

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JEROME MELTZER, :
 :
Complainant, :
 :
vs. : Case II
 : No. 19016 Ce-1603
 : Decision No. 13556-A
WAYNE MOSLEY AND ROGER BROWN, :
ROCKY ROCOCO CORPORATION, :
 :
Respondents. :
 :

DANA SCHNEIDER, :
 :
Complainant, :
 :
vs. : Case III
 : No. 19022 Ce-1605
 : Decision No. 13557-A
WAYNE MOSLEY AND ROGER BROWN, :
ROCKY ROCOCO CORPORATION, :
 :
Respondents. :
 :

Appearances:
Ms. Ann Odegaard, Representative, Madison Independent Workers Union,
appearing on behalf of the Complainants.
Ross & Stevens, Attorneys at Law, by Mr. Jonathan E. Bauman,
appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Jerome Meltzer and Dana Schneider having filed separate complaints with the Wisconsin Employment Relations Commission, herein Commission, alleging that Wayne Mosley, Roger Brown and Rocky Rococo Corporation have committed unfair labor practices within the meaning of Section 111.04 and 111.06 of the Wisconsin Employment Peace Act, hereinafter the Act; and the Commission having appointed Amedeo Greco, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Act; and a consolidated hearing on said complaints having been held at Madison, Wisconsin on May 15, 1975, before the Examiner; and the parties having thereafter filed briefs which were received by September 23, 1975; and the Examiner having considered the evidence and arguments of counsel, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Rocky Rococo Corporation, herein Respondent, operates a pizza restaurant near the University of Wisconsin campus in Madison, Wisconsin; that Respondent opened its restaurant in the Spring of 1974; 1/ and that Wayne Mosley and Roger Brown, hereinafter Mosley or Brown, are Respondent's co-owners, and at all times material hereto have acted as Respondent's agents.

1/ Unless otherwise specified, all dates hereinafter refer to 1974.

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2. That Dana Schneider and Jerome Meltzer, hereinafter referred to as Schneider, Meltzer and/or Complainants, were hired by Respondent in the Spring of 1974; and that both worked for Respondent until they were fired on December 16, at which time Schneider worked in the kitchen and Meltzer served as a combination dishwasher-busboy.

3. That in October Respondent was named by a student newspaper as having the best pizza in Madison; that immediately thereafter, Respondent's business increased substantially; that Respondent's business reached a peak when final examinations were given at the University of Wisconsin in the first two weeks of December; and that as Respondent's business increased, so did the work load of Respondent's employees.

4. That when the restaurant opened in the Spring, Respondent told its employees that they would receive a wage increase when business improved; that Schneider and another employee, Annette Marvie, approached Mosley and Brown in early November regarding the possibility of a raise for those employees who had been employed since the opening of the restaurant in the Spring; that Mosley replied that if employees in other Madison restaurants asked for a raise, they would be considered expendable by the management of those restaurants; that Mosley also said that he could not give an immediate raise because Respondent's financial condition at that time was somewhat unclear and that he would give Schneider and Marvie a definite response in a week; that about one week later, Schneider again spoke to Mosley about a raise, at which time Mosley said he did not know whether a raise could be granted; that Meltzer at about that time also asked Brown for a raise, to which Brown replied to the effect that he had assessed the market for employees and decided that raises were not in order at that time because of the availability of other people to take the jobs; that Mosley subsequently informally told some employees, other than Meltzer and Schneider, during Thanksgiving week that they would be receiving a wage increase in mid-December; that said increase became effective on December 16 and amounted to about 10 or 15 cents for all non-delivery employees and 25 cents for delivery employees; that Respondent on or about December 17 also gave to each of its employees a \$10 to \$25 Christmas bonus; that it does not appear that Respondent prior to that time ever told its employees that they would be receiving a Christmas bonus; and that Respondent granted the aforementioned wage increases and bonuses in order to defeat the Union organizing campaign which is described below.

5. That at all times material hereto, Respondent's employees have not been represented by a collective bargaining representative; that shortly after Schneider spoke to Mosley about a raise, Schneider on November 23 contacted Liora Alschuler of the Madison Independent Workers Union, hereinafter referred to as the Union, regarding the need for a union at the restaurant; that the Union thereafter immediately started an organizational drive among Respondent's approximately 28 employees which resulted in the execution of about 14 union authorization cards by early December; that Schneider and Meltzer were among the most active union adherents during that organization campaign; that both signed union authorization cards on November 24; that both solicited numerous employees to join the Union; that both signed a representation petition dated December 6 which was received by the Commission on December 13; that said petition was immediately withdrawn and never served on Respondent; that a second representation petition signed by Meltzer and another individual was filed with the Commission on December 17 and served on Respondent on or about December 19; and that subsequent thereto, the Union lost the representation election conducted among Respondent's employees in May, 1975.

6. That Respondent fired Schneider on December 16; that earlier in her employment, Schneider was once caught by Mosley giving away food to a friend; that on another occasion in the Summer, Schneider left work early without permission, thereby leaving only one employee in the restaurant; that Mosley then told Schneider that she was fired for

leaving early; that Schneider pleaded for her job back; that Mosley agreed to retain Schneider with the express understanding that Schneider would be fired for any subsequent misconduct of any kind; that on December 4, Schneider was scheduled to report for work at 5:00 p.m.; that Schneider arrived at the restaurant that day at about 4:45 p.m. and ordered a pizza to take out; that Schneider thereafter left the restaurant and returned at 5:15 p.m.; that upon her return, Schneider gave no explanation to either Mosley or Brown for her 15-minute tardiness; that on December 9 Schneider reported on her time card that she had started working at 5:00 p.m., when in fact she did not report for work until 5:15 p.m.; that neither Mosley nor Brown spoke to Schneider regarding the incidents of December 4 and 9; and that Mosley and Brown told Schneider on December 16 that she was fired and then handed Schneider a note which stated that Schneider was being fired because of tardiness and lack of trust.

7. That Meltzer was initially hired as a janitor and several months later became a dishwasher and bus boy; that Meltzer's work during the first few months of his employment was, in Mosley's words, "exemplary"; that Meltzer telephoned the restaurant on November 8 to report that he was ill and that he would therefore miss work that night, which he did; that Meltzer missed work on November 13, 14 and 15 because of a cut finger which had been injured on the job; that Meltzer thereafter applied for and received workman's compensation for those three days; that Respondent did not challenge Meltzer's workman's compensation claim; that after Meltzer asked Mosley for a raise in November which was refused, Meltzer that night slammed pans in the kitchen; that shortly thereafter, Mosley asked Meltzer on November 26 to report for work each day a half hour earlier in the future; that Meltzer said he would do so, but only if the restaurant was cleaned up when he reported for work, because he, Meltzer, would be unable to clean up the entire day's dishes; that Mosley at that point became very angry, grabbed Meltzer and told him that he had a bad attitude; that Meltzer subsequently missed work on November 29, December 5, December 11 and 12; that Meltzer asked for and was given permission to miss work on December 5 so that he could attend a concert; that Mosley and Brown told Meltzer on December 16 that he was fired and handed Meltzer a note which read:

"This is to inform you that we are terminating your employment as of Sunday December 15, 1974. Our decision was based on the following factors;

(1) a decrease in our confidence in your reliability growing from frequent last minute absences from work necessitating last minute replacements which have put a heavier burden on both staff and management;

(2) an increasingly hostile attitude towards your job, towards management, and towards the public having an adverse effect on our establishment.

The reason this point in time has been chosen to terminate your employment is the following;

it is the end of a period of continual growth in our business which is closely tied to the University of Wisconsin's school year which has ended. Since we are nearing a slow business period the management has taken this opportunity to evaluate personnel and to hire and train new personnel before the next period of growth.

Enclosed is a check covering your final pay period ending 12-15-74."

that Meltzer there asked why he was being discharged, to which Mosley and Brown replied that they did not want to discuss the matter; that prior to Meltzer's discharge, Respondent had never questioned Meltzer about his absences; and that but for the November 26 incident described above, Respondent has never spoken to Meltzer regarding his attitude or any other alleged work derelictions.

8. That sometime in November, Mosley told counter girl Lynn Tolcott, who was then working one night a week for about nine hours, that he was glad that Tolcott was working at the restaurant and that if Tolcott ever wanted to work more hours Tolcott should talk to him about it; that on December 4, Tolcott asked Brown for more hours; that Brown did not then ask Tolcott how many more hours she wanted to work or inquire as to which days she would be able to work; that instead, Brown brought up the subject of the Union, said that he knew about it, expressed negative feelings about the Union, said that he knew that Schneider and Meltzer were among the "ringleaders" of the Union, and that since Tolcott was a friend of Schneider's he would not give Tolcott more hours because of Tolcott's Union sympathies; that Tolcott's hours were not thereafter immediately increased despite the fact that there was work available for which Tolcott was qualified to perform; that Respondent refused to grant Tolcott an immediate increase of hours because of her alleged friendship with Schneider; that several weeks later, Tolcott informed Mosley that she would be missing one night of scheduled work because of Christmas vacation and asked whether she would be able to have her hours back when she returned from Christmas vacation; that Mosley replied that there were "a lot of things going on", that he did not know what was going to be happening, and that, therefore, he could not promise Tolcott her hours upon her return; that Tolcott subsequently returned to work after Christmas vacation and had her hours increased in the first week of February, 1975; and that earlier, Respondent hired two new employees, Mary Stolpher and Lori Kelly, who began working on December 3 and December 9 respectively.

9. That at the time of their discharges, Respondent knew that Schneider and Meltzer were among the most active adherents in the Union's organizational campaign; that Respondent did not decide to fire Meltzer and Schneider on November 26 and December 4, as alleged; and that Respondent fired Schneider and Meltzer because of their union activities.

On the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSION OF LAW

That Respondent fired Jerome Meltzer and Dana Schneider because of their union activities and that, therefore, said terminations violated Section 111.06(1)(a) and (c)1a of the Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes the following

ORDER

IT IS ORDERED that Respondent, Rocky Rococo Corporation, its officers and agents, shall immediately:

1. Cease and desist from discriminating against Jerome Meltzer or Dana Schneider, or any other employees, in retaliation against their activities on behalf of Madison Independent Workers Union, or any other union.
2. Take the following affirmative action which the undersigned finds will effectuate the purposes of the Act:
 - (a) Immediately offer to reinstate Jerome Meltzer and Dana Schneider to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges which they may enjoy, and make each whole by paying them a sum of money equal to that which they would have earned, including all benefits, less any amount of money that they earned or received that

they otherwise would not have earned or received, but for their terminations.

- (b) Notify all employees by posting in conspicuous places in its offices where employees are employed copies of the notice attached hereto and marked "Appendix A". That notice shall be signed by Respondent and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced or covered by other material.
- (c) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 19th day of December, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Amedeo Greco
Amedeo Greco, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

Pursuant to an Order of the Wisconsin Employment Relations Commission and in order to effectuate the policies of the Wisconsin Employment Peace Act, we hereby notify our employees that:

1. WE WILL offer to reinstate Jerome Meltzer and Dana Schneider to their former or substantially equivalent positions and we shall make them whole for any loss of money they may have suffered as a result of their terminations.
2. WE WILL NOT discriminate against Jerome Meltzer or Dana Schneider, or any other employees, because of their Union activities.
3. WE WILL NOT in any other or related manner interfere with the rights of our employees, pursuant to the provisions of the Wisconsin Employment Peace Act.

By _____
Rocky Rococo Corporation

Dated this _____ day of _____, 1975.

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

The basic issues presented herein are whether Respondent discriminantly fired Meltzer and Schneider because of their union activities, with Complainants asserting, and Respondent denying, that such was the case.

In resolving these issues, the undersigned has been presented with some conflicting testimony regarding certain material facts. Accordingly, it has been necessary to make credibility findings, based in part on such factors as the demeanor of the witnesses, material inconsistencies, and inherent probability of testimony, as well as the totality of the evidence. In this regard, it should be noted that any failure to completely detail all conflicts in the evidence does not mean that such conflicting evidence has not been considered: it has.

Furthermore, it must be noted at the outset that Complainants have the burden of proving the alleged discriminatory nature of Meltzer and Schneider's terminations, as they must prove by a clear and satisfactory preponderance of the evidence that Respondent had knowledge of Meltzer and Schneider's union activities, that Respondent was hostile towards such activities, and that their terminations were motivated at least in part by anti-union considerations. St. Joseph's Hospital (8787-A, B) 10/69, 12/69; Earl Wetenkamp d/b/a Wetenkamp Transfer and Storage (9781-A, B, C) 3/71, 4/71, 7/71; and AC Trucking Co., Inc., (11731-A) 11/73.

Turning first to the issue of knowledge, the record establishes, as noted above in paragraph five of the Findings of Fact, that both Meltzer and Schneider were extremely active on behalf of the Union. Initially, when asked about such activities, Mosley denied that he knew before December 16 that Schneider and Meltzer had been active for the Union and he claimed that he had no specific knowledge that the Union then was in the midst of an organizational drive among Respondent's employees. But, upon further questioning, Mosley admitted, albeit reluctantly, that he knew by December 16 that Union organizational campaigns were occurring at other Madison area restaurants and that he had an "inference" of such activity in his store because, in his words, "The people were unhappy. They just - they were complaining about their wages. If there were union activities going on, that could certainly be a basis for it." Mosley also conceded that "you would figure disgruntled employees like [Schneider] would be involved in something like that."

Additionally, Brown had specific knowledge of Meltzer and Schneider's union activities, as evidenced by the fact that in his December 4 conversation with Tolcott, Brown there brought up the subject of the Union, expressed negative feelings about it, said that he knew that Schneider and Meltzer were among the "ringleaders" of the Union, and stated that since Tolcott was a friend of Schneider's, she would not be given more hours. While Brown denied making the above statements, the Examiner discredits his denial, and instead, credits Tolcott's foregoing account of this conversation for the reasons noted above.

Coupled with such specific knowledge of Schneider and Meltzer's union activities, the record further establishes that Respondent bore animus against them because of such activities. Respondent's hostility against any concerted activity was first reflected in Mosley's initial conversation with Schneider in November regarding her request that raises be given to those employees who had been employed since the opening of the restaurant. In response, Mosley said if employees in other Madison restaurants asked for a raise, such employees would be considered expendable by the management of those restaurants. Although Mosley did not expressly state that his employees would suffer the same fate, such explication was unnecessary as his response was a thinly veiled threat of what could happen to them in the future regarding their raise request. Secondly, it is noteworthy that

when Mosley announced to several employees during Thanksgiving week in late November that there would be a general wage increase in mid-December, he failed to also directly notify either Schneider or Meltzer, the two individuals who had initially asked about such an increase. Mosley's failure to do so can only be construed to reflect his displeasure over their efforts in bringing the raise issue to a head. The timing of the raises is also indicative of Respondent's hostility against the Union. Thus, whereas Respondent initially told its employees in the Spring that they would receive raises when business increased, and although such an increase began in October and November, Mosley told Schneider in their second discussion in November that he did not know whether a raise would be given and Brown categorically told Meltzer in a similar conversation at about the same time that there would be no raises. Thereafter, Respondent suddenly reversed itself and announced that there would be raises. Since the raise issue was a major point of discontent among Respondent's employees which led Schneider to contact the Union on November 23, 2/ it is reasonable to infer that Respondent immediately learned of the Union's impending organizational drive, and to stop that drive, Respondent thereafter immediately announced in Thanksgiving week 3/ the raise which it had denied only shortly beforehand. Similarly, with reference to the granting of a Christmas bonus in mid-December, since the record fails to establish that Respondent ever informed its employees prior thereto that they would be receiving such bonuses, it is also reasonable to infer that Respondent decided only at the last minute to grant that benefit and that its purpose in doing so, like the granting of the wage increase, was to help defeat the Union's campaign.

In addition to the above, Respondent's animus is most significantly reflected by Brown's December 4 remarks to Tolcott wherein Brown said that Meltzer and Schneider were "ringleaders" in the Union, that Tolcott was a friend of Schneider, and that because of such friendship, 4/ Tolcott would not be given more hours. Thereafter, Brown refused to immediately increase Tolcott's hours, despite the fact that such hours were available. 5/ For, although Respondent contends that there were no additional hours for Tolcott to work, Mosley and Brown elsewhere assert that they decided on December 4 to fire Schneider, but that they then agreed to delay her actual termination until the end of final exams in mid-December on the ground that it was too difficult to hire additional help during Respondent's extremely busy period in early December. If that is so, why did Respondent not immediately fire Schneider on December 4 and give to Tolcott any of the hours then worked by Schneider? Since Tolcott by then had been with the Respondent for four months, and as she was in close proximity to the kitchen where Schneider worked, it certainly appears that she was familiar enough to perform Schneider's duties with little or no difficulty. Indeed, Respondent itself makes no claim that Tolcott could not perform Schneider's duties. Such a transfer of hours to Tolcott, therefore, was certainly feasible, especially in light of the fact that Respondent had hired a new employee, Mary Stolpher, on December 3. If, then, Respondent could hire and train such a new employee during a peak

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- 2/ Although there was testimony that Schneider contacted the Union on either November 23 or November 26, the record indicates that the latter date is correct since both Meltzer and Schneider signed union authorization cards on November 24.
- 3/ While the exact date of the announcement is unclear, it appears that it followed Schneider's initial contact with the Union.
- 4/ No proof was adduced at the hearing to support Brown's belief that Tolcott and Schneider were good friends.
- 5/ Because this issue was not alleged in the complaint, the Examiner has not made any conclusion of law as to whether such conduct was unlawful.

business period, it certainly could have taken the time to give Tolcott, who was experienced and who needed less training, more hours only one day later. That certainly would have been most reasonable as it would have cured two pressing problems: Tolcott's request for additional hours and Respondent's alleged unhappiness over Schneider's work performance. Respondent, however, refused to do that. Instead, it did not fire Schneider until December 16 and it did not increase Tolcott's hours until two months later, in early February, 1975. Additionally, inasmuch as Schneider was fired on December 16 and as Schneider was working about 30 hours per week, her termination then created some additional hours which had to be filled by others. 6/ Why, then, did Respondent not offer any of those hours to Tolcott instead of waiting until February, 1975 to do so? 7/ Similarly, as a new employee, Lori Kelly, started working on December 9, only five days after Tolcott had requested more hours, why did Respondent not give Tolcott any of the hours allocated to Kelly? To that, Brown answered only that "I didn't think that would--she could have filled the spots we were looking for." But, since Brown never asked Tolcott about her availability to work certain hours, and inasmuch as no showing has been made that Tolcott could not perform the duties in issue, it is clear Brown has offered no satisfactory explanation for his conduct.

Respondent's actions throughout this matter, therefore, can only be explained on the basis that it wanted to deprive Tolcott of any additional hours for as long as possible and to thereby punish Tolcott because of her alleged friendship with Schneider, just as Brown promised would happen in his December 4 conversation with Tolcott. 8/ That, of course, is evidence that Respondent was extremely hostile against Meltzer and Schneider because of their union activities, for, if Brown bore animus against Tolcott merely because of her alleged friendship with Schneider, it follows that Respondent bore an even deeper animus against the very "ringleaders" of the Union, Meltzer and Schneider.

Inasmuch as the foregoing establishes that Respondent knew of Meltzer and Schneider's union activities at the time of their December 16 terminations, and that Respondent was hostile towards the Union and resented such activities, the ultimate question herein is whether said terminations were in any way based on anti-union considerations. 9/

As to Meltzer, Respondent basically claims that Mosley and Brown decided on November 26 to fire Meltzer because of Meltzer's absences and his alleged bad attitude towards his work, management and customers, and that they retained Meltzer until December 16 only because it was too difficult to replace Meltzer during Respondent's business period in early December.

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- 6/ Even if the full 30 hours were not available, it hardly seems likely that no hours were available, especially since Respondent acknowledges that its business increased with the advent of second semester after the Christmas vacation, at which time it planned to hire additional help.
- 7/ Since Tolcott took only a one-week vacation in late December and returned for work in January, 1975, it cannot be said that the refusal to grant her any more hours was based on her alleged unavailability during that period.
- 8/ Even absent Respondent's post-December 4 conduct, Brown's remarks to Tolcott on December 4, standing alone, reflect Respondent's animus.
- 9/ In resolving this question, the Examiner has given no weight whatsoever to the findings and conclusions made in reference to Meltzer and Schneider's request for unemployment compensation, as such findings and conclusions are not dispositive of the issues herein.

On this point, the record establishes that Meltzer was absent on November 8, 13, 14, 15, 29, December 5, 11 and 12. However, Brown alleged that he and Mosley decided on the night of November 26 to fire Meltzer because of Meltzer's attitude and his absences, absences which in Brown's words by then had become "a problem of major proportions." Under Brown's version, post-November 26 absences are therefore immaterial as the decision by then had already been made to fire Meltzer. As to pre-November 26 absences, Meltzer had only missed work on November 8 when he called in sick, and on November 13, 14 and 15, when Meltzer was absent because of a cut finger which he incurred at the job. Respondent never questioned Meltzer about his November 8 illness, it has offered no proof whatsoever that Meltzer was not in fact sick that day, and Respondent did not challenge Meltzer's workman's compensation claim which he filed over his job-related injury, a claim which was subsequently upheld by the Workmen's Compensation Division. In light of these factors, and since Respondent concedes that prior thereto Meltzer was "very punctual", the record fails to establish that Meltzer's absences by November 26 constituted any grounds for his termination.

Furthermore, even assuming arguendo that post-November 26 absences should be considered, it is nonetheless inexplicable as to why Respondent never spoke to Meltzer regarding such absences or why, if the absences were such a problem, Respondent granted Meltzer permission to attend a music concert on December 5. Additionally, since Respondent knew in any event why Meltzer was absent on at least four of the eight occasions in question, i.e., November 13, 14, 15 and December 5, it can hardly be said that the remaining four absences - considered in the light of Meltzer's prior excellent record - constituted any grounds for firing Meltzer, especially when it is remembered that Respondent has offered no proof whatsoever that Meltzer was not ill on those occasions.

Secondly, Respondent asserts that it also fired Meltzer in part because of his bad attitude. This claim of course is highly subjective and, as such, must be particularly scrutinized where, as here, Respondent's alternative reason for firing Meltzer, his alleged absences, is without merit for the reasons noted above. As to this claim, the record establishes that Meltzer's relationship with Brown and Mosley did deteriorate after he had asked for and had been denied a raise in November. That situation, however, may well have developed because Brown and Mosley resented Meltzer's union activities and thereafter reflected such displeasure in their subsequent dealings with Meltzer, just as credibly testified to by Meltzer. 10/ Accordingly, and inasmuch as Mosley only once spoke to Meltzer about his attitude, and then in extreme anger on November 26 over a specific incident, and because Respondent acknowledges that Meltzer previous thereto had been an exemplary employe, the Examiner is unable to give any weight to the claim that Meltzer was hostile towards Respondent's management. Similarly, and for the same reasons, there is no merit to the claim that Meltzer's attitude towards customers deteriorated, as Respondent never brought any customer complaints to Meltzer's attention, something it certainly would have done if such complaints had been made and if it ever hoped to correct Meltzer's alleged derelictions in this area.

But, the record does establish, as contended by Respondent, that Meltzer deliberately slammed pizza pans on the night in which he had asked for and had been denied a raise in November. While such conduct is not to be condoned, it is nonetheless significant that Respondent never once spoke

10/ Schneider credibly testified that her relationship with Brown and Mosley also deteriorated after she had asked for a raise.

to Meltzer about this incident, thereby indicating that it did not view the matter that seriously.

Respondent has also shown that when Mosley asked Meltzer on November 26 to work an additional one-half hour each day to help clean the afternoon dishes, Meltzer replied that he would do so, provided that he would be able to handle such an increased work load. Respondent contends that that response evidenced Meltzer's bad attitude toward his work and that it triggered Respondent's decision on November 26 to subsequently fire Meltzer in mid-December. In evaluating this claim, it is noteworthy that Meltzer never refused to work the additional one-half hour in issue. Moreover, inasmuch as Meltzer worked alone as a dishwasher and since Respondent's business by then had increased substantially, there is no question but that Meltzer was extremely busy in performing his duties and that, therefore, his caveat was not an unreasonable fear as to whether he would be able to handle the additional work assignment.

Reviewing the above, the record establishes that Respondent believed Meltzer to have been a good employe before the Union came on the scene; that Meltzer was extremely active on behalf of the Union; that Respondent learned of and resented such activities; that but for the November 26 incident in which Mosley told Meltzer that he had a bad attitude, Respondent never questioned or reprimanded Meltzer regarding any purported work derelictions or his absences; that one of the grounds given for Meltzer's termination, his alleged excessive absenteeism, has no merit; and that the other asserted ground, Meltzer's alleged poor attitude, is highly subjective and devoid of much substantial proof. These factors must also be considered alongside the fact that Respondent's version as to when it decided to fire Meltzer is totally implausible. Thus, although Respondent contends that it decided to fire Meltzer on November 26 and that it delayed his actual termination because it would have been too difficult to find an immediate replacement for Meltzer, the record shows that Respondent thereafter hired two new employes, Stolpher and Kelly. Since Respondent could hire those employes during its busy season, it is not unreasonable to assume that it also could have hired or attempted to hire an additional employe to replace Meltzer at the same time. That is especially so where, as here, it could have given some of Meltzer's hours to Tolcott. 11/ In light of the totality of the record, it can therefore be inferred that Respondent did not decide to fire Meltzer until sometime after November 26.

Since, therefore, the foregoing establishes that Respondent's account as to when it fired Meltzer is inherently implausible, and inasmuch as Respondent has offered few, if any, valid reasons as to why Meltzer was discharged, and in light of the above-noted factors which show that Respondent bore animus against Meltzer because of his union activities, it can be inferred, and I so find, that Respondent in fact terminated Meltzer because of his union activities and that Respondent's stated reasons for effectuating his termination were pretextual in nature. Accordingly, his discharge was violative of Section 111.06 of the Act. To remedy that unlawful conduct, Respondent is required to take the remedial steps noted above.

As to Schneider's termination, the record shows, as noted in paragraph six of the Findings of Fact, that Schneider was earlier fired 12/ and

11/ While Meltzer's duties as a dishwasher and busboy were different from Tolcott's duties as a counter girl, it is also true that Meltzer's duties require little, if any skills, and that Tolcott an experienced employe, would have needed little, if any, training for that job.

12/ Although Schneider denied that she was so fired, the Examiner discredits this particular part of her testimony and, instead, credits Mosley's account as to what there transpired.

then immediately rehired in the Summer on the condition that she would not engage in any subsequent misconduct, after she had given away a piece of pizza to a friend and after she had left work early without permission. Thereafter, Respondent had no further difficulties with Schneider until the latter part of 1974, when, according to Respondent, her work deteriorated and she became increasingly hostile towards everyone after she had requested and had been denied a wage increase. For the reasons noted above in reference to Respondent's similar claim against Meltzer, however, the Examiner finds no merit to this contention.

But, as correctly noted by Respondent, the record does establish that Schneider was scheduled to report for work at 5:00 p.m. on December 4, that she did not punch in until 5:15 p.m., and that Schneider gave no explanation for her tardiness, despite the fact that she had been in the restaurant at 4:45 p.m. at which time she ordered a pizza and then left. Similarly, it is also true that Schneider on December 9 claimed on her time card that she had reported for work at 5:00 p.m., when in fact she did not do so until 5:15 p.m. ^{13/} Respondent contends in this connection that it decided to fire Schneider on December 4 because Schneider gave no explanation for her tardiness that day and that it retained Schneider until mid-December on the ground that it was not feasible to hire a replacement for her before then. As to the December 9 incident, Respondent claims that that was "icing on the cake" and that it did not speak to Schneider about it because the decision had already been made by then to fire her.

With respect to Schneider's December 4 tardiness, there is no evidence that employees were ever expected to explain why they were late. Absent such a requirement, and because there is no indication that Schneider previous thereto had experienced any similar difficulty, it would appear that Schneider's lack of explanation that day hardly constituted sufficient grounds for dismissal. The December 9 incident, on the other hand, is more serious as it can constitute sufficient grounds for termination under many circumstances.

Even assuming arguendo, then, that Respondent did have cause to fire Schneider, the mere existence of such cause, however, does not end the matter as it is entirely possible that an employer can seize upon an employee's malfeasance to terminate that employee when in fact the employer's true motivation in effectuating such a discharge rests partly on discriminatory anti-union considerations. This point has been expressly recognized by the Wisconsin Supreme Court in Muskego-Norway Consolidated School District No. 9, et al., v. Wisconsin Employment Relations Board (1967) 35 Wis 2d 540, 151 NW 1d 617, wherein the court noted that:

" . . . an employee may not be fired when one of the motivating factors is his union activities, no matter how many other valid reasons exist for firing him."

Applying that principle here, it is therefore necessary to determine whether Respondent's termination of Schneider was in any way motivated by anti-union considerations.

The resolution of that issue, in turn, rests on the totality of the record taken as a whole, as well as the reasonable influences contained

^{13/} Schneider denied that she incorrectly filled out her time card. The Examiner discredits this part of her testimony, as the evidence in its totality establishes that she did.

therein, and, accordingly, does not depend merely on Respondent's denial of any wrongdoing in firing Schneider. This is so because, as succinctly stated in Shattuck Denn Mining Corp. v. NLRB 362 F. 2d 466, 470 (CA 9, 1966):

"... actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive: the trier of fact may infer motive from the total circumstances proved. Otherwise, no person accused of unlawful motive who took the stand and testified to a lawful motive could be brought to book."

Here, on the one hand, Schneider was guilty of misconduct near the beginning of her employment, at which time she was told that she would be fired for any subsequent misconduct. Thereafter, Schneider was tardy for work on December 4 and she incorrectly reported her time on December 9. These factors lend some support to Respondent's defense. On the other hand, there are other record facts which indicate that Schneider's discharge was based on anti-union considerations, e.g., Respondent's knowledge of Schneider's union activities, Brown's characterization of Schneider as a "ringleader", Respondent's pronounced union animus, Respondent's efforts to defeat the Union by granting raises after it had initially denied such raises, Brown's threat to Tolcott (subsequently carried out) that she would not receive any more hours because of her alleged friendship with Schneider, and Respondent's discriminatory discharge of Meltzer, another "ringleader" whom Respondent fired on the very same day and in the very same fashion that it discharged Schneider.

Furthermore, and as with Meltzer, the record establishes that Respondent's version as to when it initially decided to fire Schneider is inherently implausible. For, if in fact Respondent decided to fire Schneider on December 4 as alleged, why did Respondent not immediately fire Schneider on December 4 and offer her hours to Tolcott who on the same day asked for more hours? To that, Respondent offers no plausible explanation. Similarly, how is it that Respondent on the one hand claims that it was too busy to seek an immediate replacement for Schneider on December 4, while at the same time it was not too busy to secure the services of a new employee, Mary Stolpher, who began working only one day before, on December 3, and to subsequently hire another employee, Lori Kelly, only a few days later? Again Respondent offers no explanation for such action. Accordingly, since Respondent's delay in immediately firing Schneider is inexplicable, it must be concluded that Respondent did not decide to fire Schneider until sometime after December 4 and that Respondent's account as to when it decided to fire Schneider is totally pretextual in nature, and that such a false account has been advanced in order to conceal the true reasons motivating Schneider's discharge.

Based upon the facts herein, which show that Respondent knew of Schneider's union activities, that it resented such activities, that it waged an anti-union campaign to defeat the Union, that it threatened to deprive Tolcott of additional hours merely because of her alleged friendship with Schneider, that it subsequently did so, and that it discriminatorily fired Meltzer, another "ringleader", it can be inferred, and I so find, that Respondent's true motivation in firing Schneider was one which it has sought to conceal, i.e., in this case the fact that Schneider, like Meltzer, was a "ringleader" for the Union, one who Respondent believed had to be terminated in order to help thwart the Union's campaign. Accordingly, since the record in its totality establishes that Schneider was fired because of her union activities, and not because of her work derelictions, I find that her termination was

violative of Section 111.06 of the Act. As a remedy, Respondent is required to take the action noted above.

Dated at Madison, Wisconsin this 19th day of December, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner