22-6582-ag (L)
N.Y. Presbyterian Hudson Valley Hosp. v. NLRB

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 18th day of December, two thousand twenty-three.

Present:

DENNIS JACOBS,
RICHARD C. WESLEY,
WILLIAM J. NARDINI,
Circuit Judges.

NEW YORK PRESBYTERIAN HUDSON VALLEY HOSPITAL,

Petitioner-Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent-Cross-Petitioner,

NEW YORK STATE NURSES ASSOCIATION,

Intervenor.

22-6582-ag (L),
23-6036-ag (XAP)

For Petitioner-Cross-Respondent: JOHN HOUSTON POPE (James S. Frank, Corey Argust, *on the brief*), Epstein Becker & Green, P.C., New York, NY

For Respondent-Cross-Petitioner:	GREGOIRE SAUTER (Jennifer A. Abruzzo, General Counsel, Peter Sung Ohr, Deputy General Counsel, Ruth E. Burdick, Deputy Associate General Counsel, David Habenstreit, Assistant General Counsel, Elizabeth A. Heaney, Supervisory Attorney, *on the brief*), Attorney, National Labor Relations Board, Washington, DC
For Intervenor:	KATE M. SWEARENGEN, Cohen, Weiss and Simon LLP, New York, NY

On petition for review of the December 5, 2022, decision and order of the National Labor Relations Board and cross-petition for enforcement.

UPON DUE CONSIDERATION of this petition for review and cross-petition for enforcement of the December 5, 2022, decision and order of the National Labor Relations Board**, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the petition for review is **DENIED** and the cross-petition for enforcement is **GRANTED**.

Petitioner New York Presbyterian Hudson Valley Hospital (the "Hospital") seeks review of a December 5, 2022, decision and order from the National Labor Relations Board ("NLRB" or "Board"). The NLRB, in turn, cross-petitions for enforcement of the remedies that its order imposed. This labor dispute stems from the Hospital's termination of registered nurse ("RN") Rosamaria Tyo for leaving an operating room ("OR") during a February 25, 2020, surgery to engage in concerted activity with a group of union representatives and coworkers. Tyo worked as a circulating nurse in the OR and, as part of her position, was responsible for documenting procedures, retrieving supplies as needed during surgeries, and assisting in case of an emergency, among other tasks. Because of her experience in the OR, Tyo served as a "preceptor" or, in other words, a trainer to new OR nurses known as "orientees." Tyo was assigned to the February 25 surgery along with RN Andrew Lazaro, who was an orientee. During the surgery, Tyo left the OR

for twenty-eight minutes to confront Chief Nursing Officer Ophelia Byers with the union group while Lazaro remained in the OR. After an investigation triggered by the union activity, the Hospital terminated Tyo for patient abandonment.

The NLRB's General Counsel ("General Counsel") filed a complaint against the Hospital, asserting that the Hospital violated Section 8(a)(3) and (1) of the National Labor Relations Act (the "Act"), 29 U.S.C. § 151 *et seq.*, by unlawfully terminating Tyo for her union activity, among other claims. At the core of this dispute is a disagreement over the reason for her termination: the Hospital argued that it terminated Tyo for misconduct because she left the OR without obtaining coverage from a qualified circulating nurse, whereas the General Counsel argued that Lazaro was qualified to cover for Tyo and the Hospital terminated Tyo for her union activity. Ultimately, the NLRB affirmed the Administrative Law Judge's ("ALJ") conclusion that the Hospital terminated Tyo for her union activity. This petition and cross-petition followed. We assume the parties' familiarity with the case.

"[O]ur review of the Board's decision is highly deferential." *NLRB v. Special Touch Home Care Servs., Inc.*, 566 F.3d 292, 296 (2d Cir. 2009).[1] "We examine the Board's findings of fact to determine whether they are supported by substantial evidence. Substantial evidence is more than a mere scintilla. The substantial evidence standard requires us to review the record in its entirety, including the body of evidence opposed to the NLRB's view. We may not, however, displace the NLRB's choice between two fairly conflicting views, even though we would justifiably have made a different choice had the matter been before us de novo." *NLRB v. Newark Elec. Corp.*, 14 F.4th 152, 159–60 (2d Cir. 2021). Further, "we will not disturb the Board's adoption of an ALJ's

[1] Unless otherwise indicated, case quotations omit all internal quotation marks, alteration marks, footnotes, and citations.

credibility determinations unless the testimony is hopelessly incredible or the findings flatly contradict either the law of nature or undisputed documentary testimony." *NLRB. v. Pier Sixty, LLC*, 855 F.3d 115, 122 (2d Cir. 2017). "We will reverse based upon a factual question only if, after looking at the record as a whole, we are left with the impression that no rational trier of fact could reach the conclusion drawn by the Board." *Int'l Bhd. of Elec. Workers, Loc. Union 43 v. NLRB*, 9 F.4th 63, 70 (2d Cir. 2021). In contrast, "[w]e review the NLRB's legal conclusions *de novo*," though "[w]e give considerable deference . . . to legal conclusions based upon the Board's expertise." *Newark Elec. Corp.*, 14 F.4th at 160.

Where, as here, the "General Counsel files a complaint alleging that an employee was discharged because of [her] union activities and the employer counters that it had an unrelated, legitimate motive for its decision," the burden-shifting framework set forth in the NLRB's decision in *Wright Line* applies. *Bozzuto's Inc. v. NLRB*, 927 F.3d 672, 683 (2d Cir. 2019); *see Wright Line*, 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). Under the *Wright Line* framework, the "General Counsel must [first] establish a prima facie case that protected conduct was a motivating factor in the employer's decision to fire." *Bozzuto's Inc.*, 927 F.3d at 683. "The Board may infer an employer's discriminatory motive from circumstantial evidence, which may include the employer's knowledge of the employees' union activities, the timing of the discharge, or other antiunion activity by the employer." *Id.* If the General Counsel establishes a prima facie case, then "[t]he burden then shifts to the employer to show, as an affirmative defense, that the discharge would have occurred in any event and for valid reasons." *Id.*

I. Discriminatory Animus

The Hospital first argues that substantial evidence does not support the NLRB's conclusion that animus towards Tyo's union activity was a motivating factor in her discharge. The NLRB found animus, relying on the following evidence: (i) Byers's remarks during the confrontation that the union group's actions were "disrespectful" and "unacceptable" and that Tyo "knows better than this," Spec. App'x at 4; and (ii) the timing of the Hospital's investigation and termination of Tyo, which occurred shortly after the confrontation. The Hospital contends that Byers's remarks were "nonthreatening" and therefore do not support a finding of animus. Pet'r's Br. at 38. It also contends that the timing of the investigation does not support a finding of animus because Tyo's purported misconduct—that is, the alleged patient abandonment—occurred simultaneously with the protected activity. Instead, the Hospital points to evidence of how it treated the union as a whole as well as the other union members involved in the confrontation as the "most probative evidence of . . . [its] motives." *Id.* at 35.

Like the Hospital, we are not convinced that Byers's remarks, without more, demonstrate animus towards union activity. Although she expressed disapproval, Byers did not threaten reprisal for engaging in union activity. We nonetheless find that substantial evidence supports the NLRB's finding of animus because there is other evidence indicative of animus, namely, the investigation of Tyo. Less than two hours after the confrontation between union proponents and hospital officials, the Hospital initiated an investigation into the confrontation and, as the investigation progressed, identified each employee present. Despite the Hospital's claim that its investigation was undertaken to ascertain how unidentified visitors gained access to the building, it focused its investigation on Tyo, who was dressed in scrubs and clearly a Hospital employee. Notably, the Hospital started its investigation of Tyo because of her participation in union activity,

not her purported misconduct. Regardless of whether we would reach the same conclusion on *de novo* review of this record, we are called upon here to determine only whether there is substantial evidence to support the NLRB's finding of animus. Given this highly deferential standard of review, we are compelled to uphold the NLRB's determination.

II. Justification for Termination

The Hospital next challenges the NLRB's finding that the Hospital failed to prove it would have terminated Tyo even absent her union activity. Substantial evidence supports the NLRB's finding that the Hospital's stated reason for Tyo's termination was pretextual.

The Hospital argues that it was justified in discharging Tyo because she violated both state law and regulations, which require the presence of a qualified circulating nurse in the OR, and "the Hospital's established procedures for handing off . . . responsibilities to another qualified nurse." Pet'r's Br. at 44. But there was evidence in the administrative record supporting the NLRB's determination that Tyo followed the expected norm for preceptors at the Hospital. The Hospital had no written guidelines concerning a preceptor's role. In lieu of any formal policies, nurses from the Hospital testified to the general expectations for preceptors. Some of that testimony, credited by the agency factfinder, indicated that there was no Hospital policy prohibiting a preceptor from leaving an orientee in the OR and that, in fact, preceptors were permitted to judge whether orientees were ready to serve as the only circulating nurse in the OR. Tyo abided by those expectations: she determined that Lazaro was qualified to be the circulating nurse for the February 25 surgery based on his previous experience and confirmed with Lazaro that he knew how to reach her or other nurses if he needed assistance.

Moreover, the NLRB found that the Hospital's reason for termination was pretextual because of, among other evidence, the Hospital's failure to punish RN Marissa Cedieux, a

preceptor who left Lazaro in the OR to serve as the circulating nurse only one week later, during a March 2, 2020, surgery. Cedieux was assigned to the March 2, 2020, surgery with Lazaro. After the surgery started, Cedieux felt that Lazaro was "okay to be left alone" in the OR, App'x at 656, and sat outside the OR for the rest of the surgery, checking in with Lazaro every fifteen minutes. The NLRB permissibly interpreted the evidence to show that one of the nursing supervisors was aware that Cedieux stayed outside of the OR for most of the procedure and "acquiesced" to Cedieux's assessment of Lazaro's qualifications to be left alone. Spec. App'x at 6. Thus, the crux of Tyo's purported wrongdoing—a preceptor leaving an orientee to serve as the circulating nurse in the OR—was present in Cedieux's case. And despite this, the Hospital did not punish Cedieux for her conduct.

III. Remedies

The Hospital further argues that the NLRB exceeded its remedial powers by ordering the reinstatement of and backpay to Tyo under 29 U.S.C. § 160(c), which prohibits such remedies if the employee was discharged for cause. The Hospital argues that such remedies may not be ordered because it discharged Tyo for cause based on her "indefensible" conduct. Pet'r's Br. at 53.

The NLRB permissibly found that Tyo's discharge was not for cause. As explained above, substantial evidence supports the NLRB's finding that the Hospital's reason for Tyo's termination was pretextual. Furthermore, Tyo's conduct was not "indefensible." In the health care context, conduct is "indefensible" and therefore loses the protection of the Act, *Bethany Med. Ctr.*, 328 N.L.R.B. 1094, 1094 (1999), where "employees . . . cease work without taking reasonable precautions to protect the . . . patients from foreseeable imminent danger due to sudden cessation of work," *NLRB v. Special Touch Home Care Servs., Inc.*, 708 F.3d 447, 452 (2d Cir. 2013).

Consistent with what the evidence in the administrative record showed were the expectations for preceptors in the Hospital at the time, Tyo took reasonable precautions to ensure that the patient was not in any foreseeable imminent danger by confirming that Lazaro was comfortable acting as the circulating nurse by himself and knew how to reach her or other nurses if he needed help. Additionally, "[t]his was not a case in which patients were left lying on the operating table," *Montefiore Hosp. & Med. Ctr. v. NLRB*, 621 F.2d 510, 516 (2d Cir. 1980); other medical professionals remained present in the OR, including the surgeon, anesthesiologist, and scrub technologist, not to mention another circulating nurse (Lazaro). Because Tyo's discharge was not for cause, the NLRB was permitted to order reinstatement and backpay.

IV. Remote Hearing

Finally, the Hospital argues that it did not receive a fair hearing because the ALJ conducted a remote hearing, in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq*. The Hospital also argues that the remote format caused fatigue, which affected the ALJ's credibility determinations. We disagree. First, the ALJ did not violate the APA by conducting the hearing remotely. The ALJ determined that a remote hearing was necessary due to the COVID-19 pandemic. Under Section 102.35(c) of the NLRB's Rules, "the taking of video testimony by contemporaneous transmission from a different location may be permitted" "upon a showing of good cause based on compelling circumstance." *Morrison Healthcare & SEIU United Healthcare Workers E.*, 369 N.L.R.B. No. 76, at *1 (May 11, 2020). The NLRB has held that the COVID-19 pandemic qualified as such "compelling circumstances" warranting a remote hearing. *Id.* at *2. Second, the Hospital's general assertions as to the potential shortcomings of remote hearings, without more, are insufficient to show that it did not receive a fair hearing.

* * *

As the NLRB observed during oral argument, the Hospital is free to adopt policies, including written policies, that clearly define the responsibilities of a preceptor in the OR. This decision and the NLRB's decision do not prevent the Hospital from adopting such policies; this case implicates only the narrow question of whether Tyo violated the Hospital's unwritten policies at the time of her termination.

We have considered the Hospital's remaining arguments and find them unpersuasive. Accordingly, the petition for review is **DENIED**, and the cross-petition for enforcement is **GRANTED**.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk