United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1187 **September Term, 2018**

FILED ON: APRIL 30, 2019

KITSAP TENANT SUPPORT SERVICES, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

Consolidated with 18-1217

On Petition for Review and Cross-Application
for Enforcement of an Order of
the National Labor Relations Board

Before: GARLAND, *Chief Judge*, HENDERSON, *Circuit Judge*, and SENTELLE, *Senior Circuit Judge*.

J U D G M E N T

This petition for review and cross-application for enforcement were considered on the record from the National Labor Relations Board and on the briefs of the parties. *See* FED. R. APP. P. 34(a)(2); D.C. CIR. R. 34(j). The Court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). It is

ORDERED AND ADJUDGED that the petition for review be denied and the NLRB's cross-application for enforcement be granted.

On May 31, 2018, the Board found that petitioner Kitsap Tenant Support Services had unlawfully disciplined four employees and violated its statutory duty to bargain during and after its caregiving employees' successful unionization campaign. The Board's remedy required Kitsap to bargain with the union for fifteen hours per week and to submit periodic progress reports, and to reinstate the disciplined employees with backpay. We conclude that all of Kitsap's challenges in its petition for review lack merit.

First, the Board correctly applied its *Wright Line* test to all four disciplined employees, and its findings are supported by substantial evidence.

(a) *Bonnie Minor*. The Board reasonably concluded that substantial evidence supports the prima facie case, relying on Minor's membership in the union's organizing committee, her extremely strong annual performance review just one week before her discharge, her lack of any previous discipline, her termination the same day she spoke at Kitsap's mandatory meeting regarding unionization, and Kitsap's other actions demonstrating anti-union animus. J.A. 117-19; *see Inova Health Sys. v. NLRB*, 795 F.3d 68, 82 (D.C. Cir. 2015). Kitsap failed to meet its burden in rebuttal because Program Manager Alan Frey never mentioned forthcoming discipline when reprimanding Minor for canceling a client Christmas party and engaging in "triangulation" with clients; Kitsap did not identify any other employee ever discharged for "counter-therapeutic" conduct; and the Board showed that Kitsap tolerated worse conduct by other employees. J.A. 119-20, S.A. 1-3.

(b) *Alicia Sale and Hannah Gates*. The General Counsel met his initial burden by showing that Kitsap knew Sale and Gates were members of the union-organizing committee, placed Sale and Gates on administrative leave two days after receiving notice that the union campaign had been successful enough to support an election petition, and disciplined Sale and Gates more harshly than other employees who intentionally harmed clients. J.A. 121, S.A. 1-3. Kitsap's argument in rebuttal, that it had a good-faith belief that Sale and Gates engaged in misconduct, fails because Kitsap did not "parcel[] out discipline as it normally would when confronted with the same kind of employee misconduct that its managers reasonably believed had occurred." *Ozburn-Hessey Logistics v. NLRB*, 833 F.3d 210, 221 (D.C. Cir. 2016) (citation omitted).

(c) *Lisa Hennings*. Finally, the Board reasonably concluded that Hennings' demotion was unlawful because Kitsap was aware of Hennings' union membership and issued several pretextual letters of discipline against her, including for tardiness (though the General Counsel demonstrated that other tardy employees were not so disciplined), for scheduling beyond the scope of her role (though Frey admitted that such scheduling was routine), and for failing to complete client narratives (though Kitsap so disciplined no other employees in Hennings' house). *See* J.A. 124-27; S.A. 4-7; *Ozburn-Hessey*, 833 F.3d at 219-20.

Second, substantial evidence supports the Board's conclusion that Kitsap violated § 158(a)(3) of the Act by increasing its enforcement of disciplinary rules due to its employees' union support. Kitsap does not dispute that a deviation from prior practice coincided with the union election, and its purported concern about a potential state audit was pretextual. *See* J.A. 127-29; *Jennie-O Foods*, 301 N.L.R.B. 305, 311 (1991).

Third, we find that the Board adequately supported its conclusion that Kitsap did not "meet at reasonable times" and bargained in bad faith. 29 U.S.C. § 158(d); *see id.* § 158(a)(5) (recognizing "refus[al] to bargain collectively" as an unfair labor practice). Kitsap's negotiator repeatedly failed to respond to union scheduling requests and canceled or cut short several meetings. J.A. 109-12. Kitsap also engaged in regressive tactics by accepting and then rescinding an agreement to include heads of household in the bargaining unit. J.A. 115. Kitsap further violated its duty to bargain by failing to turn over information relevant to evaluating its proposal with respect to wages. *See KLB Indus., Inc. v. NLRB*, 700 F.3d 551, 556-57 (D.C. Cir. 2012). Given that the "drawing of inferences

as to good or bad faith in the bargaining process is largely a matter for the Board's expertise," the Board has adequately supported its conclusion in this case. *Int'l Woodworkers of Am. v. NLRB*, 458 F.2d 852, 854 (D.C. Cir. 1972) (citation omitted).

Fourth, we reject Kitsap's challenges to the Board's remedial order. We lack jurisdiction to consider Kitsap's challenge to the mandated bargaining schedule and status reports because Kitsap did not raise that argument in a motion for reconsideration before the Board. *See* 29 U.S.C. § 160(e). Kitsap also claims that the Board's remedy of reinstatement with backpay for the four employees is punitive. But this is the Board's conventional remedy, *see, e.g.*, *Precoat Metals*, 341 N.L.R.B. 1137, 1138 (2004); Kitsap's suggestion that the employees were disciplined "for cause" conflicts with the Board's settled interpretation of this term, 29 U.S.C. § 160(c); *see Anheuser-Busch, Inc.*, 351 N.L.R.B. 644, 647 (2007); and Kitsap's argument that these employees were "unfit" for reinstatement fails because Kitsap did not deem unfit other employees who engaged in considerably worse misconduct, *cf. NLRB v. W. Clinical Lab., Inc.*, 571 F.2d 457, 460 (9th Cir. 1978).

Finally, we lack jurisdiction to consider Kitsap's claim that the complaint was not properly ratified because that objection was not raised before the Board. *See* 29 U.S.C. § 160(e).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk