

GREATER NEW BEDFORD INFANT TODDLER CENTER AND DISTRICT 65, UNITED AUTO WORKERS,  
AFL-CIO, UP-2493 (8/8/85).

62.5 insubordination  
63.3 discrimination - hiring, layoffs, promotion  
63.7 discrimination - union activity  
65.2 concerted activities  
65.6 employer speech  
65.61 promise of benefit  
65.62 threat of reprisal  
82.1 affirmative action  
82.11 back pay  
82.111 interest  
82.13 reinstatement

Hearing Officer:

Amy Laura Davidson, Esq.

Appearances:

John F. McMahon, Esq. - Representing District 65, United Auto Workers  
Phillip Rivara-Raposa, Esq. - Representing the Greater New Bedford Infant Toddler Center

#### HEARING OFFICER'S DECISION

This case involves a charge by District 65, United Auto Workers, AFL-CIO (Union or District 65) that the Greater New Bedford Infant Toddler Center (Center or Employer) violated Sections 4(3) and (1) of Massachusetts General Laws, Chapter 150A (the Law or G.L. c.150A) by terminating Yvonne Houtman and by reprimanding two other employees, allegedly in retaliation for their protected union activities. Also at issue is whether certain alleged statements by the Director of the Center independently violated Section 4(1) of the Law.

The Union filed the instant charge with the Labor Relations Commission (Commission) on October 17, 1983.<sup>1</sup> Following an investigation of the charge, the

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<sup>1</sup> By letter dated July 27, 1983, the National Labor Relations Board declined to assert jurisdiction over the Center, concluding that, "In any applicable 12-month period, the Employer derives gross revenues from the operation of a daycare center and related facilities that are substantially less than \$250,000, the minimum amount of gross revenues that the Board requires before it will assert jurisdiction over daycare centers. Salt & Pepper Nursery School & Kindergarten No. 2, 222 NLRB 1295 (1976) and Rebecca Blaylock Nursery School, Inc., 260 NLRB 1428 (1982)."

Neither party contests the jurisdiction of the Commission over this case under G.L. c.150A, Section 10(b). In fact, the Employer specifically admitted in its Answer the allegation in the Complaint that it is an employer within the meaning of Section 2 of the Law.



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Commission issued a complaint on February 24, 1984, alleging that the Center had violated Sections 4(3) and (1) of the Law by the actions described supra. Pursuant to notice, formal hearings were held on May 1 and 2, June 5 and 25, 1984 before the undersigned, a duly designated hearing officer of the Commission. Both parties were afforded full opportunity to appear and to examine and cross-examine witnesses. Both parties have filed briefs which have been considered. On January 30, 1985, the hearing on this matter was redesignated "expedited" pursuant to 402 CMR 13.02(1).

Essentially, this case concerns a union organizational drive at the Center and certain disciplinary actions taken by Mrs. Alice Smith against Patricia L'Abbe, Patricia Cook and Yvonne Houtman, three employees actively involved in the union drive. The main question is whether Mrs. Smith disciplined the three employees in retaliation for their union activities or for other reasons. Also at issue are various anti-union statements attributed to Mrs. Smith. The resolution of these issues rests principally on credibility determinations.

Upon a thorough review of all the evidence, I conclude that the Center did violate the Law, based on the weight of the evidence and the credible testimony of five employee witnesses<sup>2</sup> demonstrating that Mrs. Smith was angered by the employees' efforts to unionize the Center, threatened retaliation, and retaliated against certain employee activists involved in the drive. Mrs. Smith's testimony contradicted her own sworn affidavit filed with the Commission and was refuted by a number of witnesses, called by both the Union and the Employer. Moreover, the testimony of both Mrs. Smith and her daughter Gail in this matter was replete with gratuitous irrelevant and non-responsive statement calculated to discredit various employees who testified on behalf of the Union in this matter. Such over-zealous character assassination on the part of Mrs. Smith and her daughter Gail raises strong suspicions about their credibility. In comparison, the five employee witnesses were, on the whole, forthright, credible and consistent under both direct and cross-examination. Therefore, where contradictions exist between their testimony and that of Mrs. Smith and Gail, they are credited.

#### Findings of Fact

The Greater New Bedford Infant Toddler Center is a privately owned and operated day care facility that opened in April 1981.<sup>3</sup> Mrs. Alice Smith (Mrs. Smith) is the Director of the Center. Until October 1983, the following individuals were employed by the Center: Yvonne Houtman, Patricia Cook, Lydia Rodrigues, Patricia L'Abbe, Anna Gomes, Donna Carvalho, Dorothy Alfonso, Toni Pires and Mrs. Smith's daughter, Gail. Houtman was employed as a cook for the Center until October 6, 1983, when she was discharged. Rodrigues and Cook were teachers' aides.

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<sup>2</sup>Donna Carvalho, Patricia Cook, Yvonne Houtman, Patricia L'Abbe and Lydia Rodrigues.

<sup>3</sup>During all times relevant here, the Center received certain federal funds.



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L'Abbe, Gomes, Carvalho and Gail Smith (Gail) held teacher's positions. Pires, who is Mrs. Smith's niece, was employed part-time as a bookkeeper for the Center.

#### The Beginning of the Organizational Drive<sup>4</sup>

On or about June 15, 1983, Cook approached Mrs. Smith in her office and asked if she could post a flyer regarding an informational meeting about the 'How's and Why's of Day Care Unionization' that was sponsored by the Union and scheduled for June 16. Mrs. Smith looked at the flyer and responded, "I don't care. I'm not having a union here. No one is going through my books."<sup>6</sup> Cook posted the flyer on the bulletin board of the Center and distributed copies in the staff room.<sup>7</sup>

Several employees attended the Union's informational meeting on June 16 and signed authorization and designation cards. On June 17, a group of employees approached Mrs. Smith to discuss unionization at the Center. Present in the room were Gomes, L'Abbe, Carvalho, Rodrigues, Houtman, Cook, Mrs. Smith and her daughter, Gail. Gomes spoke first and informed Mrs. Smith that employees at the Center

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<sup>4</sup>In an effort to demonstrate the absence of anti-union animus on the part of Mrs. Smith, the Employer presented evidence that in February of 1983 Mrs. Smith and Gail attended a conference on day care sponsored by District 65. Although Mrs. Smith claimed that the materials about the UAW conference were distributed to all the employees at the Center and that employees were invited to attend, L'Abbe, Cook and Carvalho all denied ever having been notified of the conference. L'Abbe, Cook and Carvalho also disputed Mrs. Smith's claim that she had reported on the conference to the employees when she returned from it.

I find that Mrs. Smith and Gail attended the conference but did not notify the employees at the Center of its existence, did not invite employees to attend it, and did not report on it afterwards. I also note that on the conference registration forms which were filled out by Mrs. Smith, and her daughter, both answered the following questions in the negative: "Do you want more information about unionizing?" Are you interested in discussing the possibility of unionizing at your center or worksite?"

<sup>5</sup>All dates hereinafter refer to calendar year 1983, unless otherwise specified.

<sup>6</sup>Mrs. Smith testified that Cook approached her at a picnic table in front of other employees and requested permission to post the flyer. According to Mrs. Smith, she responded, "Yes, of course." (Tr.3-14) I credit Cook's version of the conversation for several reasons. First, Mrs. Smith's claim that the conversation occurred at a picnic table in front of other employees is devoid of evidentiary support. None of the seven employee witnesses, including the two called by the Employer, corroborated having witnessed such a conversation. In addition, as discussed below, Mrs. Smith made similar comments to other employees about her unwillingness to allow the Union to "go through her books" (see p. 1133, *infra*),

(continued)

7 (see page 1134)



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had attended a meeting the previous night and had joined the Union. Gail turned to Houtman and asked, "You can join the Union? You're only a cook. I thought it was only for teachers." Houtman replied, "Yes. That's what I was told." Mrs. Smith asked the employees why they wished to unionize. L'Abbe replied that the workers wished to have a union to obtain medical benefits. Gail asked who would pay for the benefits and Cook responded that the Union would. Gail also said that the Union would take money out of each employee's paycheck and would deplete the day care center's funds. Shortly thereafter, the meeting ended and the employees returned to their respective work stations.

A few days after the meeting, Houtman heard a conversation between Mrs. Smith and Gail about unionization at the Center. Mrs. Smith said, "I don't understand why the girls would care about the union. They're the highest paid day care workers in the area." Houtman intervened in the conversation and asked, "What is this all about? I don't know about unions." Gail replied, "All unions do is make you pay them."<sup>6</sup>

Sometime between June 17 and 27, Rodrigues went to speak with Mrs. Smith because she had noticed that Mrs. Smith was less friendly toward her. Rodrigues asked Mrs. Smith if anything was wrong and the following discussion occurred:

Rodrigues: Mrs. Smith, have I done anything to you? I've noticed you've changed.

Mrs. Smith: I don't like what you did.

Rodrigues: What do you mean?

Mrs. Smith: You went behind my back and went to the Union.

Rodrigues: I did not go behind your back. A flyer was posted which we all read. As a matter of fact, I thought Gail and Dotty (referring to Dorothy Alfonso, another employee at the Center) would be there.

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<sup>6</sup> (continued)

thus showing Smith's propensity to make such comments. Finally, as developed more fully below, Mrs. Smith's testimony was generally unreliable.

<sup>7</sup> (from page 1133)

The copy of the flyer on the bulletin board kept disappearing and Cook posted new copies in its place.

<sup>8</sup> Houtman testified that later the same day, she overheard Mrs. Smith remark, "There will be a union over my dead body." According to Houtman, Mrs. Smith was twelve feet away when the comment was made. Houtman could not identify the person to whom the comment was directed.

Based upon the distance between Houtman and Mrs. Smith and Houtman's inability to identify who Mrs. Smith was speaking to, I find the testimony regarding this comment to be unreliable.



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Mrs. Smith: Gail would never go behind my back.

Rodrigues: That's not going behind your back. It's our right to join  
a union.<sup>9</sup>

Reprimand of Patricia L'Abbe

L'Abbe was employed as a teacher at the Center from its inception in April 1981 until she resigned in December 1983. Until June 28, L'Abbe was assigned to work in the infant room of the Center.

Prior to June 27, L'Abbe had been reprimanded on only one occasion which occurred in September 1981. On that occasion, she had requested a week leave without pay in order to take a vacation. At some point just prior to the week leave L'Abbe had requested, Mrs. Smith informed her that she could not take the planned week off because another employee had requested the same week. L'Abbe became upset and told Mrs. Smith she thought her actions had been unfair. The following day Mrs. Smith gave L'Abbe a written reprimand for insubordination and tradiness. Later that week, Mrs. Smith revoked the reprimand and told L'Abbe she could have the week she had requested.

On Friday, June 24, 1983, L'Abbe was working in the infant room alone, caring for three infants. One of the infants was Alexander, who is Gail Smith's son and Mrs. Smith's grandson. According to L'Abbe, Alexander had been crying off and on all day. L'Abbe had been holding Alexander to comfort him when another infant began to cry. L'Abbe placed Alexander down on an infant seat in order to attend the other infant. While she was changing the other child, Alexander began crying loudly. Mrs. Smith overheard a baby crying and went into the infant room to investigate. When Mrs. Smith entered the infant room, L'Abbe was holding the other child and had just completed diapering her. L'Abbe asked Mrs. Smith to watch the infants so that she could go wash her hands. Mrs. Smith agreed. When L'Abbe returned to the infant room, Mrs. Smith said she was going to take Alexander down the hall with her and left with the child. At no time on June 24 did Mrs. Smith mention anything to L'Abbe about neglecting Alexander while he cried.

Later the same day, L'Abbe had a conversation with Gail about Alexander. L'Abbe told Gail that Alexander had not been himself and was not feeling well. Gail said that she would "keep an eye" on him.<sup>10</sup>

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<sup>9</sup> Although not specifically questioned about this conversation, Mrs. Smith categorically denied having made any negative comments about unionization at the Center. Based upon the entire record, I credit Rodrigues' testimony about the above conversation. Rodrigues was credible in demeanor, her testimony was consistent with other witnesses' testimony regarding similar comments made by Mrs. Smith about unionization at the Center, and she had no self-interest in the outcome of this case.

<sup>10</sup> Gail Smith testified that she asked L'Abbe on June 24 why L'Abbe had let  
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The following Monday, June 27, Mrs. Smith called L'Abbe into her office and the following conversation ensued:

Mrs. Smith: I want to know what happened to Alexander.

L'Abbe: I don't know. What happened?

Mrs. Smith: You know what happened, you let him cry. I'm going to put you before the Advisory Board.

L'Abbe: Is this a joke?

Mrs. Smith: No, Gail is upset. I'm going to put you before the Advisory Board and let you go.

L'Abbe: Fine. When is the Advisory Board meeting? I want to be there.

Mrs. Smith: I don't know.

At that point L'Abbe left Mrs. Smith's office.

Mrs. Smith testified that she decided to discipline L'Abbe because her daughter Gail had informed her that L'Abbe intentionally let Alexander cry.<sup>11</sup> Mrs. Smith also claimed that Pamela Rouell, a parent whose child was under L'Abbe's care at the Center, had complained that L'Abbe was vacuuming while her child Matthew was crying. At no time during her brief discussion with L'Abbe on June 27 did Mrs. Smith mention anything about L'Abbe having neglected any other infants or Rouell's complaint.<sup>12</sup>

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10 (continued)

her son Alexander cry to long. According to Gail, L'Abbe replied, "I knew if I let him cry long enough, Mrs. Smith would come and get him." L'Abbe denied having made any such statement to Gail.

Based upon my personal observations of the demeanor of both witnesses, I credit L'Abbe's testimony about the events of June 24. L'Abbe responded to all inquiries about this matter in a direct, forthright manner, whereas Gail was hostile and her testimony appeared calculated to undermine L'Abbe. In addition, the statements which Gail attempted to attribute to L'Abbe were inherently unbelievable. Therefore, I discredit Gail's testimony.

<sup>11</sup> More specifically, Mrs. Smith testified that her daughter Gail informed her that L'Abbe had said, "I knew if I let [Alexander] cry long enough, [Mrs. Smith] would come and get him."

As discussed supra (note 10), I find that L'Abbe never made such a statement to Gail Smith. Based upon the record as a whole, particularly the inconsistencies in Mrs. Smith's testimony about this incident (see infra, note 12), I discredit

(continued; 12, see page 1137)



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Shortly after her conversation with Mrs. Smith, L'Abbe approached Gail and asked, "Are you saying that I don't take care of Alexander?" Gail responded, "No, but I heard him crying, too." Gail began to speak when Mrs. Smith entered the room. Mrs. Smith told L'Abbe that she was "never to work in the infant room again." L'Abbe began to cry, became ill, and left the Center for the rest of the day.

That evening, L'Abbe received a phone call at home from Rouell, who asked, "What's going on down there at the Center?" Rouell said that Mrs. Smith had called Rouell into her office and told her that L'Abbe had been vacuuming while Rouell's child Matthew, was crying.

On Tuesday, June 28, L'Abbe returned to work and was reassigned to the toddler room. She approached Mrs. Smith in her office and asked if she intended to put her before the Center's Advisory Board. Mrs. Smith said she had not decided yet. L'Abbe told Smith that she considered herself an excellent teacher and would "fight this to the end." Mrs. Smith instructed L'Abbe to talk with her daughter Gail. Later, L'Abbe approached Gail and asked her what she had done wrong to Alexander. Gail responded that she heard her child crying. L'Abbe explained that Alexander had been sick. Gail agreed that the baby had been sick and said, "You didn't do anything to Alexander. My mother is upset that you went and joined a union behind her back. I can't understand why you girls can't talk to my mother."<sup>13</sup>

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11 (continued)

Mrs. Smith's testimony that Gail related any such comment by L'Abbe to her mother.  
12 (from page 1136)

Mrs. Smith submitted a sworn affidavit to the Commission in December 1983 wherein she described her discussion with L'Abbe on June 27 in pertinent part as follows:

On or about Monday, June 27, 1983 I confronted Ms. L'Abbe with what had happened on Friday. I told her that her conduct was unprofessional and that leaving any child unattended under Friday's circumstances was unacceptable. I also told her that she had recently been observed ignoring a child who was similarly in distress. I indicated that she had been seen vacuuming instead of attending to the needs of the ignored child. I told her that as a result of the described incidents I intended to bring her conduct before the Advisory Board.

Nevertheless, under cross-examination during the hearing on this matter, Mrs. Smith admitted that she never discussed Rouell's alleged "vacuuming" complaint with L'Abbe on June 27 or thereafter.

<sup>13</sup> Gail Smith denied having made this statement to L'Abbe. Based upon my observations of the demeanor of both witnesses and for the reasons stated earlier in this decision, I credit L'Abbe's testimony and find that Gail made this comment regarding her mother's feelings about the union to L'Abbe. In so finding, I make no determination as to the truth of the comment made by Gail, only that it was said.



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Gail also said there were no funds for raises and talked about the Center's financial difficulties. Gail asked L'Abbe, "Do you want this day care center to close?" L'Abbe said "No." Gail said, "Neither do I. I love the children as much as you do." The two women hugged and L'Abbe left. As she was leaving, L'Abbe told Gail that she intended to "fight" any proceedings brought against her by Mrs. Smith before the Center's Advisory Board. Gail told L'Abbe not to worry, her mother would not put her before the Board.

The following day, Mrs. Smith stopped L'Abbe in the hallway and said, "I want you to know that I'm dropping everything; I'm not putting you before the Advisory Board because I think it's just one big um... ." L'Abbe asked, "Misunderstanding?" Mrs. Smith responded, "Yes." L'Abbe said, "Fine," and proceeded back to the toddler room. At no time during her discussions with L'Abbe on June 28 or afterwards did Mrs. Smith mention anything about any complaints made by Pamela Rouell.

#### Staff Meeting on June 27

Mrs. Smith called a staff meeting in the afternoon of June 27. Present were Alfonso, Gomes, Carvalho, Rodrigues, Mrs. Smith and Gail. L'Abbe was not present because she had left the Center ill earlier the same day. Mrs. Smith said she did not want any more vacuuming while children were in the day care center and that the children should be constantly observed and watched. Mrs. Smith also informed the employees present that L'Abbe would be brought before the Advisory Board because of "parent complaints." Carvalho asked who had complained about L'Abbe. Mrs. Smith responded that it was not just her daughter Gail. She said Rouell had also complained about L'Abbe.

Mrs. Smith informed the employees at the meeting that the funding contract between the Center and the Department of Social Services (DSS) in effect until June 1983 would not be renewed and that she intended to "go private" and to relocate the day care center to another site. At some point during this meeting, one of the employees raised the issue of unionization. In response, Mrs. Smith said, "As for the Union, if you girls stay with the Union, the only ones assured of their jobs will be Gail and I. If you choose not to stay with the Union you may move with us to the new center."<sup>14</sup> Finally, Mrs. Smith said she was tired of secretive conversations among the Center's employees.

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<sup>14</sup> Mrs. Smith's version of the June 27 meeting differed from that related above. Smith testified that Donna Carvalho brought up the subject of unionization and she responded, "I don't know anything about the union. So far as I know, you girls have already signed your cards." According to Mrs. Smith, Carvalho said that Gomes had been mistaken in claiming on June 17 that the employees had signed cards and Carvalho said the employees had not signed union cards yet.

Dorothy Alfonso, an employee who testified on the Employer's behalf, had no independent recollection of either version of the discussion about the Union on June 27.

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On June 28, Mrs. Smith asked the three employees who were not present at the June 27 meeting to come to her office so that she could inform them what transpired at the previous day's meeting. Mrs. Smith told L'Abbe, Cook and Houtman that she would not be renewing the DSS contract and that she was going to move the Center to a new location. At no time during this discussion did Mrs. Smith mention the Union. As discussed above, later that day Mrs. Smith told L'Abbe that she would not be brought before the Advisory Board.

July Conversation with Houtman

In July 1983, a dispute arose between Houtman and Mrs. Smith regarding Houtman's request to attend a field trip scheduled on July 13 for teachers and children at the Center.<sup>15</sup> Houtman was scheduled for vacation the week of the trip. On July 7, Houtman asked Mrs. Smith if she could work the day of the field trip so she could attend the trip with her son, Isaiah, a student at the Center. During the course of the discussion about her request, Houtman raised the subject of unionization at the Center and the following conversation ensued:

Houtman: I'm glad we had this chance to talk because it seems that since we joined the Union the air is thick around here. Why are you so against the Union?

Mrs. Smith: I don't want anyone going into my books.

Houtman: They're not going to go into your books.

Mrs. Smith: You girls went behind my back.

Houtman: We didn't go behind your back. It's our right; we have a constitutional right [to join a union].

Mrs. Smith: You girls all went behind my back; that's why I'm going to go private. I'm not going to renew the contract.

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<sup>14</sup> (continued)

The Employer erroneously claimed in its post-hearing brief that Pires had corroborated Mrs. Smith's version of the June 27 meeting. However, Pires was never questioned about the June 27 meeting either under direct or cross-examination, and therefore did not corroborate either version of the meeting.

On balance, I credit the testimony of Rodrigues and Carvalho that Mrs. Smith made the comment related above. Both employees were credible and neither had any self-interest in the outcome of these proceedings.

<sup>15</sup> An extensive discussion of the dispute about Houtman's request to attend the field trip is contained on pp. 1148-1149, below.



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Houtman: Why are you doing that?

Mrs. Smith: Pay back.

Houtman: I wish you wouldn't take this attitude because you are  
tending to lose a lot.

Smith: No, you all do.<sup>16</sup>

Houtman left the room and returned to the Kitchen. A few minutes later, Mrs. Smith came into the kitchen and said, "Am I going to get one of those letters from the Union now?" Houtman responded, "Whatever I have to say, I tell you to your face."

#### The Lease for the New Center; the Representation Petition

Sometime in early July, Mrs. Smith brought L'Abbe, Cook, Carvalho and Alfonso to see the building where she intended to relocate the day care center. The women present discussed how the space could be utilized. In addition, Mrs. Smith discussed certain provisions in the lease which she felt were unfair. At various times in July and August, Mrs. Smith discussed the provisions of the lease with individual employees, pointing out those portions which she felt were unfair.<sup>17</sup>

On July 29, the Union filed a petition with this agency seeking to represent full-time and regular part-time teachers, teacher's aides, and cooks at the Center. A hearing on the petition was scheduled for September 6.

#### August 29 Staff Meeting

On August 29, Mrs. Smith held a meeting with the Center's employees to discuss the relocation of the day care center. Mrs. Smith opened the meeting by announcing that the employees would be receiving a 4% cost of living raise retroactive to July. Mrs. Smith informed employees that their hours would be changed and that they would work with different age groups in different teams at the new location. Mrs. Smith also stated that she intended to hire a new teacher. Patricia Cook, a teacher's aide at the Center, asked Smith whether she would consider promoting a teacher's aide, either herself or Lydia Rodrigues, to the teacher position. Mrs. Smith responded that she did not think such a promotion would "work out."

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<sup>16</sup> Mrs. Smith did not specifically confirm nor deny that such a conversation occurred, apart from her general denial of any anti-union remarks. I find that Mrs. Smith made the comments related above.

<sup>17</sup> There was some dispute as to whether Mrs. Smith left a copy of the lease in the staff room. The resolution of this dispute is unnecessary for the disposition of this case.



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At some point during the August 27 meeting Houtman brought up the subject of the representation petition filed by the Union and asked to discuss it. Mrs. Smith stated that she would not discuss the matter, on advice of counsel. Cook asked Smith if she was planning to attend the hearing on the representation petition scheduled at the Commission on September 6. Mrs. Smith responded that her attorney would be taking care of the matter for her.

On August 30, Houtman reported to work and saw a notice on the bulletin board regarding changes in staff hours. The notice stated that Houtman's hours of work were reduced. Later that day, Houtman asked Mrs. Smith why her hours had been cut. Mrs. Smith responded that a woman from the state nutrition bureau had recommended that Houtman's hours be cut.<sup>18</sup>

#### Reprimand of Patricia Cook on August 30

Cook was hired by the Center as a Teacher's Aide in March 1981. On September 30, 1981, Cook was laid off due to lack of funds. Cook was rehired as an Aide in September 1982. From September 1982 to August 1983, Cook was assigned to work in the toddler room under Dorothy Alfonso, a teacher at the Center.

On the morning of August 30, the day after the staff meeting regarding relocation of the Center, Mrs. Smith called Cook into her office and said she had been receiving reports that Cook had been interfering with the teachers' work. Mrs. Smith handed Cook a written document entitled "Disciplinary Sheet." The document stated that:

Patricia [Cook's] attitude towards teachers in room is very indifferent [sic] -- She still tends to take over -- Her work is good but her attitude toward director [sic] is very indifferent and quarrelsome. Needs a course in diplomacy and tact.

Cook read the document and asked Mrs. Smith what she meant by it. Smith responded that Gail and Alfonso had complained that Cook was questioning their authority by inquiring about the way they were handling child discipline. Mrs. Smith also told Cook that she was giving the teachers "dirty looks" and had a "horrible attitude."

Cook requested the opportunity to write a written response to the reprimand and wrote the following in the "Employee Comments" section of the form:

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<sup>18</sup> The reduction in Houtman's hours was not alleged as a separate violation in the Complaint in this case and was not addressed by either party as such. In fact, the Union specifically stated in its brief that it did not wish to pursue the reduction in Houtman's hours as a separate violation. Therefore, I render no opinion as to the lawfulness of the Employer's decision to reduce Houtman's hours. See City of Worcester, 5 MLC 1397 (1978); Town of Wayland, 7 MLC 2082 (1981).



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I do not intentionally give anyone looks. I try to do my job as best as I can. I try to inquire about all aspects of the daycare by asking questions of the teachers. I do not question their authority or their ability as teachers. I have a need to know [sic] what is going on in the classroom to adequately participate.

Mrs. Smith gave the form to Cook and told her she was suspended for three days. Cook took the disciplinary form and returned to work. Later that day, Cook approached Smith and asked her to note on the form that a suspension had been given and when the suspension would become effective. Mrs. Smith added a notation on the form stating, "3 day suspension beginning 8/31/83."

Late in the day on August 30, Mrs. Smith called Cook into her office and asked her for the disciplinary form back, stating that she had changed her mind and would not suspend Cook.

Prior to August 30, Cook had been reprimanded only once, two years earlier, in July of 1981. On that occasion, Mrs. Smith gave Cook an evaluation of her work performance in which she noted, "Patricia is a good worker but tends to take over. Patti needs course in tact and common courtesy." The evaluation additionally stated that Cook was unable to "take constructive criticism," was "indifferent," "Quarrelsome" and "insubordinate." The form ended with a warning that unless Cook's attitude changed within three weeks, she would be terminated. Cook disagreed with the evaluation and refused to sign it. Two months later, in September 1981, Mrs. Smith wrote a favorable recommendation for Cook, stating that Cook was an "efficient" caretaker and showed "great concern for the children's health and wellbeing."

Mrs. Smith testified that the August 30, 1983 reprimand stemmed from complaints she had received from Alfonso, who was Cook's immediate supervisor. According to Mrs. Smith, Alfonso had complained that Cook was undermining everything she was doing with the children. Alfonso had also complained that she felt she was "unnneeded" as a teacher because Cook initiated various activities with the children before Alfonso arrived at work.<sup>19</sup>

Mrs. Smith testified that Alfonso approached her one day prior to the reprimand, presumably on August 29, and was very upset. Mrs. Smith claimed that on August 29 Alfonso threatened to quit because of Cook's interference. In contrast to this, both Alfonso and Cook testified that they stopped working together in early August 1983. Alfonso, who testified on behalf of the Employer, stated that all her conversations with Mrs. Smith about Cook occurred in July 1983.<sup>20</sup>

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<sup>19</sup> Cook began work an hour before Alfonso.

<sup>20</sup> Based upon Cook's and Alfonso's testimony, I conclude that whatever complaints Alfonso voiced to Mrs. Smith about Cook occurred at the latest in July 1983.



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Alfonso stated that she had complained to Mrs. Smith on three occasions in July 1983 about Cook. On the first occasion, Cook came into a ballgame Alfonso was playing with the children, took the ball and said, "This is how to play." On the second occasion, Cook had asked Alfonso why the children could not have some birthday cake for a snack. On the third occasion, Alfonso arrived at work after Cook and brought games to play. Cook told Alfonso that the children had already done fingerpainting, waterplay and coloring prior to her arrival. On the first two occasions, both occurring in early July, Alfonso told Mrs. Smith that she felt Cook was countermanding what she was doing with the children. On the last occasion, which occurred in late July, Alfonso told Mrs. Smith that she felt unneeded and wanted to resign. At no time did Alfonso confront Cook regarding these issues. The first time Mrs. Smith raised Alfonso's complaints as an issue with Cook was on August 30.

#### Union Election

On September 15, the Union and the Employer executed a consent election agreement for a unit of full-time and regular part-time teachers, teachers aides and cooks. An election was scheduled for Tuesday, September 27, 1983 between 11 a.m. and 12 noon.

At some point prior to the election date, Houtman was chosen to act as an observer for the Union at the election. On September 27, Nancy deProsse, an organizer for the Union, arrived at the Center and introduced herself to Mrs. Smith. DeProsse asked Mrs. Smith if Houtman could be released from her duties to act as an observer for the Union at the representation election scheduled for that day. Mrs. Smith responded that she needed Houtman in the kitchen during the time of the election. DeProsse said "fine" and acted in Houtman's stead as an observer for the Union.<sup>21</sup>

#### Termination of Yvonne Houtman

Yvonne Houtman was employed as a cook for the Center from March 1982 until she was terminated on October 6, 1983. The circumstances surrounding Houtman's termination were as follows.

Thursday, October 6 was payday for employees at the Center. Houtman was to receive two checks that day: a regular weekly paycheck and a vacation check. She had spoken to Pires, the part-time bookkeeper for the Center, the preceding week to remind her that her (Houtman's) vacation check should be for twenty hours of work

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<sup>21</sup>The Union won the election held on September 27 and was certified as the exclusive bargaining representative for all full-time and regular part-time teachers, teacher's aides and cooks on November 1, 1983.



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rather than 17-1/2 hours.<sup>22</sup> Nevertheless, the vacation check Houtman received on October 6 reflected only 17-1/2 hours pay.

When Houtman noticed this deficiency she went to see Mrs. Smith and asked her why her vacation check was "short." Mrs. Smith said that she did not know and that Houtman would have to speak with Pires about the matter. Houtman asked Mrs. Smith where Pires could be reached and the following conversation ensued:

Houtman: What's her [Pires'] number? I want to get in touch with her.

Mrs. Smith: You can't call her. She's at work (Pires held another job aside from the one at the Center).

Houtman: Mrs. Smith, I will get in touch with [Pires] because I'm going to get to the bottom of this. I'm tired of you playing games.

Mrs. Smith: Look, Yvonne, I don't have to take this from you.

Houtman: (Holding the checks up) I don't have to take this from you either.

Mrs. Smith: You can leave, you know.

Houtman: I'm not going anywhere.

Houtman then left Mrs. Smith's office and returned to the Kitchen. Mrs. Smith entered the kitchen a few moments later. Alfonso was present. Mrs. Smith said, "I don't have to take this crap from these girls." Houtman said, "If you have something to say, I wish you'd say it to me." Mrs. Smith responded, "I've said all I'm going to say to you." At that point Mrs. Smith told Houtman that she "meant" what she said about leaving the Center. Houtman told Mrs. Smith that she was getting a witness and returned to Mrs. Smith's office with L'Abbe. Mrs. Smith asked L'Abbe to leave and Houtman asked her to stay. Mrs. Smith then informed Houtman that she was being fired for insubordination and instructed her to leave the Center. Houtman left the Center and did not return.

On October 13, Houtman received the following letter from Mrs. Smith, dated October 7 and postmarked October 12:

Dear Mrs. Houtman:

This letter is to advise you that a meeting of the Board of Directors

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<sup>22</sup> Because Houtman had accrued vacation time prior to the reduction in her hours on August 30, her vacation check should have reflected 20 hours pay rather than the then-current rate of 17-1/2 hours.



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of the Greater New Bedford Infant/Toddler Day Care Center, Inc. will be held at 9:00 A.M. on Oct 17, 1983 at 247 Smith Street, New Bedford. At that time I intend to ask the Board formally to dismiss you from your position as cook at the center for reason of your wilful [sic] insubordination. You will have the opportunity before the Board to reply to and appeal from the charges of which I have already advised you and which are restated below:

1. On a series of occasions starting in 1982 and occurring as late as September 1983, I have continuously directed you not to allow children into the kitchen. Their presence in that location constitutes a danger to themselves and impairs the strict health conditions which we must observe. Moreover, their presence is in violation of the state rules and regulations under which we operate. Nonetheless, you have repeatedly allowed and invited your son into the kitchen. I have observed him sticking his hands into various foods being prepared for other children. Despite a warning from me that such conduct is intolerable, you have refused to obey my directives and have defied your superiors by continuing this unacceptable practice.
2. On or about June 30, 1983, you requested a vacation day to go on a field trip with one of your children who attends another school. I granted your request and obtained another person to fill your position for that day. You later advised me that the trip date had been changed and that you did not wish to take a vacation day. After being advised by me that I had already made a commitment to your replacement, you became verbally abusive toward me and loudly resisted my directive. At that time, I told you that your conduct was totally unacceptable and constituted insubordination.
3. On Friday, July 1, 1983, you "informed" me that you intended to take a one week vacation starting the following Monday. As you know, and as you knew then, vacations are scheduled on a three month notice basis in order to ensure adequate staffing. Nonetheless, you became highly agitated and directed abusive accusations at me for enforcing established policy. I again advised you that your conduct was inappropriate and amounted to an insubordinate refusal to abide by the rules and regulations established by your superiors.
4. During the period of July 11-15, 1983, you repeatedly demanded your vacation week although you had not provided timely notice of your intentions. You objected to my enforcement of official policy and proceeded to scream and shout at me. Despite your conduct, at a point you were allowed your vacation request. Nonetheless, you later stated that you intended to reserve one of the vacation days that I had already allowed you so that you could go on a scheduled field trip for teachers and children at the Center. I advised you that your



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replacement had already been hired. You insisted that I identify that person to you and contact him/her with instructions not to work that day. I told you that you were welcome on the trip but that your replacement would perform the cook's duties. At that point you continued to argue with me and shouted that I should change my decision. I told you that your aggressive defiance constituted insubordination and that such an attitude and conduct could not be tolerated.

5. During the week of September 19, 1983, I repeatedly directed you to clean up the kitchen, which is your assigned responsibility as cook. I directed your attention to unclean areas in the vicinity of the stove, refrigerator and counter. I repeatedly advised you that such lack of cleanliness was not only a violation of the Center's high standards, but constituted a violation of the state rules and regulations under which we operate. Nonetheless, you disobeyed my directive and failed to perform the necessary clean up. Your insubordination and obstinance ultimately required other personnel to perform your duties.

6. On a series of occasions starting in 1982 and especially occurring in September, 1983, I instructed you not to interfere with the teaching staff in their handling of the children. I specifically and repeatedly told you that your responsibility was the preparation of food and that the care of the children, including their feeding and toilet training, was the responsibility of the teaching staff. Indeed, you have been told the same by teachers who have themselves complained to me about you leaving the kitchen and interfering with the children. Nonetheless, you have proceeded to involve yourself in such matters and in the performance of other teachers [sic] duties. Despite my repeated admonitions you have continued to defy my orders and have intruded yourself into areas involving the responsibility of the teaching staff.

7. On a continuing basis, I have told you which foods are to be served to the children for snacks and which are to be provided at lunch. Nonetheless, you have persisted in disobeying my orders and have served the children snack foods at lunch time. As recently as October 5, 1983, when I was absent, you again defied my instructions and served the children snack foods at lunch time.

Also regarding food selections, you have repeatedly argued with me about meal plans. You have wilfully [sic] refused to follow my directives and have excluded certain items from the menu despite my orders to the contrary. As a result of your insubordination, the state has cited the Center for failure to serve the food combinations which I have directed you to prepare.

8. On October 6, 1983 you confronted me in my office, waving your





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payroll and vacation checks in my face and shouting that your vacation check showed payment for 17-1/2 hours rather than 20 hours. I explained that there had apparently been an error but that it would be corrected and you would be given the balance due to you. You continued to shout at me and charged me with intentionally "playing games" with your check. I readvised you that an error had apparently been made and that it would be corrected. I then directed you to return to your post. You refused and exclaimed that you intended to stay in my office. You continued to shout your accusations and repeatedly refused to leave my office at which time I told you that you were being wilfully [sic] insubordinate and that you left me no choice but to take further action. At a point, you stormed out of my office. Shortly thereafter, while I was in conversation with a member of the teaching staff, you shouted abusive remarks at us.

In conclusion, on a number of occasions, including those listed above, you have conducted yourself in a manner disruptive to the operation of the Center and insubordinate toward your superiors. You were reprimanded on those occasions and were advised that such conduct would not be tolerated.

Accordingly, I now find it necessary to take this further action.

On November 2, a meeting was held by the Center's Board of Directors (Board) to consider Houtman's termination. The Board consists of three members: Mrs. Smith, Mrs. Smith's sister Phyllis Bulger, and Carla Richardson, a friend of Mrs. Smith. At the meeting, Mrs. Smith described the contents of the above letter. Houtman attended and was given an opportunity to respond. On that date, the Board voted to terminate Houtman effective October 14, 1983.

Prior to October 6, Houtman had never been formally reprimanded by Mrs. Smith during her employment at the Center. Houtman testified that her relationship with Mrs. Smith from the time she was hired in March 1982 until June 15, 1983 was friendly and good. After June 15, Mrs. Smith was less friendly toward Houtman. She stopped taking Houtman on food shopping trips and stopped conversing with Houtman as she had before.<sup>23</sup>

With respect to each of the alleged reasons for terminating Houtman contained in Mrs. Smith's October 13 letter, the following facts were adduced at the hearing:

1. Children in the Kitchen.

The kitchen at the Center<sup>24</sup> was located next to the bathrooms the children

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<sup>23</sup>Other employees also testified that their relationship with Mrs. Smith deteriorated after June 15.

<sup>24</sup>In referring to the location of the kitchen, I am referred to the kitchen in the former locale of the Center at 95 Cedar Street, New Bedford.



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used. The kitchen door was kept open and often children, including Houtman's son Isaiah, would wander into the kitchen where Houtman worked. When this occurred, Houtman would ask the child to leave. In addition, both the staff and the children would sometimes "sneak into" the kitchen and grab food without Houtman noticing. On one occasion, in January 1983, Houtman's son Isaiah, ran into the kitchen and put his fingers in some pudding. Mrs. Smith told Houtman that her son was not allowed in the kitchen. Houtman acknowledged this and apologized, saying that he kept running into the kitchen.

Houtman recalled that Mrs. Smith had instructed her on a few other occasions not to allow children in the kitchen and that she tried to comply with Smith's directive.<sup>25</sup> Prior to her termination, Houtman was never formally reprimanded for allowing children in the kitchen.

#### 2. June 20 Vacation Day Request

On or about June 30, Houtman asked Mrs. Smith for a vacation day to attend a field trip with one of her children sponsored by the United Front Day Care Center. Mrs. Smith allowed this request. The day before the field trip, Houtman learned that the trip had been postponed one day and advised Mrs. Smith that she would be working on the originally scheduled date instead. According to Houtman, Mrs. Smith did not say anything to her regarding this change in plans and she did not have any argument with Mrs. Smith at that time.<sup>26</sup>

#### 3. July Vacation Request

On or about June 30, Houtman learned from Cook that Cook would not be taking vacation during the week of July 4-8, as she had scheduled. Because Houtman was expecting out-of-town visitors that week of July 4-8, Houtman decided to ask Mrs. Smith if she could take that week as a vacation week.

On Friday, July 1, Houtman approached Mrs. Smith and asked her if she could take a vacation the following week. Mrs. Smith declined the request, stating that she did not have enough time to find a replacement cook and suggested that Houtman

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<sup>25</sup> However, Mrs. Smith brought her niece into the kitchen each morning for breakfast. In addition, at times Houtman was instructed to mind children sent to the kitchen for punishment.

<sup>26</sup> Mrs. Smith's version of this incident differed from Houtman's. According to Mrs. Smith, Houtman said she intended to work and Smith responded that she had already obtained a replacement. Mrs. Smith testified that Houtman demanded to know who her replacement was and Mrs. Smith responded by telling Houtman that she was "out of line" and "insubordinate." I credit Houtman's version of this incident, noting that, despite this alleged conduct on Houtman's part, Mrs. Smith did not formally reprimand Houtman, and called the replacement and told her not to come in.



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take the following week (July 11-15) off. According to Houtman, she had not expected Mrs. Smith to grant her request on such late notice. Therefore, Houtman did not argue with Mrs. Smith about the denial of the request.<sup>27</sup> Houtman testified that she was not aware of the Center's vacation policy at that time.<sup>28</sup>

#### 4. July Request to Attend Field Trip

Houtman chose to take a vacation for the following week of July 11-15 as Mrs. Smith had suggested.<sup>29</sup> On July 7 Houtman learned that a field trip had been scheduled for July 13 and left a note for Mrs. Smith requesting permission to work the day of the field trip, so that she and her son Isaiah, a student at the Center, could attend the trip. Mrs. Smith received the note and telephoned Houtman at home to discuss the request. Mrs. Smith told Houtman that she could not go on the trip because she was not staff, she was only a cook. Houtman responded that she wished to attend and thought Smith was being unfair. Mrs. Smith said, "You're on vacation next week. You girls want everything your own way." Smith then terminated the conversation, saying that if Houtman wished to discuss the matter further she should come to Smith's office.

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<sup>27</sup> Although Mrs. Smith claimed in paragraph 3 of her termination letter that Houtman "became highly agitated and directed abusive accusations at me for enforcing established policy" when Mrs. Smith denied her vacation request, Mrs. Smith's testimony on direct examination contradicted this claim in her letter:

Q. Now, directing your attention to early July of 1983, do you remember a conversation with Ms. Houtman in regard to her taking a one-week vacation?

A. Yes. I do.

Q. Could you give us that conversation as best you can recall today?

A. Yvonne said to me, "Seeing as Patty Cook is not going to take that first week in July, can I take it?" I stated, "Yvonne, you have to let me know in advance. You just can't say this week, 'I'm taking next week as vacation.'"

Q. What did she (Houtman) say?

A. She says, "Yes. I know, Mrs. Smith." But she didn't know exactly when her sister was coming until then.

Q. Could you describe her tone in this conversation?

A. It was a friendly tone.

Q. Throughout the conversation?

A. Yes.

(Tr. 3-66, 3-67, 3-68, 3-81).

<sup>28</sup> Houtman first became aware of the vacation policy on July 8, as discussed infra at p. 1150.

<sup>29</sup> Although Mrs. Smith claimed in paragraph 4 of her October 7 termination letter that "During the week of July 11-15, 1983, [Houtman] repeatedly demanded her vacation week...objected to [Mrs. Smith's] enforcement of official policy and proceeded to shout and scream at [Mrs. Smith]," she did not corroborate this assertion (continued)



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On July 8, Houtman approached Mrs. Smith in her office. Mrs. Smith showed Houtman the vacation policy and said that she had to pay for each person on the field trip and had reserved a limited number of seats already. Mrs. Smith also told Houtman that she had already obtained a replacement employee for the week of July 11-15. Houtman asked Mrs. Smith who her replacement was and Smith responded that it was none of Houtman's business. At that point, Houtman dropped the matter and the conversation about unionization, discussed supra, occurred.<sup>30</sup>

That evening Mrs. Smith called Houtman at home and said that some other parents had expressed an interest in the field trip and would be attending it. Mrs. Smith told Houtman that she could attend the trip with her children also.

#### 5. Cleaning the Kitchen

Employees at the Center testified that Houtman was diligent in maintaining cleanliness in the kitchen. Cook testified that every Friday Houtman would wash the kitchen floors and that she was cleaning out the refrigerator continuously.<sup>31</sup> In addition, a report on the Center by the State Bureau of Nutrition, Education and School Food Services (Bureau of Nutrition) in June 1983 indicated that the kitchen was sanitary and clean.<sup>32</sup>

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#### 29 (continued)

in her testimony. The only testimony regarding any vacation request by Houtman was the testimony related above at page 1149, fn. 27, supra, describing the conversation as a friendly one.

Moreover, given that Houtman was actually on vacation during the week of July 11-15, she could not have "repeatedly demanded" a vacation week during the time when she was already on vacation.

Mrs. Smith did assert that Houtman was angry and shouted at her over the phone when she informed Houtman that she could not attend the field trip. According to Smith, she told Houtman at that time that she was "out of line" and "insubordinate." I credit Houtman's version of the conversation, noting that Mrs. Smith never issued a reprimand to Houtman for such behavior and ultimately allowed her to attend the trip.

<sup>30</sup>See pp. 1139-1140, supra.

<sup>31</sup>Because Houtman worked only until noon, other employees, including Alfonso, emptied wastebaskets and cleaned the kitchen at the end of the day, after the afternoon snack.

<sup>32</sup>Houtman testified that she received compliments on the cleanliness of the kitchen by a representative of the Bureau of Nutrition.



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The first occasion in which Mrs. Smith raised cleanliness as an issue with Houtman occurred in late September or early October 1983.<sup>33</sup> One morning Mrs. Smith came into the kitchen, pointed to the counter and the stove, and instructed Houtman to clean them because Mrs. Smith said the areas were "filthy." Houtman complied with this directive and later indicated so to Mrs. Smith. Mrs. Smith told Houtman that she had failed to clean inside the stove. Houtman responded that she was waiting to clean the oven until the day the Center moved to its new location, which was scheduled a few weeks later.<sup>34</sup> Mrs. Smith accepted Houtman's suggestion to wait to clean the oven until the move and did not raise cleanliness as an issue with Houtman after that occasion.<sup>35</sup>

6. Interference with Teaching Personnel.

As noted above, Houtman's son Isaiah attended the Center and was placed in the Toddler Room during Houtman's employ. During 1983, Houtman had approached Mrs. Smith and her daughter Gail on various occasions regarding the care of Isaiah at the Center.

Mrs. Smith described three instances of Houtman's "interference with teaching personnel." The most recent one occurred in August 1983. At that time, Rodrigues took Isaiah to the bathroom and he fell down. Houtman heard her son crying and went into the bathroom and asked what was wrong. Mrs. Smith was present and told Houtman that Isaiah was fine and Rodrigues could handle the situation. With this assurance, Houtman returned to the kitchen.

The second incident of interference described by Mrs. Smith occurred in June 1983. On that occasion, Houtman came out of the kitchen to see what her son was eating and gave instructions to a teacher about his diet. The third example of interference related by Mrs. Smith was Houtman's occasional participation in songs and games with the children.<sup>36</sup>

Mrs. Smith never mentioned to Houtman that she was interfering with teaching personnel prior to the discharge.

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<sup>33</sup>There was some dispute as to the exact date of the "cleaning" discussion. Mrs. Smith testified that the discussion occurred on September 19, 1983. Houtman testified that the conversation occurred the day before she was fired. The resolution of this dispute is unnecessary to the disposition of this case.

<sup>34</sup>The Center moved to a new location at 247 Smith Street on or about October 12, 1983.

<sup>35</sup>According to Mrs. Smith, Houtman failed to clean the side of the stove as Smith had instructed. Houtman denied this, stating that she cleaned all of the areas as she was instructed, with the exception of the inside oven, which she planned to do the week of the move. I credit Houtman's testimony.

<sup>36</sup>Gail Smith claimed that she had complained to her mother about Houtman interfering with her teaching duties on two occasions. The first involved an

(continued)



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#### 7. Improper Food Selections

Sometime in 1982, Mrs. Smith had a conversation with Houtman regarding what foods were to be served as snacks and what foods were to be served as desserts. Mrs. Smith told Houtman to serve "finger" foods such as cookies at snack time and to serve foods that required plates and utensils as desserts after lunch in order to cut down on dishwashing. Houtman complied with these instructions to the extent that she was able to. On occasions when there were not canned foods available to serve for dessert, Houtman would serve cookies or other "finger" foods which were available. On October 5, the day prior to her termination, Houtman served oatmeal cookies to the children for dessert because there was nothing else available to serve.<sup>37</sup>

In June, an audit was conducted of the Center by the Bureau of Nutrition (Bureau). The Bureau's report dated June 20, 1983, indicated that the menu plans at the Center should be revised to state specifically what foods were offered and that bread should be served with each meal. Mrs. Smith pointed out the bread requirement to Houtman, who complied with the Bureau's directive. In August, the Bureau revisited the Center for a follow-up visit. No further deficiencies were noted at that time.<sup>38</sup>

On other occasions during Houtman's employ at the Center, Mrs. Smith suggested different ways of preparing certain meals for the children.<sup>39</sup> On those occasions, Houtman complied with Mrs. Smith's directions. Finally, Mrs. Smith spoke with Houtman on a few occasions in 1982 and 1983 about Houtman's failure to post menus each week.

At no time prior to Houtman's termination did Mrs. Smith reprimand her for her food selection, preparation, or menus.

#### The Move to the New Center

On the weekend of October 8, 1983, the Center moved to its new location. L'Abbe, Cook, Gomes, Rodriguez and Carvalho were all assigned to work on one side of the new Center. Gail and Alfonso were assigned to other locations.

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#### 36 (continued)

incident in which Houtman asked Gail why her son was being made to sit at a small table rather than the big table where the other children his age ate. The second involved alleged interference by Houtman during the children's "circle time." Mrs. Smith did not corroborate having received these complaints about Houtman from Gail. The only incidents of interference related by Mrs. Smith were those described above.

<sup>37</sup> Mrs. Smith was absent on October 5 and made no mention of the use of oatmeal cookies for dessert until she sent the letter of termination to Houtman on October 13.

<sup>38</sup> and <sup>39</sup>, see page 1153



## MASSACHUSETTS LABOR CASES

CITE AS 12 MLC 1153

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On October 11, 1983, the day the new Center opened, Gail Smith distributed the following letter to L'Abbe, Cavalho, Cook and Gomes:

To: Mrs. Patricia L'Abbe  
Mrs. Donna Cavalho  
Mrs. Patricia Cook  
Ms. Anna Gomes

I am removing my son from your questionable care. I do not feel that you provided him or myself with the same quality day care previously given the other children.

Other mothers may not mind their children being bought [sic] up by disloyal, amoral, unethical, hypocritical, selfish, ignorant individuals such as yourselves but I want much more than you for my son. Since I do feel that day care workers do have a hand in the upbringing of other people's children and if children learn nothing else; [sic] common human decency should be taught. You ladies are incapable of teaching anything but an extremely distorted version of that particular quality.

My son has been left unattended severel [sic] times and he also picked up a diaper rash that subsequently burned the skin off his diaper area. This rash was a direct result of your lack of cleanliness. I am also sick to death of his belongings (bottles, blankets, toys, etc.) being used by every other child in the facility except him.

As a parent I don't feel that my son is recieving [sic] quality day care because as Anna stated in class all they do is "lay in their cribs and play with their crib toys or their fingers." I expected my son to be stimulated. If you day care workers are incapable of stimulating my son then you are not providing quality care.

As a day care worker I know the kind of care you ladies have provided in the past. Your present fixation on the union has drastically changed your viewpoint on quality care.

There are other parents that have been made uneasy by your performances and are subsequently removing their children from the Center.

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38 (from page 1152)

When the Bureau returned to the Center in August, Houtman discussed acceptable substitutes for bread with the Bureau's representative.

39 (from page 1152)

More specifically, Mrs. Smith suggested additional flour in beef stew and sugar in the spaghetti sauce.



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You (I hesitate to call you ladies yet again) have given the Center and day care a bad name by claiming to want to continue to provide quality day care and at the same time scaring our foster grandmothers, young children and parents.

A copy of this letter has been mailed to the office for children and another copy has been given to my attorney.

I hope you don't misunderstand this letter. I mean every word you think I mean.

Sincerely,  
Gail Y. Smith

(emphasis in original)

Gail Smith testified that she wrote the above letter because, according to Gail, the care of her son at the Center began deteriorating once the teachers became more involved with the Union. Although Gail's letter was addressed to Cook and L'Abbe, neither woman had direct care responsibilities for Gail's son Alexander, aside from coverage on other teachers' work breaks.

As noted in the document, Gail sent a copy of the above letter to the State Office for Children. In response to the letter, Cook, L'Abbe, Gomes and Carvalho prepared a petition which was distributed to various parents of children in the Center. The petition stated:

We, the parents of children presently and formerly enrolled at the Greater New Bedford Infant/Toddler Day Care Center, hereby express our total support of the program's staff.

We freely acknowledge our complete confidence in the competency of the entire staff, as it pertains to their performance regarding the care and teaching of our children.

The petitions with approximately 27 accompanying signatures were later submitted to the State Department of Social Services.<sup>40</sup>

On December 6, 1983, Cook, L'Abbe, Rodrigues, Gomes and Cavalho collectively resigned from the Center.

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<sup>40</sup> There was testimony by Mrs. Smith and Gail that they were approached by various parents of children at the Center who complained that they were forced to sign the petition or signed under duress. The resolution of this issue is unnecessary to the disposition of this case.





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### Opinion

The Complaint in this case alleges that the Center, through its director Mrs. Smith, violated the Law by: 1) making certain statements which might reasonably be said to tend to restrain, coerce and interfere with employees in the exercise of their rights under the Law; 2) reprimanding Patricia L'Abbe in retaliation for her protected activities; 3) reprimanding Patricia Cook in retaliation for her protected activities and 4) discharging Yvonne Houtman in retaliation for her protected activities. Each of these allegations is dealt with in seriatim below.<sup>41</sup>

#### I. Interference, Restraint and Coercion

An employer violates the Law if it "engages in conduct which it may reasonably be said tends to interfere with the free exercise of employee rights under the [Law]." Illinois Tool Works v. NLRB, 153 F.2d 811, 814 (7th Cir. 1946), cited in Bristol County House of Correction, 6 MLC 1582, 1584 (1979).

This principle is derived from the statutory language of Section 4(1) of G.L. c.150A, which, like the analogous provision of the National Labor Relations Act (NLRA),<sup>42</sup> makes it unlawful for an employer or its agents to:

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<sup>41</sup>The Complaint in this case also alleged the Employer violated Section (4)(1) when:

"Smith reacted angrily to the information that Cook, L'Abbe and Houtman and the other employees had signed authorization cards and stated that a union would come in 'over my dead body.'"

As discussed in the findings of fact above (p. 1134, supra), I conclude that Houtman's testimony about this comment is unreliable given the distance between herself and Mrs. Smith when she overheard the alleged remark.

Even if such a remark was made, it is unclear who the comment was directed to and whether Mrs. Smith intended Houtman to hear it. The comment could have been directed to a person, such as a parent, who was not an employee of the center. In such circumstances I would not find that Mrs. Smith's conduct violated Section 4(1) of the Law, absent a showing that the remark was made with some intent that it be overheard. See, NLRB v. McCann Steel Co., 448 F.2d. 277, 78 LRRM 2237, 2238 (6th Cir. 1971); Colecrafter Manufacturing Co. v. NLRB, 385 F.2d. 998, 66 LRRM 2677 (2nd Cir. 1967). No such showing was made here, particularly in light of the distance between Houtman and Smith when the remark was made. Therefore, I dismiss that portion of the Complaint.

<sup>42</sup>Section 4(1) of Massachusetts General Laws, Chapter 150A parallels the provisions of Section 8(a)(1) of the National Labor Relations Act, 29 USC Section 157, et seq.. The decisions of the National Labor Relations Board and the federal courts may be referred to in interpreting state law. See Don's Catering Service, 5 MLC 1179, 1182 (1978), citing Jordan Marsh Co. v. Labor Relations Commission, 312 Mass. 597.



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Interfere with, restrain or coerce any employee in the exercise  
of any right guaranteed under Section 3.

Section 3 of the Law, like Section 7 of the NLRA, provides in pertinent part  
that:

Employees...shall have the right to self-organization, to form,  
join or assist labor organizations, to bargain collectively through  
representatives of their own choosing, and to engage in concerted  
activities, for the purpose of collective bargaining or other mutual  
aid or protection.

Statements by a supervisor in the nature of threats of reprisal for protected  
activities have been held to violate Section 8(a)(1) of the NLRA even though the  
statements may not be directly coercive, if they could be reasonably so construed  
by the employee. Don's Catering Service, *supra*; NLRB v. Electric Steam Radiator,  
321 F.2d 733 (6th Cir. 1963); NLRB v. Ayer Lar Sanitarium, 436 F.2d 45 (9th Cir.  
1970); Stein Seal Co. v. NLRB, 605 F.2d 703 (3d Cir. 1979); Misericordia Hospital  
Medical Center v. NLRB, 623 F.2d 808 (2d Cir. 1980). The Supreme Judicial Court has  
followed such precedent in cases under Section 10(a)(1) of Massachusetts General  
Laws, Chapter 150E,<sup>43</sup> holding that "a threat need not be explicit if the language  
used can reasonably be construed as threatening." Southern Worcester County  
Regional Vocational School District v. Labor Relations Commission, 377 Mass. 897,  
905 (1979).

Conversely, promises of future benefits to employees for abandoning or re-  
fraining from protected activities have also been held to constitute Section 8  
(a)(1) violations under the NLRA, because "[E]mployees are not likely to miss the  
inference that the source of benefits now conferred is also the source from which  
all future benefits must flow and which may dry up if it is not obliged." NLRB  
v. Exchange Parts Co., 375 U.S. 405, 409 (1964); Chromalloy Mining and Minerals  
v. NLRB, 620 F.2d 1120 (5th Cir. 1980).

With these principles in mind, I now turn to analyze the incidents in this  
case to determine whether Mrs. Smith's conduct tended to interfere with the free  
exercise of employee rights under the Law.

#### 1. Statement at June 27 Staff Meeting

On June 27, a staff meeting was held regarding re-location of the Center and  
one of the employees present raised the issue of unionization. In response, Mrs.  
Smith indicated that, if employees continued in their efforts to unionize, only she  
and her daughter Gail would be assured employment at the Center's new location. She

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<sup>43</sup>Section 10(a)(1) of Chapter 150E parallels Section 4(1) of Chapter 150A  
and Section 8(a)(1) of the NLRA.



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further stated that those who abandoned the union would be permitted to move to the new Center.

I find both these statements to be unquestionably coercive on their face and a direct and impermissible threat of retaliation against employees who chose to exercise their statutory right to unionize. The clear message employees would draw from these statements is that continued pursuit of their organizational efforts might cost them their jobs. I therefore conclude that Mrs. Smith's comments on June 27 violated Section 4(1) of the Law.

## 2. July Conversation with Houtman

On July 7, 1983, Houtman had a conversation with Mrs. Smith regarding her request to attend a field trip. During the discussion, Houtman observed that relations between herself and Mrs. Smith had been strained since the union began its organizational drive, and asked Mrs. Smith why she was opposed to the union. In response, Mrs. Smith said that, because the employees "went behind her back" and joined the union, she was "going private" and would not renew the Center's contract with the Department of Social Services (DSS). When Houtman asked Smith why she was taking such an action, Smith responded "Payback."

I find Mrs. Smith's comments on July 7 to be threatening and coercive within the meaning of Section 4(1) of the Law. Regardless of the actual effect that cancellation of the DSS contract might have had on employees, the clear import of such statements was that Mrs. Smith would retaliate against those who "went behind her back" and exercised their protected right to join a union.

## II. The Reprimands and Discharge

The remainder of this case centers around certain disciplinary actions taken by Mrs. Smith against L'Abbe, Cook and Houtman. The complaint alleges that the actions taken against these three employees violated Section 4(3) of the Law.

In order to establish employer discrimination in violation of Section 4(3) of the Law, the Union might first establish a prima facie case by showing (1) that the employee was engaged in protected activity; (2) that the employer knew of the activity; (3) that the employer took adverse action against the employee; and (4) that the employer's motive for taking the adverse action was to penalize or discourage the protected activity. Clinton Services d/a/a Great Expectations, Inc., 9 MLC 1494, 1497 (1982); Trustees of Forbes Library v. Labor Relations Commission, 384 Mass. 559 (1981); cf. Worcester Reg. Voc. School District v. Labor Relations Commission, 386 Mass. 414, 418-19 (1982); Boston City Hospital, 11 MLC 1065, 1071 (1984). With respect to the motivational element, the charging party must demonstrate in its prima facie case that protected activity played some role in causing the adverse action. Boston City Hospital, id.<sup>44</sup>

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<sup>44</sup> (see page 1158)



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An employer may rebut the prima facie case by producing evidence that one or more lawful reasons actually motivated the adverse action. If lawful motives co-exist with impermissible ones, rendering the case one of "mixed motives," the Commission must judge the employer's motivation under a "but for" standard. If the employer would not have taken adverse action against the employee but for the employee's protected activities, the adverse action is unlawful and the employee will prevail. If, on the other hand, a lawful cause would have led the employer to the same action even in the absence of protected activity, the complaint will be dismissed. Trustees of Forbes Library, supra. Once the employer has proffered a lawful reason and presented supporting facts, the presumption of discrimination is dispelled. The burden of persuasion is on the charging party, who must prove by a preponderance of the evidence that the employer's asserted reason would not have caused the discharge absent the protected activity.

Bearing this in mind, I now turn to the three instances of adverse action to determine whether such actions violated Section 4(3) of the Law.

Reprimand of Patricia L'Abbe

On June 16, 1983, L'Abbe and other employees at the Center attended an informational meeting held by the Union and signed authorization and designation cards. On June 17, the employees held a meeting with Mrs. Smith during which they announced that they had "joined" the Union. L'Abbe was present at the June 17 meeting and when Mrs. Smith asked why the employees wished to unionize, L'Abbe replied that the employees wanted a union to obtain medical benefits.

It is axiomatic that L'Abbe's participation in efforts to organize a union at her place of employment constitutes activity protected under Section 3 of the Law. Clinton Services, supra. In addition, Smith had knowledge of L'Abbe's concerted, protected activities on and after June 17, the date on which L'Abbe spoke out in support of the Union. Mrs. Smith took adverse action against L'Abbe on June 27, when she orally reprimanded L'Abbe and threatened to take her before the Center's Advisory Board and "let her go."<sup>45</sup>

<sup>44</sup> Direct evidence of unlawful motivation is rare; it is therefore well established that this element may be proved by circumstantial evidence and reasonable inferences to be drawn therefrom. Circumstantial factors which may affect a finding of improper motive include the timing of the adverse action in relation to the protected activity and the insubstantiality of the reasons advanced by the employer for the termination. Town of West Springfield, 8 MLC 1041, 1047-48 (1981). In addition, marked departure from normal procedures for effectuating employee discipline, such as failing to provide prior warning to the employee, failure to tell the employee the reason for the action contemporaneously with the action, and different explanations for the action, may cast doubt upon the legitimacy of the employer's motives. Boston City Hospital, supra at 1072-73.

<sup>45</sup> See City of Boston, 8 MLC 1281, 1284-85 (1981) (a reprimand is adverse action and properly analyzed under 10(a)(3)). See also Commonwealth of Massachusetts 9 MLC 1371 (H.O. 1982) (changing employee's desk location considered adverse action sufficient to trigger (a)(3) analysis).



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With respect to the motivational element, the record yields substantial evidence that L'Abbe's protected activities played a role in the decision to reprimand her. First, there is direct evidence of anti-union animus on the part of Mrs. Smith, who reacted angrily when initially approached by an employee with a request to post a flyer regarding unionization of day care workers. In addition, after employees announced their intent to unionize, Mrs. Smith expressed perplexity at the employees' desire to unionize and later told employee Rodrigues that she "didn't like" the fact that Rodrigues and others had gone "behind her back" and joined the Union.

Moreover, certain circumstantial factors suggest impermissible motivation. One is the timing of the reprimand, which was proximate to L'Abbe's protected activity and her statement in support of the Union at the June 17 meeting. Apart from one other isolated incident in 1981, L'Abbe was not criticized or reprimanded by Mrs. Smith until after she became involved in the union drive.

A second circumstantial factor is the pretextual nature of the reasons asserted by the Employer for its action. Boston City Hospital, *supra* at 1072. Despite the fact that Mrs. Smith witnessed the event which she asserts prompted the reprimand (i.e. Alexander's prolonged crying), she made no mention of it at the time of its occurrence. The failure of Mrs. Smith to contemporaneously indicate that this was a problem to L'Abbe casts suspicion on her motives. This suspicion is enhanced by the apparently fabricated nature of the Employer's other asserted lawful reason for its action, namely Rouell's alleged "vacuuming" complaint. Accordingly, I find that the facts support a prima facie showing that Mrs. Smith reprimanded L'Abbe because of her protected, concerted activity.

In response, the Employer proffered two legitimate, non-discriminatory reasons for reprimanding L'Abbe. It claims that the reprimand was based upon: 1) L'Abbe's neglect of baby Alexander by allowing him to cry so long and 2) the alleged vacuuming complaint by parent Rouell. In order to rebut the Union's prima facie case, the employer must substantiate these proffered reasons with evidence showing that they actually played a part in its decision, Boston City Hospital, *supra* at 1072; City of Woburn, 9 MLC 1417, 1422 n. 5 (1982). For the reasons discussed below, I find that neither of the above reasons actually motivated the Employer to discipline L'Abbe.

With respect to the first rationale, as noted above, Mrs. Smith witnessed Alexander crying on June 24, yet took no action against L'Abbe and made no comment about it to her on the day it occurred.<sup>46</sup> I do not believe that, if Mrs. Smith felt that her own grandson had been mistreated or neglected, she would fail to mention this to L'Abbe immediately while she (Mrs. Smith) was present in the infant room on

<sup>46</sup> Mrs. Smith did not dispute that she failed to mention anything about this incident to L'Abbe on June 24, the day it occurred.



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June 24.<sup>47</sup> Instead, I find that Mrs. Smith failed to mention anything to L'Abbe about Alexander crying on June 24 because, as Mrs. Smith testified at the hearing, she could see that L'Abbe was busy attending to another infant.<sup>48</sup> For all these reasons, I find this rationale for L'Abbe's reprimand to be pretextual.

I further find Mrs. Smith's reliance on an alleged vacuuming complaint about L'Abbe by Rouell to be factitious. Mrs. Smith claimed that Pamela Rouell, a parent of an infant under L'Abbe's care, had complained to her that L'Abbe was vacuuming while her child Matthew was crying. As noted in the facts found above, this claim appears to be a complete fabrication, invented and instigated by Mrs. Smith herself.<sup>49</sup> Moreover, it is undisputed that Mrs. Smith never discussed Rouell's alleged vacuuming complaint with L'Abbe at the time she reprimanded L'Abbe or thereafter.

For all these reasons, I conclude that neither of the reasons advanced by the Employer actually motivated the Employer to discipline L'Abbe. Accordingly, I conclude that Mrs. Smith reprimanded L'Abbe because of her participation in concerted, protected activity. The Employer has therefore violated Section 4(3) and (1) of the Law.

#### Reprimand of Patricia Cook

On August 30, 1983, Mrs. Smith handed Cook a written reprimand which alleged that Cook had been "indifferent and quarrelsome." In addition, Mrs. Smith informed Cook that she was to be suspended for three days. Although Mrs. Smith later withdrew the suspension, it is unclear from the record whether the written reprimand was ever removed from Cook's personnel file. In any event, Mrs. Smith's reprimand and threat to suspend Cook are sufficient to constitute "adverse action" under Section 4(3) of the Law. See, City of Boston, *supra*, 8 MLC at 1284-85.

With respect to the element of protected activity, there can be no doubt that Cook was engaged in protected activity and that Mrs. Smith knew of her activities. On June 15, 1983, Cook requested Mrs. Smith's permission to post a flyer about a meeting sponsored by District 65 regarding unionization of day care workers.

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<sup>47</sup>For the reasons outlined above (see *supra*, pp. 1135-1136, fn. 10), I have discredited Gail and Mrs. Smith's testimony regarding the alleged comment by L'Abbe to the effect that she let Alexander cry intentionally. Therefore, the Employer may not rely on this fabricated statement as a basis for its decision.

<sup>48</sup>On direct examination, Mrs. Smith described this incident as follows. "I went down [to the infant room] to see what baby was crying, and it was Alexander, my grandson...Patty L'Abbe was sitting there with baby Tunisia in her arms. I knew she was busy with one of the babies, so I just stepped over the fence and I picked up Alexander." (Tr. 111-22) (emphasis added).

<sup>49</sup>See p. 1137.





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Mrs. Smith reacted angrily to this request. The day following the union meeting, Cook and other employees approached Mrs. Smith and announced they had joined the union. Two months later, at a staff meeting held on August 29, Cook asked Mrs. Smith whether she planned to attend a hearing to be held on the Union's representation petition. In addition, at the August 29 staff meeting, Cook proposed that she or another employee be granted a promotion to a teacher's position. All of the above described conduct was for the purpose of collective bargaining or for other mutual aid and protection and therefore constitutes concerted, protected activity.

Turning to the final element, there is ample evidence that Mrs. Smith's decision to reprimand Cook was unlawfully motivated. When Cook initially approached Mrs. Smith to request permission to post the flyer regarding a union meeting, Mrs. Smith crumpled the flyer and said, "I don't care. I'm not having a union here. No one is going through my books." In addition, at a staff meeting on June 27, Mrs. Smith stated that only employees who abandoned the union would be assured continued employment at the "new" center. Further evidence of anti-union animus can be drawn from Mrs. Smith's July comments to Houtman. At that time, Mrs. Smith indicated that she resented the fact that the employees had "gone behind her back" and joined the union and she intended to retaliate by "going private."

In addition to this direct evidence of animus, there are circumstantial indications of unlawful motivation. The timing of the Cook reprimand is suspect for two reasons. One is the fact that the reprimand was issued the day immediately following a staff meeting during which Cook raised a question about the Union's petition and sought to have herself and another employee considered for a promotion at the Center. Second and even more critical is the fact that all the complaints on which Mrs. Smith relies to support her discipline of Cook had been voiced at least a month prior to the reprimand. Finally, apart from one isolated incident in 1981, Cook was not criticized or disciplined by Mrs. Smith until after she initiated concerted, protected activity. For all these reasons, I find that the Union has established a prima facie case of unlawful discrimination under Section 4(3) of the Law.

The Employer proffered essentially one non-discriminatory reason for its action. It contends that the reprimand was based on complaints made to Mrs. Smith by Alfonso, an employee who had supervised Cook. For the reasons outlined below, I reject this purported justification and find that the Employer's reason for disciplining Cook was her protected, concerted activity.

Mrs. Smith claimed that Cook's reprimand was prompted by complaints from Alfonso that Cook was "undermining" everything Alfonso was doing with the children. According to Mrs. Smith, Alfonso had come to her and threatened to quit because of Cook's interference the day preceding the issuance of the reprimand. However, as noted above,<sup>50</sup> Cook and Alfonso stopped working together in July, a month prior to the reprimand. In addition, Alfonso testified that all of her conversations with

<sup>50</sup> See p. 1142, supra.



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Mrs. Smith about Cook had occurred in July. No mention of Alfonso's complaints was made to Cook until the end of August, a month after the complaints were made and a month after the two had stopped working together. The lapse of time between Alfonso's complaints and the reprimand, coupled with the proximity of the reprimand to Cook's protected activity at the August 29 meeting, demonstrate that Mrs. Smith seized upon Alfonso's complaints as a pretext for disciplining Cook for her concerted, protected activity. I therefore conclude that the Employer's reprimand and threat to suspend Cook violated Sections 4(3) and (1) of the Law.<sup>51</sup>

#### The Termination of Yvonne Houtman

On October 6, 1983 Mrs. Smith discharged Houtman from her position as cook for the Center. On November 2, the Center's Board of Directors affirmed Mrs. Smith's discharge decision.<sup>52</sup> Based upon the record and for the reasons discussed infra, I find that the Union made out a prima facie case of unlawful discharge by producing evidence demonstrating that Mrs. Smith acted adversely toward Houtman because of her protected activities. The Employer attempted to rebut the Union's case by asserting several legitimate non-discriminatory reasons for its action. Having carefully considered all the evidence surrounding Houtman's discharge, I conclude that Houtman would not have been terminated "but for" her protected activities.

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<sup>51</sup> Another possible justification which was briefly touched upon at the hearing was Gail Smith's complaints about Cook's interference. I reject this justification for the following reasons. First, Gail claimed that she had raised these complaints as early as 1982 and no disciplinary action was taken until August 1983. In addition, Gail and Cook stopped working together in June 1983, two months prior to the reprimand. Finally, when questioned about the reason for the reprimand, Mrs. Smith only raised Alfonso's complaints.

<sup>52</sup> In considering whether the Employer violated Section 4(3) of the Law, I focus my attention upon Mrs. Smith's motivation. Although the Center's Board of Directors had the final authority to discharge Houtman, the Board relied upon Mrs. Smith's recommendations in reaffirming Houtman's termination.

In Forbes, supra, the Court stated that;

If...the decision makers [in a discriminatory discharge case] relied upon the recommendations of supervisors, the motives of the supervisors should be treated as the motives for the decision maker. (cite omitted) An employer should not be permitted to insulate its decision by interposing an intermediate level of persons in the hierarchy of decision, and asserting that the ultimate decision makers acted only on recommendation, without personal hostility toward protected activity." Forbes, supra at 569-571.

The above principle applies with even greater force in the instant case, given the composition of the Center's Board of Directors, comprised of Mrs. Smith, her sister and a close friend.





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Houtman was engaged in protected concerted activity by joining with other employees in their efforts to unionize. Mrs. Smith knew of Houtman's protected activities. On June 16, when employees told Mrs. Smith they had joined the Union, Gail Smith asked Houtman in Mrs. Smith's presence whether she (Houtman) was "allowed" to join the Union. Houtman responded affirmatively. After that date, Houtman noticed Mrs. Smith was less friendly towards her. In early July, Houtman had a conversation about the Union, during which Mrs. Smith indicated her displeasure with employees who had joined the Union. In addition, at a staff meeting on August 27, Houtman brought up to Mrs. Smith the subject of the Union's representation petition. Finally, on September 27, a Union representative informed Mrs. Smith that Houtman had been chosen to act as a Union observer for the representation election scheduled on that date.<sup>53</sup>

The record also compels the inference that Mrs. Smith's decision to discharge Houtman was unlawfully motivated. As noted *supra*, there is ample evidence that Mrs. Smith was irritated by employee efforts to unionize. In June 1983, when Mrs. Smith was initially approached by Cook regarding posting the Union's flyer, she stated that there "was not going to be a union" at the Center. In July, Houtman asked Mrs. Smith why she opposed the Union and Mrs. Smith responded that she resented the fact Houtman and other employees had "gone behind her back" and joined the Union. Mrs. Smith also indicated to Houtman that she intended to retaliate by "going private." Finally, at a staff meeting held on August 27, Mrs. Smith announced that only employees who renounced the Union would be assured continued employment at the Center's new location.

In addition to the above evidence, there are circumstantial indicia of impermissible motivation. At no time prior to her discharge was Houtman ever warned or formally reprimanded for any of the incidents alleged in the Employer's October 7 discharge letter. Moreover, the majority of these incidents occurred at least three months to a year prior to the discharge. In addition, as discussed more fully below, many of the reasons cited by the Employer for its action are either insubstantial in nature or completely fabricated. Finally, the timing of the discharge was proximate to the September 27 union election in which Houtman had been selected to act as union observer. Accordingly, I find that the Union made out a prima facie case of unlawful discharge under Section 4(3) of the Law.

In response, the Employer asserted eight non-discriminatory reasons for its action: 1) Houtman was allowing children into the kitchen; 2) alleged insubordination regarding a June 30 vacation day request; 3) alleged insubordination regarding a July vacation request; 4) alleged insubordination regarding a July request to attend a field trip; 5) alleged failure to clean the kitchen; 6) alleged

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<sup>53</sup> Houtman did not ultimately act as observer for the Union at the election. However, this has no bearing on the issue of employer knowledge or motivation.



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interference with teaching staff; 7) serving "snack" foods for dessert; and 8) alleged insubordination on October 6, the day Houtman was terminated. Based upon the facts found above and for the reasons which follow, I conclude that the proffered reasons were either pretextual or did not independently motivate the Employer and that Houtman would not have been discharged were it not for her protected concerted activities.

Mrs. Smith claimed in her October discharge letter that one reason she had terminated Houtman was Houtman's failure to comply with Smith's directive not to allow children in the kitchen. In support thereof, Mrs. Smith pointed to an incident in which she had observed Houtman's son, Isaiah, "sticking his hands into foods being prepared for other children." However, both Mrs. Smith and Houtman testified that the incident in which Isaiah put his fingers into some pudding had occurred in January 1983, ten months prior to the discharge, and that no formal disciplinary action was taken in response to it at that time. In addition, as noted above, the location of the kitchen was such that the children often wandered in. On the occasions when this occurred, Houtman instructed the child to leave. Although Mrs. Smith claimed that this had been a continuing problem since 1982, she failed to take any intermediary steps to correct this "problem" prior to Houtman's discharge.<sup>54</sup> The remoteness of the "pudding incident" and Mrs. Smith's failure to take any corrective measures to alleviate the "continuing" problem of children in the kitchen for well over a year lead me to conclude that this rationale is spurious. See Town of Stowe, 11 MLC 1312, 1320 (1984).

The next three rationales advanced by the Employer relate to incidents of alleged insubordination by Houtman in June and July 1983. All three incidents involved certain vacation and scheduling requests made by Houtman. Based upon the factual determinations set forth earlier in this decision,<sup>55</sup> I find that the allegations of insubordination contained in paragraphs 2, 3 and 4 of Mrs. Smith's termination letter are completely fabricated. Indeed, Mrs. Smith herself contradicted at least one of the allegations of insubordination contained in her own letter by testifying that her conversation with Houtman regarding Houtman's July vacation request had been a "friendly" one. Moreover, if any of these alleged incidents of insubordination had occurred, Mrs. Smith would not have waited three months before disciplining Houtman. A single instance of insubordination by L'Abbe in 1981 prompted Mrs. Smith to issue an immediate written reprimand. If Houtman had been insubordinate on three consecutive occasions within a two-week time period as described in the letter, why did Mrs. Smith fail to immediately reprimand Houtman? All of these factors lead me to conclude that the June-July allegations of insubordination contained in Mrs. Smith's letter are without evidentiary support and formed no basis for Houtman's termination.

<sup>54</sup> If Mrs. Smith had been truly concerned about children in the kitchen, she could have easily remedied the problem by instructing Houtman to keep the kitchen door closed.

<sup>55</sup> See Findings of Fact section, supra at pp. 1148-1150.



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The next justification advanced by the Employer concerned Houtman's failure to clean the kitchen as instructed by Mrs. Smith. As Noted supra,<sup>56</sup> I have found that Houtman performed the cleaning duties as instructed, with the exception of the inside oven, which Mrs. Smith agreed could wait until moving day. I also note that, although Houtman had been employed at the Center from March 1982 until October 1983, Mrs. Smith raised cleanliness as an issue only once, in September 1983, after Houtman became involved in concerted protected activities. Therefore, I conclude that this cleanliness rationale is also specious.

Another reason asserted for the discharge was Houtman's interference with teaching staff in their handling of children who attended the Center. The only instances Mrs. Smith could cite in support of this assertion were: 1) an occasion in which Houtman entered the bathroom to see if her son was all right after he had fallen down; 2) an instance in which Houtman gave instructions to a staff member about her son's diet; and 3) Houtman's occasional participation in games and songs with the children.

While interference with teaching personnel might very well motivate disciplinary action under certain circumstances, it did not in this case. All three incidents cited by Mrs. Smith are patently trivial. They were remote in time from the discharge and Mrs. Smith never raised the issue of interference with staff to Houtman at any time prior to terminating her. Hence, I do not believe that this rationale motivated Houtman's discharge. See Luana's Mexican Hat Restaurant, 8 MLC 1207, 1211 (1981).

Mrs. Smith additionally asserted that Houtman had been discharged because she made "improper food selections." A review of the evidence reveals that this charge is also groundless. Mrs. Smith relied on two instances of improper food selection. One involved an audit conducted by the Bureau of Nutrition in June 1983, wherein the Bureau cited the Center for failure to serve bread at each meal and instructed the Center to state specifically what foods were offered. The second involved Houtman's use of oatmeal cookies, a "snack" food, for dessert. The nutrition audit occurred four months prior to the discharge and the deficiencies noted had been corrected long before Houtman's termination. In addition, Mrs. Smith did not mention the use of oatmeal cookies for dessert until after Houtman's discharge. Because of the remoteness of the nutrition audit from the discharge and the insignificance of the oatmeal cookies incident, I reject both as rationales for the discharge.<sup>57</sup> See Town of Townsend, MUP-298; Labor Relations Commission v. Board of Regional Community Colleges, 377 Mass. 847; 388 N.E.2d 1185 (1979).

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<sup>56</sup>See Findings of Fact section, supra at pp. 1150-1151.

<sup>57</sup>According to Mrs. Smith, she spoke with Houtman several times in 1982 and 1983 regarding her failure to post menus each week. No reference to this is contained in the discharge letter and Mrs. Smith never took any formal measures to correct this problem prior to the discharge. I therefore find that the failure to post menus did not motivate the discharge.



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The final rationale for Houtman's discharge was her "insubordinate" behavior on October 6, the day of her termination. The facts surrounding this incident are essentially undisputed. On October 6, Houtman confronted Mrs. Smith about a deficiency in her vacation check and demanded to speak with Pires, the bookkeeper, to straighten the matter out. Mrs. Smith told Houtman that she could not contact Pires because she was at another job. Houtman responded that she was going to get in touch with Pires to "get to the bottom of this." Houtman also said she was "sick of [Mrs. Smith] playing games." Shortly thereafter, Mrs. Smith instructed Houtman to "leave the Center" and terminated her employ.

I must now consider whether this incident motivated the discharge. Given the contemporaneity between this incident and the discharge, I find that unlike the other asserted grounds, Houtman's behavior on October influenced Mrs. Smith's decision to terminate her. Nevertheless, on the basis of the entire record, I am convinced that the discharge would not have occurred in the absence of Houtman's protected concerted activity.

My opinion is supported by a number of factors. First, the only other comparable incident of insubordination by an employee occurred in 1981, when L'Abbe became angry over a change in the vacation schedule and accused Mrs. Smith of being unfair.<sup>58</sup> In that instance Mrs. Smith gave L'Abbe a written reprimand and later revoked it. Houtman's behavior on October 6, which consisted of a demand to contact the bookkeeper and an accusation that Mrs. Smith was "playing games," did not differ materially from L'Abbe's behavior in 1981. Thus, I do not believe that Mrs. Smith would have viewed the above-described conduct as so opprobrious as to prompt her to discharge Houtman. Town of Stow, supra.

Second, as noted above, Mrs. Smith had previously applied the principles of progressive discipline in dealing with other employees' misconduct by initially issuing a written reprimand for improper behavior. In contrast to this, Mrs. Smith failed to take any intermediary disciplinary measures against Houtman prior to imposing the most severe form of workplace punishment: discharge. The uncharacteristic manner in which Mrs. Smith dealt with Houtman is strongly suggestive of improper motivation. Town of Somerset, 3 MLC 1618 (1977).

Third, as noted earlier, there had been no animosity between Mrs. Smith and Houtman until Houtman became involved in protected concerted activities. Once Mrs. Smith learned that Houtman was involved with the union drive, she became less friendly toward Houtman. When Houtman asked Mrs. Smith why this was the case, Smith responded that she resented the fact that Houtman and others had gone behind her back and joined the Union and that she intended to retaliate by "going private."

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<sup>58</sup> Since I have determined that the other allegations of Houtman's insubordination are fabricated, they cannot be referred to for comparative purposes.



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Finally, the timing of the discharge is suspect. It occurred shortly after the Union election in which Houtman was to act as union observer and shortly before the date the Center relocated. The latter date is significant inasmuch as Mrs. Smith had stated in a prior staff meeting that only those who abandoned the union would be insured continued employment at the Center's new locale.

In sum, based upon Mrs. Smith's demonstrated animosity toward the Union and Houtman's protected activities in particular, the pretextual and factitious nature of the reasons advanced for the discharge, and the uncharacteristic failure of Mrs. Smith to warn or reprimand Houtman prior to invoking vocational capital punishment, I am persuaded that Houtman's concerted protected activity, alone or in combination with the October 6 incident, motivated the discharge. Stated differently, "but for" her protected concerted activities, Houtman would not have been discharged.<sup>59</sup> Accordingly, the Center has violated Sections 4(3) and (1) of the Law.

#### Conclusion and Remedy

Based upon the entire record, and for the reasons set forth above, I conclude that the Center, through its director Mrs. Smith, violated Section 4(1) of the Law by making certain statements which would reasonably tend to interfere with the free exercise of rights the center's employees enjoy under Section 3 of the Law.

I also conclude that the Center violated Sections 4(3) and (1) by reprimanding L'Abbe and threatening to discharge her, and by reprimanding Cook. Mrs. Smith would not have taken action against either of these employees were it not for protected union activities. Finally, I conclude that "but for" Houtman's protected concerted activity, she would not have been discharged; the center thereby violated Section 4(3) and (1) of the Law.

Having found that the Center independently violated Section 4(1) of the Law, I order it to cease and desist from such conduct and to post a notice to all employees drawing their attention to this decision.

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<sup>59</sup> The Employer erroneously asserts that, in order for the Union to prevail in this case, it must demonstrate why employees other than the discriminatee were not adversely treated. The Forbes decision contains no such requirement.

I conclude that the Union has met its burden of proof in this case for the reasons outlined above. I also note that one ostensible reason why Houtman was the object of the harshest treatment by Smith was Houtman's prior relationship with Mrs. Smith and her daughter Gail. Prior to the Union drive, Houtman and her family had been good friends with the Smiths. In fact, it was suggested that Houtman obtained her job at the Center through this friendship. Given this, Mrs. Smith may have felt particularly betrayed by Houtman's involvement in the Union.



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Having further concluded that the Center violated Section 4(3) of the Law by taking adverse action against L'Abbe, Cook and Houtman, I order the following remedies. Because Mrs. Smith did not pursue her oral reprimand and threat to terminate L'Abbe, the only appropriate remedy is a cease and desist order coupled with the attached posting. With respect to Cook, although the three day suspension was revoked by Mrs. Smith, it is unclear whether the written reprimand was removed from Cook's personnel file. Therefore, I order that the written reprimand be expunged from Cook's personnel file.

Finally, because I have concluded that the Center violated Sections 4(3) and (1) by discharging Houtman, I order it to reinstate Houtman with full benefits, make her whole for the monetary loss incurred as a result of the Center's unlawful action, and post the attached notice to employees. See, School Committee of Newton v. Labor Relations Commission, 388 Mass. 557 (1983).

Order

WHEREFORE, IT IS HEREBY ORDERED that the Greater New Bedford Infant Toddler Center shall:

1. Cease and desist from:
  - a. Interfering with, restraining, and coercing its employees in the exercise of any right guaranteed under the Law.
  - b. Discriminating in regard to hiring, tenure or any term or condition of employment to encourage or discourage membership in any labor organization.
2. Expunge from its records the August 30, 1983 reprimand addressed to Patricia Cook, together with any and all copies of and references to the same.
3. Immediately offer Yvonne Houtman reinstatement to her former position and make her whole for any loss of benefits and wages she suffered as a result of the Center's decision to discharge her, plus interest on any sums owing, at the rate specified in M.G.L. c.231, Section 6B, with quarterly computation, from the date of discharge.
4. Post in the Center, where notices to employees are usually posted, the attached Notice to Employees, and leave the same posted for a period of not less than thirty (30) consecutive days.
5. Notify the Commission within ten (10) days of receipt of this Decision and Order of the steps taken to comply herewith.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS  
LABOR RELATIONS COMMISSION

AMY LAURA DAVIDSON  
Hearing Officer



## MASSACHUSETTS LABOR CASES

CITE AS 12 MLC 1169

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NOTICE TO EMPLOYEES  
POSTED BY ORDER OF  
THE MASSACHUSETTS LABOR RELATIONS COMMISSION  
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

After a hearing at which all parties had the opportunity to present evidence, a hearing officer of the Massachusetts Labor Relations Commission has determined that the Greater New Bedford Infant Toddler Center (Center) violated Section 4(1) of Massachusetts General Laws, Chapter 150A (the Law) by making certain statements regarding the possible negative consequences which might result if employees unionize and by threatening to retaliate against employees who continued efforts to unionize.

The hearing officer further determined that the Center violated Section 4(3) and (1) of the Law by reprimanding Patricia L'Abbe, and Patricia Cook, and by discharging Yvonne Houtman from her position as Cook at the Center because of each employee's concerted protected activities. The hearing officer has ordered the Center to post this Notice and abide by what it says.

Massachusetts General Laws, Chapter 150A gives public employees the following rights:

To engage in self-organization;  
to form, join or assist any union;  
to bargain collectively through representatives of their own choosing;  
to act together for the purpose of collective bargaining or other mutual aid or protection;

WE WILL NOT do anything that interferes with, restrains or coerces employees in the exercise of these rights.

WE WILL NOT discriminate against employees to encourage or discourage membership in any labor organization.

WE WILL EXPUNGE from our records the August 30, 1983 reprimand of Patricia Cook, together with any and all copies of and references to the same.

WE WILL REINSTATE YVONNE HOUTMAN to her position as cook for the Center, complete with all benefits to which she would otherwise have been entitled, and make her whole for any monetary loss she has incurred.

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MRS. ALICE SMITH

