United Parcel Service *and* David Dunning. Cases 7–CA–33137, 7–CA–33981(2), 7–CA–34605, and 7–CA–34903

December 24, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On February 20, 1998, Administrative Law Judge Judith Ann Dowd issued the attached supplemental decision on remand.[1] The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

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

The Board has considered the supplemental decision on remand,[2] and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions[4] and to adopt the recommended Order.

1. The judge found, and we agree, that the Respondent violated Section 8(a)(1) of the Act by enforcing its no-distribution rule in the check-in area and by discriminatorily applying the rule against David Dunning in the check-in area. The judge found that during the hour before the drivers' starting time at 8:30 a.m., the prestart period, the drivers openly read, lounge, engage in social conversation, and generally use the check-in areas as assembly and waiting rooms. She also found that while supervisors occasionally give some instructions or supplies to drivers in the check-in areas during the prestart period, this is the exception and not the rule. The judge concluded that the check-in areas are nonwork areas, or at most, mixed use areas. The Respondent, therefore, was not privileged to ban distribution in such areas.

We agree with the judge's analysis. The Board has long held that an employer may lawfully prohibit employees from distributing literature in work areas in order to prevent the hazard to production that could be created by littering the premises. *Stoddard Quirk Mfg. Co.,* 138 NLRB 615 (1962). However, the Board has also held, with court approval, that this rule does not apply to a mixed use area. *Transcon Lines,* 235 NLRB 1163, 1165 (1978), affd. in pertinent part 599 F.2d 719 (5th Cir. 1979) (employer failed to meet burden of establishing that distribution, which took place in area used for recreation as well as work, occurred in a work area or during worktime); *Rockingham Sleepwear,* 188 NLRB 698, 701 (1971) (sewing area which is work area for greater portion of day, but used as lunch area during lunch period, not "work area" within meaning of *Stoddard-Quirk* for duration of lunch period, but lunchroom where distribution may not lawfully be prohibited). The concerns for protecting the production process which were at issue in *Stoddard Quirk* do not rise to the same level when an employer compromises a work area by permitting nonwork use of it.

2. The judge concluded that the Respondent's no-distribution rule was discriminatorily enforced in the check-in area against employee Dunning. We agree. The judge found that drivers routinely and openly distributed such materials as fishing contest forms, football pool material, and information about golf tournaments, in the check-in areas during the prestart period. She further found that supervisors routinely mingled with the drivers in the check-in areas during the prestart period. The judge inferred that the supervisors were aware of these distributions and took no action to stop them. Action, however, was taken against Dunning's distribution of dissident union literature. Accordingly, the judge found that the Respondent discriminatorily enforced the no-distribution rule against Dunning.

Contrary to the assertion of our dissenting colleague, the judge's finding of knowledge of the distribution is not mere speculation. It is a reasonable inference drawn from the evidence that distributions were open and routine and that supervisors routinely mingled with drivers during the time such distributions took place. See, e.g., *Schaeff, Inc. v. NLRB,* 113 F.3d 254 (D.C. Cir. 1997) (Board had adequate support for inference that management knew of employees' union activities because there was evidence that employees openly talked about the activities at work and a manager regularly mingled with the employees when they were working).

3. The judge found, and we agree, that the Respondent violated Section 8(a)(1) by interfering with Dunning's distribution of union literature in, or near, a nonwork area. Contrary to the suggestion of our dissenting colleague, the judge did not concede that the General Counsel failed to show that the distribution occurred in a nonwork area. She found it was unnecessary to determine

[1] The Board remanded the proceeding for further credibility determinations, and if appropriate, new Conclusions of Law and recommendations. 325 NLRB 1 (1997).

[2] The Board has also considered the judge's decision of July 8, 1997, and the record in light of the exceptions and briefs filed at that stage of the proceedings.

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

[4] Based on the judge's crediting of employee David Dunning's testimony concerning his December 28, 1992 conversation with Managers Jennifer Shroeger and William Soumis, we adopt the judge's finding, stated in her initial decision and incorporated into her supplemental decision, that the Respondent violated Sec. 8(a)(4) of the Act by discharging Dunning because he filed unfair labor practice charges with the Board. Because any remedy based on a finding that the discharge also violated Sec. 8(a)(3) would be essentially the same as the remedy for the 8(a)(4) violation, we find it unnecessary to pass on the 8(a)(3) allegation. We further find it unnecessary to pass on the judge's statements concerning what her findings would be if Soumis' version of the December 28 conversation were to be credited.

whether the distribution occurred in or near the nonwork area.

There was conflicting testimony about the location of Dunning's distribution. The break area is an unenclosed space containing refreshment vending machines, tables, and chairs. The timeclock for part-time employees is in a work area close to the break area. Dunning testified that the distribution occurred within the break area; the Respondent's witnesses testified it occurred closer to the employee timeclock.

The judge did not resolve this conflict in testimony. Instead, she found that the issue of whether the distribution took place within or a few feet outside of the unenclosed break area was elevating form over substance. She reached this conclusion because the employees were on nonworking time when the distribution occurred, no employees in the area were performing work, and there was no showing that the distribution resulted in any disruption of production or discipline. We find no error in the judge's analysis.

4. The judge found that the Respondent violated Section 8(a)(1) by removing a protected publication from a bulletin board because it was critical of the Respondent. We agree. The Respondent set aside a bulletin board for union postings. The Respondent removed from the bulletin board a copy of the union publication, "Contract Update," on the ground that it was demeaning to the Respondent. The judge found, under the rationale of *Container Corp. of America,* 244 NLRB 318 (1979), that the Respondent could not lawfully remove notices from the bulletin board which it found distasteful. She concluded that although the publication alleged that the Respondent was guilty of serious safety violations, it did not contain material so egregious as to lose the protection of the Act.

The publication at issue made reference to a national, companywide agreement signed with the Occupational Safety and Health Administration (OSHA) in the past year, and alleged continuing safety violations concerning hazardous materials spills. It stated that the Union proposed stronger health and safety contract language.

Discussion of safety and health matters is protected by Section 7 of the Act. *Blue Circle Cement Co.,* 311 NLRB 623 (1993), enfd. 41 F.3d 203 (5th Cir. 1994). Here, the publication referred to continuing hazardous materials spills and stressed the need for stronger safety and health contract language. There was nothing so inflammatory or egregious as to warrant loss of the protection of Section 7 under the standard of *Container Corp*., supra.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, United Parcel Service, Saginaw, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER HURTGEN dissenting in part.

Although I agree that the Respondent's discharge of employee David Dunning violated Section 8(a)(4) of the Act, I do not agree that the Respondent independently violated Section 8(a)(1) of the Act.

Unlike the judge, I cannot find that the Respondent violated the Act by enforcing its no-distribution rule in its check-in area. Similarly, I cannot find that the Respondent discriminatorily applied its rule against Dunning in the check-in area.

Stoddard Quirk Mfg. Co., 138 NLRB 615 (1962), is the controlling precedent with respect to distribution of literature. In that case, the Board distinguished distribution from solicitation, and held that distribution could be barred in working areas. "[D]istribution of literature, because it carries the potential of littering the employer's premises, raises a hazard to production, whether it occurs on working time or nonworking time." Thus, distribution can be barred in a work area, even during nonwork times. Unlike no-solicitation rules, the emphasis is on the locus of activity, not simply the timing of activity.

In order to avoid these principles, the General Counsel contends that the check-in area is a nonwork area between 7:30 and 8:30 a.m. However, the evidence indicates that work activity occurs in that area at all times, even during the 7:30–8:30 a.m. period. The judge concluded that the area is a mixed-use area, and that distribution cannot be barred in such areas. I disagree. If work occurs in an area, it is a work area, and the employer has a legitimate interest in keeping it free from litter. Thus, the employer can bar distribution in that area.

Further, assuming arguendo that no work occurs during the 7:30–8:30 a.m. period, I would conclude that distribution can nonetheless be barred during that period. As noted above, under *Stoddard-Quirk*, distribution in a work area can be barred, even during nonwork times. Accordingly, the asserted fact that no work occurs from 7:30 to 8:30 a.m. in this work area does not mean that the Respondent cannot enforce its no-distribution rule in that area, even during those times. The Respondent can have a legitimate concern that litter accumulating during the 7:30 to 8:30 a.m. break period would remain during the post 8:30 a.m. work period.

My colleagues rely upon *Transcon Lines*,[1] for the proposition that a "no-distribution" rule cannot be applied in a mixed use area. The case does not stand for that broad proposition. In that case, the Board, in finding a violation, relied upon the following facts: (1) the employer enforced its rule in a discriminatory manner; (2) the employer's rule was so vague that employees could never know what was permitted and what was prohibited; (3) the mixed use area was the only place where employees could regularly communicate with each other

[1] 235 NLRB 1163, 1165 (1978); affd. in pertinent part 599 F.2d 719 (5th Cir. 1979).

about subjects of mutual concern. None of these three factors is present in the instant case. The Respondent has a valid and clear rule. Further, as discussed infra, that rule has not been discriminatorily applied. Finally, the General Counsel has not shown the absence of alternative places for employee communication.

Rockingham Sleepwear, 188 NLRB 698, 701 (1971), also cited by my colleagues, is also distinguishable. In that case, as in *Transcon*, supra, the employer had no clear rule against distribution. Indeed, the employer in *Rockingham* had no rule at all. By contrast, as noted above, the Respondent here has a clear rule against distribution.

The General Counsel has not established discrimination in the application of the rule. Concededly, there is evidence that various kinds of literature have been distributed occasionally in the relevant area. However, there is no showing that the Respondent knew of such distribution. The judge found that the Respondent, through its supervisors, must have known of these prior distributions. However, such speculation, even if reasonable, is no substitute for actual evidence that supervisors were aware of such distribution.

In an effort to establish supervisory knowledge, my colleagues note that supervisors mingle with drivers during the 7:30 to 8:30 a.m. period. However, there is no evidence that the supervisors were present at the time when distributions were occurring. Further, even assuming arguendo that they were present, that would not establish a violation. Supervisory knowledge and inaction would not establish the Respondent's acquiescence in the distributions. For example, there is no showing that supervisors are the persons charged with enforcement of the no-distribution rule. To the contrary, it appears that managers are the ones who have the responsibility to enforce the rule. Manager Brian Konesko enforced the rule against Dunning, and Manager William Soumis issued the warning. There is no showing that they were aware of, and permitted, the prior distributions.

I also do not agree that the Respondent unlawfully restricted Dunning's distributions "near" a nonwork area. In my view, it was the General Counsel's burden to establish that Dunning was in fact *in* a nonwork area when he was distributing. Neither my colleagues nor the judge suggests that the General Counsel has made this showing. Thus, I cannot find the violation.

Finally, I disagree that the Respondent violated Section 8(a)(1) by removing a union posting from a bulletin board. The judge acknowledges that the Union's document alleged serious safety violations. It is clear that the Union had no statutory right to use the bulletin board.[2] However, once an employer permits such use, it may well be that it impliedly agrees to tolerate union criticisms of Respondent's position on labor-management policies.[3] But, the Union's notice here went further. It accused the Respondent of serious safety violations. Absent evidence not shown here, I would not conclude that the Respondent has agreed to give the union carte blanche to use the Respondent's bulletin board to make unsubstantiated allegations of serious safety violations by the Respondent.[4] Thus, the Respondent was privileged to remove the document at issue here.

[2] *Container Corp. of America,* 244 NLRB 318 fn. 2 (1979).

[3] Id.

[4] *Compare Container Corp*. supra, where such allegations were not made.

SUPPLEMENTAL DECISION ON REMAND

JUDITH ANN DOWD, Administrative Law Judge. On November 7, 1997, the Board issued its Order Remanding the above-captioned decision to me for explication of my resolution of certain credibility issues and for an analysis of the David Dunning discharge under *Wright Line.*[1]

A. Ruling on Motions

Following issuance of the Order Remanding,[2] Respondent filed a Motion to Reopen the Record to receive the testimony of Jennifer Shroeger and/or to admit into evidence two statements prepared by Shroeger which had been rejected during the hearing. Shroeger was present during the disputed conversation and was the manager who made the determination to discharge Dunning.[3]

At the hearing, Respondent had sought to introduce two memoranda prepared and signed by Shroeger (R. Exhs. 13 and 14). These memoranda purported to memorialize the meeting between Shroeger, William Soumis, the division manager, and Dunning which preceded Dunning's discharge and a separate conversation between Shroeger and Erin Kelley, the object of Dunning's alleged continued sexual harassment.[4] Counsel for the General Counsel objected and I rejected those memoranda as hearsay, not admissible as within the "business record excep-

[1] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[2] Although dated November 7, 1997, the Board's Executive Secretary has confirmed Respondent's contention that the Order was not served, i.e., deposited in the mail, until November 19, 1997. Thus, Respondent's motion to reopen record, which was filed on December 17, 1997, was not untimely. See NLRB Rules, Secs. 102. 48(d)(2) and 102.112.

[3] Counsel for the General Counsel submitted a response to, and a motion to strike portions of, Respondent's motion on the basis that Respondent's arguments went to the merits of the issues remanded and improperly referenced evidence not part of the official record, the rejected statements and an affidavit of Shroeger. To the extent that Respondent's arguments go to the merits, they are essentially repetitive of arguments made by Respondent in its initial brief. To the extent that they refer to the rejected exhibits, I note that counsel for the General Counsel also referred to them in his brief to me. I discern no prejudice to any party arising from consideration of Respondent's motion and deny the motion to strike. I have fully reviewed and considered again the briefs filed by all parties; I find no basis to request or allow additional briefs at this stage of the case.

[4] This latter statement purports to memorialize a conversation between Shroeger and Kelley which apparently took place after Shroeger and Soumis had spoken with Dunning. That statement begins with, "In the evening of December 28. . . ." The record is silent as to the hour when the conversation with Dunning took place but he was a day-shift employee, arriving at work between 7:30 and 8:15 a.m.

tion" to the hearsay rule. See FRE, Rules 801 and 803(6). I maintain that ruling herein, noting further that there was nothing in those statements, in Shroeger's absence or in the circumstances under which they were created which would warrant their consideration under the catchall provisions of FRE 803(24). The decision to discharge Dunning was made by Shroeger, allegedly based upon a conversation which she and Soumis had with Dunning, and possibly upon her conversation with Kelley, not by others superior to Shroeger in reliance upon her memoranda concerning those conversations. Thus, the issue was not whether Respondent had a good-faith belief that Dunning had engaged in misconduct, based upon those memoranda, but whether what transpired in the meeting and what he allegedly did to Kelley supported Respondent's claim that it had a nondiscriminatory reason for which he would have been terminated even in the absence of any protected activity.[5] Absent the applicability of an exception to the hearsay rule, the testimony of live and present witnesses, subject to cross-examination and the judge's evaluation of credibility, is the way to prove facts. Facts are not generally established by affidavit in NLRB proceedings.

In objecting to the admission of Respondent's Exhibit 13, counsel for the General Counsel noted that "the company has not demonstrated that Ms. Shroeger is not available to it as a witness." Counsel for Respondent did not assert that she was unavailable but simply brought out that Shroeger, while still employed by Respondent, was working in Atlanta, Georgia, rather than in Detroit, Michigan, where the hearing was conducted. Neither did Respondent seek to adjourn the hearing to call Shroeger as its witness. In footnote 9 of my initial decision, I noted that Respondent had "offered no explanation for its failure to call" Shroeger notwithstanding that it had acknowledged that she was still employed by United Parcel Service (UPS). Perhaps I could have said that Respondent had "failed to adequately explain or justify Shroeger's absence." The net effect, however, is the same. Respondent did not call a witness whom it could reasonably have anticipated would give testimony favorable to its cause and did not explain why it could not have done so.[6] Such failures warrant the adverse inference which I drew.

Respondent now seeks to have the hearing reopened to adduce the testimony of Jennifer Shroeger. The evidence which she would offer, however, is neither newly discovered nor previously unavailable. Neither is it evidence which was proffered at the hearing and improvidently rejected. Accordingly, under Rule 102.48(d)(1), it does not warrant that this hearing be reopened.

B. Explication of Credibility Resolutions

The events of the December 28, 1992 meeting are critical to a determination of whether Dunning was discriminatorily discharged. On direct examination, Dunning testified that he was in the office, discussing another grievance, when Shroeger raised the issue of his discussing the reasons for his earlier suspension with other employees. At that time, he asserted, she said that she had heard "that [he] was making [his] suspension a topic of locker room conversation." She also told him, and he denied, that he had been instructed to keep the nature of his suspension (i.e., the sexual harassment of Kelley) confidential and, in the course of that conversation, asked if he was a socialist, connecting his union and TDU (Teamsters for a Democratic Union) activities with that political philosophy. Shroeger and Soumis stated or implied that he was intimidating Kelley and Dunning told them that he was complying with Soumis' earlier instructions to stay away from her. He asked Soumis to similarly keep her away from him. In the course of that conversation, Dunning stated that he "had a right to talk to other members [of the union] about the reasons he was suspended" and that, if he "needed to investigate his suspension," he was allowed as a steward to do so. (Tr. 112–114.) There was some intimation, he recalled, that Kelley felt intimidated by his presence in the building and by his functioning as a union steward; he pointed out that his routes through the building and his steward responsibilities precluded total avoidance of her. On cross-examination, Dunning testified that when Shroeger had asked him whether he had consulted an attorney as she had earlier suggested, he told her that, as she knew, he had filed charges with the National Labor Relations Board. Her response, at that time, was that this was "a Federal matter not a labor matter" (Tr. 140–141). At the hearing, he was asked and acknowledged that when other employees asked him why he had been suspended, he had told them that it was "for my union activities and for sexual harassment" (Tr. 113). I credit Dunning's testimony, as set forth herein.

In crediting Dunning's recollection over that of Soumis (as set out infra and in the Board's Order Remanding), I rely here, as I expressly did in my initial decision, on the adverse inference drawn from Respondent's failure to call Schroeger. I also rely upon Dunning's credibly offered denial, when recalled to the stand, that he had ever said or done anything "to impugn Erin Kelley" or that he had said that he *had* conducted an investigation. He had only asserted a right to conduct such an investigation (into the facts of his suspension) if he choose to do so. He also expressly and credibly denied telling Soumis and Shroeger that he was "going to dig up enough dirt on Ms. Kelley to show that she's not the angel they thought she was." (Tr. 478.) In concluding, as I did in my decision, that *"[t]here is no record evidence* to support the allegation that Dunning continued to sexually harass Kelley'' (internal quotation marks omitted), I was referencing and finding without substance Respondent's first numbered reason for Dunning's discharge as set forth in the January 6 letter, i.e., "1. Continuance of sexual harassment,"[7] not disregarding Soumis' testimony. In this regard, I note the total absence of evidence that Dunning had any offensive contact with Kelley after his suspension. I note, too, Dunning's credible testimony to the effect that, in the grievance hearing with respect to his suspension, both Shroeger and Kelley confirmed that there had been no such contact, that is, no continued sexual harassment, between the suspension and the

[5] I note that the reporter improperly included R. Exhs. 13 and 14 in the official record with no notations upon them that they had been rejected. Indeed, the transcript, at Tr. 236, only reflects that R. Exh. 13 was rejected; R. Exh. 14 is shown as received. These exhibits should have been marked as rejected and they should have been included in a separate rejected exhibit file and then only if such inclusion had been requested.

[6] It is no justification that Respondent had Shroeger's contemporaneously prepared statements available as proposed exhibits. It could not reasonably have anticipated that those statements would be received in evidence in lieu of her testimony.

[7] Reasons 3 and 4, "Retaliation for filing a sexual harassment complaint" and "creating a hostile work environment" are essentially paraphrasings of this same allegation.

termination (Tr. 154). That statement also encompassed my conclusion that there was nothing in Dunning's comments to either Shroeger and Soumis or to his fellow employees concerning his suspension which could be deemed continued sexual harassment. I adhere to that conclusion under either Dunning's or Soumis' version of the conversation.

C. Wright Line Analysis

Dunning was an active and aggressive union steward. He was active as a dissident Teamster and he had filed an unfair labor practice charge asserting that his earlier suspension was discriminatorily motivated. I found, in my initial decision, that Respondent had violated Section 8(a)(1) by disparately and discriminatorily disciplining Dunning for distributing protected union literature in the check-in and similar areas on nonwork time. I also found that Respondent violated Section 8(a)(1) by removing a protected publication which had been posted on the union bulletin board by Dunning because that publication was critical of the Respondent. Dunning's active and open protected activity, Respondent's animus toward such activities as demonstrated by its unfair labor practices, and Shroeger's reference to his union activities in the December 28 meeting, followed by his discharge for comments made in that meeting, are more than sufficient to carry the General Counsel's burden of showing that the protected union activity was a motivating factor in that discharge. *WJJD,* 324 NLRB 1092 (1997); *Manno Electric,* 321 NLRB 278 (1996).

The burden of showing that it would have discharged Dunning even in the absence of his protected activity thus shifts to Respondent. It has failed to carry that burden. The principal reason asserted for the discharge, alleged sexual harassment of Kelley, is, I find, a pretext. There was no sexual harassment following Dunning's suspension. Dunning merely acknowledged that, when asked, he had told other employees that sexual harassment had been one of the reasons for his earlier suspension and he asserted (but had not exercised) the right to gather evidence with respect to his grievance. That an employee has such a right cannot be denied and there is no evidence, probative or otherwise, that Dunning said or did anything to impugn or harass Kelley or otherwise exceeded the bounds of protected activity.[8]

As to Respondent's second arrow, the alleged breach of a confidentiality mandate, I similarly find pretext. The evidence which I have credited fails to indicate that Dunning had been ordered not to talk about the reasons for his suspension. It also fails to establish that, if such an order was given, he breached it.[9] Moreover, I would find that the imposition of any such mandate would, in itself, be an unlawful infringement on Section 7 rights. Management cannot tell employees not to talk about "union stuff." *Louis A. Weiss Memorial Hospital,* 324 NLRB 949 (1997). It cannot order employees not to discuss their wages. *Vanguard Tours,* 300 NLRB 250 (1990), enfd. 981 F.2d 62 (2d Cir. 1992). The discussion of discipline and grievances pertaining thereto is of the same protected nature.

Finally, I would reach the same conclusion even if I were to credit Soumis' recollection of the December 28 meeting as related in the Board's Order Remanding. To wit, that Dunning said:

> [I]t was his responsibility as a union steward to expose Erin for what she really was; that he was interviewing people; and that he was going to prove to us that she was not the sweet angel, or a comment to that effect, that we thought she was; that, in fact, he could prove that she was a homosexual.

This conversation took place in the course of a discussion about the local level hearing to be held on Dunning's grievance over the 2-day suspension for having sexually harassed Kelley. As noted above, Dunning was entitled to grieve and to present a defense to that discipline. Sexual harassment whether directed at one who is straight or gay is reprehensible. An accusation of such an offense is serious, and to be found guilty can leave a serious blot on a reputation. Dunning could not be hobbled in mounting a defense by limitations on whether he could seek out and call witnesses. In light of his claims that he and Kelley were friends, that she was open about her sexual orientation, that he had merely been engaging in friendly banter with her in the July incident, that he was surprised when she took umbrage and that he fully and immediately complied with her request to cease making such remarks, there was a reasonable basis for him to seek supporting evidence from other employees (Tr. 168–178). I note that, while Soumis' version has Dunning stating that "he was interviewing people," there was no evidence that Respondent investigated that assertion or determined from any employee that Dunning had made untoward statements about Kelley.

Were I to find the facts to be as Soumis testified, I would find the violations alleged under both a *Wright Line* analysis and also on the principles of *NLRB v. Burnup & Sims,* 379 U.S. 21 (1964), and *Rubin Bros. Footwear, Inc.,* 99 NLRB 610 (1952):

> Where an employee is disciplined for having engaged in misconduct in the course of union activity, the employer's honest belief that the activity was unprotected is not a defense if, in fact, the misconduct did not occur. *Keco Industries,* 306 NLRB 15, 17 (1992).

Thus, if Soumis' testimony were to be credited, Dunning was engaged in protected activity in grieving his suspension and in discussing how he would present his defense. Respondent may have believed that his intended defense would constitute further harassment of Kelley but, in fact, it has not shown that further harassment or other misconduct occurred.

D. Conclusions and Order[10]

The Conclusions of Law and Recommended Order previously stated in my initial decision are incorporated by reference herein.

[8] Even if Shroeger's memorandum of her December 28 conversation with Kelley were to be admitted into evidence, it establishes neither harassment nor a basis for Respondent to believe that there had been harassment. In that conversation, as Shroeger memorialized it, Kelley purportedly spoke of not being liked anymore, of *feeling* that everyone knew what had happened, of *feeling* that Dunning was "out to get her," of being told of hearsay that another employee had heard that she was gay, of receiving a dirty look from Dunning, and of seeing Dunning in her work area. I also take notice that, other than talking to Kelley, Shroeger apparently engaged in no investigation of Dunning's alleged harassment. The absence of any meaningful investigation tends to negate the assertion of a nondiscriminatory motivation.

[9] Even if he told other employees that he had been suspended for sexual harassment, that statement without more, could not be considered a breach of anyone's reasonable expectations of privacy.

[10] Exceptions to the foregoing findings and conclusions may be filed as provided by Sec. 102.46 of the Board's Rules and Regulations.