with his prior suspension on June 9. However, as discussed below, we clarify that Hammond's suspension and discharge each constituted a separate, independent violation of Section 8(a)(1) and (4). We also clarify that the Respondent's insistence that Hammond sign a Last Chance Agreement in order to avoid discharge constituted an independent violation of Section 8(a)(1).

Facts

As found by the judge, on June 2 Hammond was involved in a disagreement with Supervisor Joel Garrett and Operations Manager Mike Sell concerning his request for light-duty work. When he refused to perform sweeping the following day, he was sent home and did not work during the remainder of the week. He filed an unfair labor practice charge the same day.

The Respondent received Hammond's unfair labor practice charge on or about Friday, June 5.[3] That day, the Respondent called Hammond and told him to report to work on Monday, June 8. When he reported as directed, he and four other employees were interviewed individually regarding allegations of drug use that violated the Respondent's drug-free workplace policy.[4] The next day, the employees were required to take drug tests, following which they were suspended. Charles Harbour, the manager of the facility, testified that the Respondent had made the decision to suspend the employees on June 8, prior to the interviews or drug tests. All five employees tested negative for drugs.

Hammond and the other employees were informed on June 15 that they should report to work the next day. Hammond met with Harbour and Human Resources Representative Sharon Jones, who presented him with a Disciplinary Action and Last Chance Agreement (Last Chance Agreement) and directed him to sign it. The Last Chance Agreement required Hammond to "agree to the following terms and conditions pertaining to disciplinary action and last chance agreement for the use of controlled substances in violation of The Drug Free Workplace Act, [Drug Enforcement Administration] regulations and Company policy." The Last Chance Agreement listed terms, including the prior suspension, followup drug tests, and possible termination based on future noncompliance. In addition, paragraph 4 of the Last Chance Agreement stated:

> 4. I hereby release and discharge McKesson Corporation ("Company") from all claims, liabilities, demands, and causes of action which I may have or claim to have against the Company as a result of this agreement. I agree not to file any law suit, unfair labor practice charge or any other legal action against the Company.

Hammond would not sign the document, stating that paragraph 4 meant that he would have to give up his rights. Harbour and Jones then left the room and returned with a notice terminating Hammond "for violation(s) of the Drug

[1] We shall modify the judge's recommended Order to conform to the requirements of *Indian Hills Care Center*, 321 NLRB 144 (1996), as revised in *Excel Container, Inc.*, 325 NLRB 17 (1997). We shall also modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001), and we shall substitute a new notice in accordance with our recent decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

[2] All dates are 1998, unless otherwise indicated.

[3] The charge was mailed on June 4, so it could not have been received before June 5. The Respondent's witness testified that the Respondent received the charge on June 4 or 5.

[4] The allegations were made in March by former employee Dale Jackson. The Respondent's policy provides in relevant part:

> [I]t is the policy of the Company to prohibit the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance in the workplace or when conducting Company business off Company premises, and requires employees and non employees [sic] to be free from illicit drugs upon entering Company premises. . . .
>
> The term "possession" is meant to also include the presence in the body system of any detectable amount of illicit drug.

Free Workplace Act, DEA regulations and Company policy pertaining to alcohol and controlled substances." The notice further stated that Hammond "declined to agree to a disciplinary action and last chance agreement which would have precluded this action." When employee Dana Ingram voiced similar reluctance to agree to paragraph 4, Harbour and Jones agreed to amend the paragraph to apply only to drugs or controlled substances.

Analysis

Violations of Section 8(a)(4) are analyzed using the *Wright Line*[5] test. See *Freightway Corp.*, 299 NLRB 531, 532 (1990) (agreeing with judge's decision that the respondent violated Section 8(a)(4), but applying a *Wright Line* analysis). Under *Wright Line*, the General Counsel has the initial burden of proving that the employee's protected activity was a motivating factor in the employer's action. If the General Counsel meets the initial burden, the burden shifts to the employer to prove that it would have taken the adverse employment action even in the absence of the employee's protected activity.

Here, the judge concluded that the General Counsel successfully met his initial burden under *Wright Line* with respect to Hammond's June 9 suspension.[6] Specifically, the judge found that Hammond's filing of his unfair labor practice charge on June 3 was protected activity and that the Respondent was aware of that activity. In addition, the judge found that Hammond's protected activity was a motivating factor in the decision to suspend Hammond based on the timing of the Respondent's action immediately after receiving his charge, the Respondent's insistence that Hammond sign the Last Chance Agreement, which demonstrated the Respondent's desire to rid itself of Hammond's charge, and the disparate treatment of Hammond and Ingram's protests concerning that Agreement. We agree with the judge's findings and conclusions.

The Respondent argues that it would have suspended Hammond even if he had not filed the unfair labor practice charge, as he was suspended solely because of alleged drug use. The Respondent argues that the Federal Drug Enforcement Administration (DEA) requires it to maintain a drug-free workplace, and that failure to comply with DEA regulations could cost Respondent its license. We agree with the judge's rejection of the Respondent's contentions.

First, the Respondent initiated its action against Hammond fully 3 months after the initial accusation in March by former employee Jackson that Hammond, as well as other employees, used drugs. Even when the Respondent decided on May 21 to take action, it still delayed another 17 days before interviewing any of the accused employees. The Respondent contends that its initial action in response to Jackson's accusations was delayed by the absences of Hammond and employee Alfonzo Flynn, who was also among the accused employees, as well as by the other work commitments of the Respondent's loss prevention manager. We agree with the judge that this explanation is inadequate, particularly in light of the Respondent's asserted concerns about compliance with DEA requirements and the Respondent's acknowledgement that it made the decision to suspend Hammond prior to the interview or drug test.

Second, there is no evidence in the record to support the Respondent's contention that Hammond violated its drug policy. The Respondent's primary source of information regarding drug use was Jackson. According to the unrebutted testimony of Hammond, Jackson was "anti-union" and was opposed to Hammond's union activity. Jackson was discharged on March 8 for attendance-related reasons. The next day he called the Respondent's operations manager Mike Sell and volunteered to share information on the alleged sale and use of drugs by Respondent's employees. Jackson had a "business friendship" with Sell and was quite comfortable talking with him about personal matters, yet he had never before mentioned drug use.

On March 10, Jackson told Sell and Harbour that he had used marijuana with Hammond, and implicated a total of nine employees, including Hammond, as being involved with drugs. Sell's March 23 internal memorandum to Harbour memorializing the conversation with Jackson contains no reference to an allegation that Hammond used or possessed drugs at work. Similarly, Jackson's April 6 e-mail summarizing his allegations states only that Jackson participated with Hammond and other employees in using drugs. It does not state that Hammond used or possessed drugs on the Respondent's premises, in violation of the Respondent's policy.

The only other evidence of Hammond's alleged drug use is the affidavit of employee Robert Hug. However, Hug provided his affidavit on June 8, when he, like Hammond, was accused of drug use. Thus, Hug's statement was provided *after* the Respondent had already decided to suspend Hammond and the others, and, of course, after Hammond had filed the unfair labor practice charge on June 3. In the affidavit, Hug averred generally that he had used drugs with Hammond. Hug made no allegation that Hammond had ever used or possessed drugs at work. Finally, Hammond denied having used

[5] 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).

[6] The complaint allegation in this proceeding pertains only to Hammond.

drugs at all and, as noted above, the Respondent suspended him without waiting for the results of his drug test (which were negative).

In light of the absence of evidence that Hammond possessed, used, or sold proscribed substances within the meaning of the Respondent's policy, we conclude that the Respondent did not reasonably believe that he had done so.[7] We agree with the judge that the Respondent has not proved that it would have suspended Hammond even in the absence of his unfair labor practice charge, thus failing to meet its burden under *Wright Line*. We therefore conclude that the suspension of Hammond on June 9 was motivated by his filing of an unfair labor practice charge, and violated Section 8(a)(1) and (4).[8]

We also agree with the judge that the Respondent violated Section 8(a)(1) and (4) by its June 16 discharge of Hammond. The termination notice to Hammond stated that the action was being taken "for violation(s) of the Drug Free Work Place Act, DEA regulations and Company policy pertaining to alcohol and controlled substances" and noted that Hammond "declined to agree to a disciplinary action and a last chance agreement which would have precluded this action." As discussed above, however, there is no evidence that Hammond violated the cited law, regulations, or policy, or that the Respondent reasonably believed that he had done so. In addition, at the time of the discharge, the Respondent had received the negative results of Hammond's drug test, which further eroded the reasonableness of any belief that Hammond violated the Respondent's requirements. Thus, we reject the Respondent's argument that it discharged Hammond for drug use in violation of the Respondent's rules, as stated in the notice of termination.

We find instead that the Respondent discharged Hammond for his refusal to sign the Last Chance Agreement. Besides calling for Hammond to agree to discipline (i.e., his unlawful June 9 suspension, "for the use of controlled substances"), and to followup drug testing, the agreement further required him to release the Respondent from all claims "which [he] may have or claim to have against the Company as a result of this agreement," and to "agree not to file any law suit, unfair labor practice charge or any other legal action against the Company." We find, as did the judge, that these provisions presented Hammond with the choice of withdrawing his pending unfair labor practice charge and agreeing not to file future charges, or losing his job.

Moreover, as indicated above, when presented with the Last Chance Agreement by Harbour and Jones, Hammond stated that he could not sign it because paragraph 4 meant that he would have to give up his rights. Harbour and Jones offered no modification of that paragraph, but rather left the room and returned with Hammond's termination notice. In contrast, when employee Ingram resisted signing the Last Chance Agreement because of paragraph 4, Harbour and Jones accommodated his concern by volunteering a limiting provision.

Based on the foregoing, we find that Hammond's filing of an unfair labor practice charge and refusal to withdraw that charge by signing the Last Chance Agreement was a motivating factor in his June 16 discharge. We further find that the Respondent has failed to establish that Hammond would have been discharged even absent his protected activity. Indeed, as indicated above, the Respondent's termination letter specifically noted that signing the Last Chance Agreement "would have precluded this action." The discharge thus constituted a further violation of Section 8(a)(1) and (4).

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[7] In order to meet its burden under *Wright Line* (i.e., to show that it would have discharged the employee even in the absence of protected activity), an employer need not prove that the employee committed the alleged offense. However, the employer must show that it had a reasonable belief that the employee committed the offense, and that it acted on that belief when it discharged him. See *Yuker Construction*, 335 NLRB 1072 (2001) (discharge of employee based on mistaken belief does not constitute unfair labor practice, as employer may discharge an employee for any reason, whether or not it is just, so long as it is not for protected activity); *Affiliated Foods*, 328 NLRB 1107, 1107 and fn. 1 (1999) (it was not necessary for employer to prove that misconduct actually occurred to meet burden and show that it would have discharged employees regardless of their protected activities; demonstrating reasonable, good-faith belief that employees had engaged in misconduct was sufficient); and *GHR Energy*, 294 NLRB 1011, 1012–1013 (1989) (respondent met *Wright Line* burden by showing that employees would have been suspended even in the absence of their protected activities, because respondent reasonably believed they had engaged in serious misconduct endangering other employees and the plant itself).

In Chairman Hurtgen's view, an employer may meet its burden under *Wright Line* by proving that it discharged an employee for a nondiscriminatory reason, even if the employer's reason is supported by little or no evidence or its decision is based on inaccurate information. However, the absence of evidence to support a discharge decision may also support an inference that an employer's real motivation for the discharge was an unlawful one. In this case, Chairman Hurtgen concludes that the lack of evidence of drug usage, when viewed in the totality of circumstances of this case, supports the conclusion that the Respondent's real motivation in suspending and discharging Hammond was not Hammond's alleged drug use, but rather his filing of an unfair labor practice charge and his refusal to withdraw it.

[8] We recognize that four employees other than Hammond were accused of drug use and suspended based upon Jackson's allegations, and that Flynn was ultimately terminated based on them as well as similar allegations by another employee. However, where, as here, the explanations given for Hammond's suspension and the timing of the suspension are not credible, the fact that a few employees who had not filed unfair labor practice charges were disciplined along with Hammond does not preclude the finding that the Respondent's retaliatory motives lay behind its actions. See *Alliance Rubber Co.*, 286 NLRB 645, 647 (1987).

Finally, we find that the Respondent independently violated Section 8(a)(1) of the Act by conditioning Hammond's return to work from his suspension on the signing of the Last Chance Agreement. As noted above, signing the Agreement would have resulted in the waiver of Hammond's rights, both present and future, to invoke the Board's processes for alleged unfair labor practices. An employer's conditioning of an employee's reinstatement on such a broad waiver of Section 7 rights violates Section 8(a)(1). See *Retlaw Broadcasting Co.*, 310 NLRB 984 (1993) (employer violated Sec. 8(a)(1) by offering to rehire employee only on condition that he waive his right to file a grievance or seek union assistance regarding any future termination of employment); cf. *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001) (separation agreement found overly broad and unlawful because it forced employee to prospectively waive her Sec. 7 rights).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, McKesson Drug Company, Memphis, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Requiring its employees to sign an agreement to withdraw present actions, including unfair labor practice charges, and to waive the right to file any future actions, including unfair labor practice charges, as a condition precedent to reinstatement.

(b) Suspending, discharging, and refusing to reemploy its employees because the employees filed unfair labor practice charges, refused to withdraw unfair labor practice charges, or refused to waive their rights to file any future actions, including unfair labor practices, against it.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

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

(a) Within 14 days from the date of this Order, offer Walter Hammond full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Walter Hammond whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, plus interest, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and discharge of Walter Hammond and within 3 days thereafter notify him that this has been done and that his discharge will not be used against him in any way.

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

(e) Within 14 days after service by the Region, post at its facility in Memphis, Tennessee, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 9, 1998.

(f) Within 21 days after service by the Regional Office, file with the Regional Director for Region 26 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.

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 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

[9] 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."

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 require our employees to sign an agreement to withdraw pending actions, including unfair labor practice charges, or to waive the right to file future actions, including unfair labor practice charges, as a condition precedent to reinstatement.

WE WILL NOT suspend, discharge, and refuse to reemploy our employees because the employees filed unfair labor practice charges with the National Labor Relations Board, refuse to withdraw unfair labor practice charges, or refuse to waive their rights to file future actions, including unfair labor practices, against us.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

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

WE WILL make Walter Hammond whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful suspension and discharge of Walter Hammond, and WE WILL, within 3 days thereafter, notify him that this has been done and that his suspension and discharge will not be used against him in any way.

MCKESSON DRUG COMPANY

Tamra Sikkink, Esq., for the General Counsel.
John S. Schauer, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

PARGEN ROBERTSON, Administrative Law Judge. A hearing was held in Memphis, Tennessee, on April 5 and July 24, 2000. The disputed issue concerned whether Respondent discharged an employee in violation of Section 8(a)(1), (3), and (4) of the Act. I have considered the full record and briefs filed by Respondent and General Counsel.

Several matters are not in dispute. At material times Respondent has been a corporate employer with an office and place of business in Memphis, Tennessee. During the 12 months ending November 1, 1998, Respondent, in conducting its business operations, sold and shipped from the Memphis facility goods valued in excess of $50,000 directly to points outside Tennessee and purchased and received goods directly from outside Tennessee valued in excess of $50,000. Respondent has been an employer engaged in commerce within the meaning of sections of the National Labor Relations Act (the Act) at all material times. At material times the Charging Party (Union) has been a labor organization within the meaning of the Act. Michael Sell, Sharon Jones, Charles Harbour, Joel Garrett, and Randy Peck were supervisors and agents at material times. Harbour was the manager and Sell the operations manager of Respondent's regional distribution center.

Around June 9, Respondent suspended and on June 16, 1998, Respondent discharged employee Walter Hammond. The General Counsel alleged that those actions were motivated by Hammond's protected union activity. Moreover, the General Counsel alleged that Hammond's suspension was motivated because he filed an unfair labor practice charge in Case 26–CA–18692 and that Hammond's discharge was motivated because he refused to sign an agreement waiving Hammond's rights to file unfair labor practice charges.

Walter Hammond testified that he did engage in union activity before his suspension and discharge. He and other employees contacted and met with the Union during January and February 1998. Hammond passed out union leaflets on two occasions (see GC Exhs. 10 and 11), including around June 2, 1998. In early April 1998, he told Supervisor Joel Garrett[1] that perhaps Respondent was not giving him light duty because they realized that Hammond was active in the Union. Garrett replied, "Well, do what you got to do."

Beginning on June 2, Hammond was involved in a dispute with Supervisor Garrett and Mike Sell regarding light duty. Hammond who had been on lengthy periods of light duty, refused to sweep the floor and was sent home on June 3. He did not work the rest of that week. On June 5, Sell phoned Hammond and told him to report to work on June 8.

After being sent home Hammond filed an unfair labor practice charge against Respondent on June 3, 1998 (GC Exh. 2, Case 26–CA–18692). A copy of that charge was served on Respondent by regular mail. The charge was mailed on June 4, 1998. Charles Harbour testified that he was unsure whether Respondent received the charge on June 4 or 5, 1998. According to Harbour he knew nothing about union activity by Hammond until Respondent was served with the charge.

On June 8, Hammond worked only until lunch because he was scheduled for physical therapy. While at therapy he was phoned to return to the job as soon after therapy as possible. After returning to the job Hammond was interviewed regarding using drugs. On June 9, Hammond (as well as four other em-

[1] Hammond admitted during July 24, 2000 cross-examination that he stated in his June 19, 1998 affidavit:

> With Joel in March, we were talking about my lawsuit I had with the company. I told him they were picking at me and didn't want to pay me my compensation and giving me all crazy jobs in the warehouse and stuff like that. Joel told me to just do what I had to do.

Hammond admitted that affidavit did not include his remarks to Garrett about not getting light duty because of the Union.

ployees) was given a drug test. Hammond (as well as the other four tested employees) was told after the test that he was suspended pending the results of the test.

Respondent admitted that all the employees tested negative. On June 15, Hammond was told to report back to work the next day. Hammond met with Charles Harbour and Sharon Jones on June 16. Harbour told Hammond that he would have to sign a "Disciplinary Action and Last Chance Agreement" before returning to work. In addition to his unfair labor practice charge Hammond had a workman's compensation claim pending against Respondent. Hammond objected to signing the Agreement.[2] That agreement included the following:

> 4. I hereby release and discharge McKesson Corporation ("Company") from all claims, liabilities, demands, and causes of action which I may have or claim to have against the Company as a result of this agreement. I agree not to file any lawsuit, unfair labor practice charge or any other legal action against the Company.

Hammond was discharged after he refused to sign the Last Chance Agreement. His separation notice (GC Exh. 5) includes the following comment:

> Violation DrugFree Workforce Act, DEA regulations, & Company Policy Refused Last Chance Agreement

Respondent witnesses Michael Sell and Charles Harbour testified about an investigation into employees using drugs. After Respondent discharged employee Dale Jackson because of absenteeism during March 1998, Jackson phoned Sell and Harbour. Jackson told them that he knew of illicit drug activity at McKesson. On March 10, 1998, Jackson met with Harbour and Sell and told them that Alfonzo Flynn was involved in distribution of marijuana and that Flynn, Walter Hammond, and several other employees had used drugs.

Sell also testified that he heard that Alfonzo Flynn[3] was involved with the Union:

> A. There was an incident within the warehouse where I had employees coming up to me complaining about Mr. Flynn soliciting or asking them, or cornering them up trying to get them involved with signing some sort of cards for the union.
>
> Q. Could you give us an approximate date, please?
>
> A. I believe it was January. I'm not for sure, exactly. I would have to—I mean, I know it was in the early part of '98.
>
> Q. All right. Tell us what occurred.
>
> A. Basically, I went to Mr. Harbour and informed him of the, of the incident. We opted to bring Mr. Flynn in and simply inform him of McKesson's policy regarding solicitation on property.
>
> Q. Tell us what you said?
>
> A. We told him that it was inappropriate during working hours, and that if this was indeed occurring, it would have to happen during nonworking hours. Mr. Flynn told us that there was nothing whatsoever going on of any sort like that, you know, that he was not involved in this at all. And he couldn't understand where it was coming from.

Sell admitted seeing union representatives passing out leaflets at Respondent's facility but he denied knowing of union activity by Walter Hammond. Charles Harbour also denied knowing of union activity by Hammond before receipt of the unfair labor practice charge. He knew of activity by union representatives. Harbour saw a couple of individuals handing out fliers over a 2- or 3-week period near Respondent's driveway.

Credibility

As shown above I have not considered the testimony of Alfonzo Flynn. I was impressed with the demeanor and general testimony of Walter Hammond. I have doubts about his account of an exchange he had with supervisor Garrett. Garrett did not testify and Hammond's account is unrebutted. Nevertheless, Hammond testified that unlike his testimony under direct examination, his prehearing affidavit about his conversation with supervisor Garrett did not mention union activity. With the exception of that exchange I fully credit Hammond's testimony. I was not impressed with the testimony and the demeanor, of Charles Harbour and Michael Sell. Both testified to no knowledge of Hammond's union activity. Harbour testified to the effect that he was not concerned[4] with whether Hammond was involved in the Union or with the unfair labor practice charge. Sell testified that he was not even aware of Hammond's unfair labor practice charge. That testimony is unbelievable. When Sell phoned Hammond to return to work June 8, both he and Harbour knew that Hammond would be interviewed about drugs. Nevertheless, according to their testimony an unfair labor practice charge filed by Hammond on June 3 alleging among other things that Respondent had discriminated against him because of his union activity generated no interest whatsoever.

Findings

The disputed issues deal with Walter Hammond's suspension and discharge. The complaint includes allegations that those actions were taken by Respondent because (1) Hammond engaged in union activities; and (2) because Hammond filed charges with the National Labor Relations Board and refused to sign a waiver of his right to sue or file charges.

[2] Hammond testified that he told Harbour and Jones that he could not sign the last chance statement because of par. 4.

[3] Although Alfonzo Flynn testified on April 5, 2000, I have discounted his testimony. After the April 5 hearing closed, I ordered that the hearing reopen to afford Respondent an opportunity to cross-examine Alfonzo Flynn and Walter Hammond. I ruled that I had not granted Respondent sufficient time to examine *Jencks* materials before cross-examining Flynn and Hammond. On July 24 when the hearing reopened, Hammond appeared and was cross-examined by Respondent. However, Alfonzo Flynn did not appear and Respondent was deprived of the right to cross-examine Flynn using *Jencks* materials. In consideration of a motion to strike Flynn's testimony I received *Jencks* materials in evidence as ALJ Exhs. 1 and 2. In light of my ruling I have not considered either of those exhibits in any manner.

[4] Charles Harbour testified that upon receipt of service he sent the charge to the proper corporate official, and then forgot about the charge until recently.

As to union activities, the record showed that Walter Hammond engaged in union activities on several occasions between January and June 2, 1998. Respondent contended that it knew nothing about Hammond and the Union. However, on June 4 or 5 Respondent received Hammond's NLRB charge alleging that it discriminated against him because he was involved with the Union.

The timing of Respondent's suspension of Hammond is suspect. On Hammond's next workday after Respondent was served with his unfair labor practice charge, he was interviewed and on the next day suspended. According to Charles Harbour the charge gave him his first knowledge that Hammond was involved in union activity.

Subsequently, after Hammond tested negative for drugs, he was called in on June 16. Even though he tested negative Hammond was required to sign a disciplinary action and Last Chance Agreement.

In light of the above evidence I shall consider whether the evidence supports a prima facie case of unlawful suspension and discharge (1) because of Hammond's union activities or (2) because Hammond filed a charge with the NLRB and refused to sign a waiver of actions against Respondent.

In consideration of whether Respondent suspended and discharged Hammond because of his union activities, the record does not support a finding of union animus.[5] With the exception of Michael Sell telling employee Alfonzo Flynn[6] that he could not solicit for the Union during worktime, there is no credible evidence showing that Respondent would discharge Hammond because of its opposition to the Union. In the absence of antiunion animus I find that the General Counsel failed to prove that Respondent suspended and discharged Walter Hammond in violation of Section 8(a)(1) and (3) *J .E. Merit Constructors*, supra. I recommend that those allegations be dismissed.

The allegations that Respondent suspended and discharged Hammond because he filed an unfair labor practice charge and refused to waive his right to sue and file charges, raise other questions. However, that analysis also begins with an inquiry into whether the General Counsel proved its case.

Here, the facts supporting the General Counsel show without dispute that Walter Hammond filed a charge with the NLRB on June 3.[7] Michael Sell sent Hammond home that day after a dispute over light duty. Respondent then received service of Hammond's NLRB charge on June 4 or 5.

Michael Sell phoned Hammond and told him to report to work on Monday, June 8. On that day Hammond, and four others, was interviewed about use of illicit drugs.

Hammond was tested for drugs the next day and suspended from work without pay. He remained on suspension until directed to return on June 16. He met with Charles Harbour and Sharon Jones who told him that he had passed the drug test but that he would have to sign a disciplinary action and last chance statement in order to be reinstated. That statement contained the following paragraph:

> 4 I hereby release and discharge McKesson Corporation ("Company") from all claims, liabilities, demands, and causes of action which I may have or claim to have against the Company as a result of this agreement. I agree not to file any lawsuit, unfair labor practice charge or any other legal action against the Company.

Hammond explained that he would not sign the statement because the above paragraph would cause him to give up his rights. He was discharged.

Five employees were tested for drugs on June 9 and all five tested negative. One of the five, Alfonzo Flynn, was discharged because it was claimed that Respondent had evidence he was a seller or ringleader. Of the remaining three employees, one—Robert Hugg—asked to take the Last Chance Agreement form away to check it with his father and his father's attorney. He was permitted to do that and he eventually signed the Agreement and returned to work. Another—Brent Rushing—signed the agreement and returned to work. The third—Dana Ingram—like Hammond, also resisted signing because of paragraph 4 of the agreement.

Charles Harbour testified about the interview with Dana Ingram:

> A. Mr. Ingram read the (agreement), told him the same thing I told Mr. Hug. He read it, and he said I have a problem with number four on the Last Chance Agreement. Sharon Jones and I, well, actually, we read number four to understand what he was talking about. And we said, well, if he had a problem with it, you know, what if we do it, put this in there. He said if you do that, I, I'll sign that. And we did that. And he signed it, and Sharon Jones signed it.

The number 4 that Dana Ingram had trouble with was the same paragraph in the agreement that had bothered Walter Hammond. However, unlike Hammond, Ingram's agreement was amended by adding at the bottom of the agreement (GC Exh. 3):

> I have a problem with # 4 because it is unclear. I would not have a problem with # 4 if it is only related to drug/controlled substance.

After signing the amended statement, Ingram returned to work.

As to the question of animus, the Last Chance Agreement clearly established that Respondent wanted to eliminate Hammond's unfair labor practice charge. The evidence shows that Respondent was willing to risk additional charges in order to eliminate the unfair labor practice charge or, alternatively, to eliminate employee Walter Hammond. Of course the Last Chance Agreement was not presented to the employees until

[5] As to how the Board has considered the issue of animus, see for example *J. E. Merit Constructors*, 302 NLRB 301, 303–304 (1991) (a refusal-to-hire case), the Board required the General Counsel to prove: (1) the job applications were filed during hiring stages, (2) the Respondent knew of their source, (3) it harbored union animus, and (4) it acted on that animus in failing to hire.

[6] As to Alfonzo Flynn I have completely disregarded his testimony. The above-mentioned evidence regarding Flynn, came from Michael Sell.

[7] The charge alleged that Respondent unlawfully denied Hammond light duty because of his union activities.

after the suspension but that agreement illustrates how Respondent felt about the NLRB charge.

Under the circumstances it appears that Respondent suspended Hammond as well as the other four employees, because of Hammond's unfair labor practice charge. Hammond was suspended directly because of his charge and the others were suspended to cover up the illegal action against Hammond. However, the only issue before me in that regard involves Hammond. The General Counsel did not allege that Respondent engaged in unlawful activity by suspending the other employees.

As to the discharge Hammond was told in effect to give up his unfair labor practice charge or be fired.

In view of that evidence showing among other things, timing, hostility toward the NLRB charge, and disparate treatment, I find that the General Counsel proved a prima facie case of unlawful suspension and discharge because of Hammond's NLRB charge and because Hammond refused to sign its Last Chance Agreement. Hammond's right to process a charge before the NLRB is protected activity specifically referred to in Section 8(a)(4) of the Act. His filing that charge and his refusal to waive the processing of the charge and his refusal to agree not to file charges in the future, fall squarely within the scope of that protection. *Retlaw Broadcasting Co.*, 310 NLRB 984 (1993).

Respondent contended that it would have suspended and discharged Hammond in the absence of protected activities. It contended that its actions against Hammond started with an interview of former employee Dale Jackson. Following Jackson's discharge for absenteeism, Jackson phoned Mike Sell and Charles Harbour. Jackson said that he knew of illicit drug activity at McKesson. Jackson met with Harbour and Sell on March 10, 1998, at Raffertys Restaurant (see R Exh. 14). Jackson reported that drug transactions formerly took place at the apartment of employee Alfonzo Flynn but that after Flynn bought a house, the transactions took place at Flynn's brother's apartment. Jackson reported that nine employees were involved in using illegal drugs and that he was involved in using drugs with others including Flynn and Walter Hammond.

Charles Harbour testified that various problems including lengthy absences by Alfonzo Flynn and Walter Hammond due to injuries slowed the investigation following Jackson's allegations. Nevertheless, Respondent's investigation eventually focused on five of the employees named by Dale Jackson. Those five were Alfonzo Flynn, Walter Hammond, Dana Ingram, Robert Hugg, and Brent Rushing. Those five were interviewed on June 8, and all were tested for drugs on June 9, 1998. Dale Jackson named nine employees in his discussions with Harbour and Sell and in an April 6, 1998 e-mail to Harbour. In his April 6 e-mail to Harbour, Dale Jackson named Brent Rushing, Robert Hugg, Dana Ingram, John Thomas, Mike Hood, Alfonzo Flynn, and Walter Hammond as employees that he knew had purchased drugs from Flynn.

Charles Harbour testified that employees Dana Ingram, Robert Hugg, Brett Rushing, Walter Hammond, and Alfonzo Flynn were interviewed on June 8 due to the reports received from Dale Jackson. As to others named by Jackson, Harbour testified that Jackson said that his information was hearsay as to them and Respondent had not uncovered anything during "the investigation to bring them in."[8]

Immediately after the June 9 drug tests, all five of the employees were suspended without pay.

In consideration of Respondent's points I am not convinced that Respondent would have suspended Hammond absent his unfair labor practice charge. Even if all Respondent's evidence is credited, Respondent's argument that it suspended all five[9] tested employees is not persuasive to the argument that it would have suspended Hammond in the absence of his unfair labor practice charge. Actually, the record shows that Dale Jackson named nine employees and Jackson's evidence was first given to Harbour and Sell 3 months before Hammond and the others were suspended. As to its argument that it suspended all five, Respondent, by presenting its employees with the Last Chance Agreement proved that it was willing to risk a great deal to rid itself of either an unfair labor practice or a bothersome employee. It would require little more to suspend three additional employees to cover up its suspension of Hammond along with a known union advocate—Alfonzo Flynn.

The timing of the suspension also cast doubt on Respondent's version of why it suspended Hammond. Why did Respondent wait 3 months to suspend a few of the employees it thought were using illicit drugs? According to the record, Respondent learned everything it came to know about Walter Hammond using drugs when Harbour and Sell talked with Dale Jackson on March 10, 1998.[10] Respondent knew that Dale Jackson claimed on or before April 6, to have first hand knowledge that several[11] of its employees were using drugs. Because of Dale Jackson Respondent allegedly believed that one of its employees was selling illegal drugs.

Respondent argued in its brief that it was delayed by several factors. It offered testimony that it was delayed in arranging the schedule of its loss prevention employees; and that it was delayed because first Flynn then Hammond, was absent from work for several days or weeks, and it wanted the two of them present when it concluded its investigation. Those factors may have supported Respondent's 3-month delay in concluding its investigation but there was nothing shown that explained why

[8] Other than information attributed to Dale Jackson in the March 10 meetings and received from Dale Jackson by e-mail on April 6, there was no showing that Respondent discovered anything linking Hammond to drugs, until after Walter Hammond filed his June 3 charge. The statement by Robert Hugg pointed to by Respondent was taken after Respondent was served with the charge and after Respondent by its own account decided to suspend the five employees following the June 9 drug tests.

[9] Charles Harbour testified that the five employees were Hugg, Ingram, Rushing, Hammond, and Flynn.

[10] As shown herein, Dale Jackson supplemented his report by e-mail on April 6 but that e-mail added little to Respondent's information regarding Walter Hammond. Respondent also received a statement from Robert Hugg about Hammond using drugs but that statement was received after service of the unfair labor practice and long after Respondent allegedly decided on May 21 to test and suspend the five employees.

[11] According to the e-mail Dale Jackson sent to Charles Harbour on April 6, 1998, Jackson actually participated in using drugs with all seven employees that he named in that memo.

Respondent waited 3 months to suspend employees suspected of selling or using illegal drugs while it was concerned with a drug free workplace. Nothing was done between March 9 and 10 and June 9, to prevent Alfonzo Flynn from selling drugs and nothing was done between those dates to prevent any of the nine employees named by Dale Jackson from using illegal drugs. Respondent argued that it risked losing its license if it did not enforce its drug policy. Obviously the dangers to Respondent were substantial. According to its own proof, it ran the risk of losing its license if the DEA discovered it was not maintaining a drug free workplace. However, that is precisely what Respondent was doing. After March 10 it permitted employees to continue working despite evidence that specific employees were violating its drug free rules by selling or using drugs. Respondent's danger of exposure appeared especially grave in view of its information coming from an employee that it had discharged. Certainly an angry former employee could have contacted DEA about illegal selling and using drugs at Respondent's facility. Respondent offered no explanation as to why that possibility did not cause it to speed up its process to rid itself of the alleged drug dealer and users by suspending those people pending its investigation.

After 3 months Respondent took action that included interviewing and testing only five of the nine employees allegedly involved in illegal drugs. Respondent explained that it did not interview and test all nine because Dale Jackson did not have first-hand knowledge as to all nine and because some of those employees no longer worked for it. That evidence shows that Respondent was not sufficiently worried about enforcing its drug policy to suspend a reputed dealer until 3 months after it learned Alfonzo Flynn may be dealing drugs.

Hammond's discharge appears to be intertwined with the suspension. The Act specifically protects employees' right to file charges with the NLRB[12] and Respondent's Last Chance Agreement required Hammond to waive those rights in order to continue working.[13] The Last Chance Agreement specifically referred to "unfair labor practice charge." Hammond had an outstanding unfair labor practice charge against Respondent and Respondent knew about that charge at the time of Hammond's discharge. Hammond was presented with an unequivocal demand that he sign a last chance statement which amounted to withdrawal of all action and an agreement never to file any action including unfair labor practice charges, against Respondent, or lose his job.

I find that the General Counsel proved that Respondent suspended and discharged Walter Hammond in violation of Section 8(a)(1) and (4) of the Act and Respondent failed to prove that it would have suspended or discharged Hammond in the absence of his charge and refusal to sign its Last Chance Agreement.

CONCLUSIONS OF LAW

1. McKesson Drug Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Teamsters, Local 667, International Brotherhood of Teamsters, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, by suspending and discharging Walter Hammond, by requiring Hammond to agree to withdraw actions including an unfair labor practice charge and to not to file such charges, because Walter Hammond filed an unfair labor practice charge and refused to waive his rights, has engaged in conduct violative of Section 8(a)(1) and (4) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6), (7), and (8) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Respondent has illegally suspended and discharged Walter Hammond in violation of sections of the Act, I shall order Respondent to offer Walter Hammond immediate and full employment to his former job or, if that job no longer exists, to a substantially equivalent position. I further order Respondent to make Walter Hammond whole for any loss of earnings he suffered as a result of the discrimination against him and remove from its records any reference to the unlawful actions against Walter Hammond and notify Hammond in writing that Respondent's unlawful conduct will not be used as a basis for further personnel action. Backpay shall be computed as described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]

[12] Sec. 8(a) It shall be an unfair labor practice for an employer—(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act. (Sec. 8(a)(4).)

[13] The question of whether Respondent engaged in unfair labor practices by demanding that all five tested employees sign the Last Chance Agreement is not before me. That was not alleged in the complaint.