LUANA'S MEXICAN HAT RESTAURANT, INC. AND BRYAN E. FONTAINE, UP-2452 AND LUANA'S MEXICAN HAT RESTAURANT, INC. AND KEVIN J. MCGARRY, UP-2454 (7/7/81).

(60 Prohibited Practices by Employer)
65.211 concerted activities -- "mutual aid or protection"

Commissioners participating:

Phillips Axten, Chairman
Joan G. Dolan, Commissioner
Gary D. Altman, Commissioner

Appearances:

Max Volterra, Esq. - Representing Luana's Mexican Hat Restaurant, Inc.

Jane K. Alper, Esq. - Representing Bryan E. Fontaine and Kevin J. McGarry

Statement of the Case

Bryan E. Fontaine and Kevin J. MCGarry filed charges with the Massachusetts Labor Relations Commission (Commission) on November 21, 1980 alleging that Luana's Mexican Hat Restaurant, Inc. (Employer) had engaged in unfair labor practices within the meaning of General Laws Chapter 150A (the Law). Pursuant to its authority under Section 6 of the Law, the Commission investigated those charges and on March 13, 1981 issued its own Complaint of Prohibited Practice. In substance, the complaint alleged that the Employer had acted in violation of Sections 4(c) and (1) of the Law by discharging Fontaine and McGarry in retaliation for engaging in concerted, protected activity. Pursuant to notice, the matters came on to be heard before Robert B. McCormack on May 5, 1981. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues was afforded all parties. Having read and examined all of the evidence of record, we hereby find and rule as follows.

Jurisdictional Findings

1. Luana's Mexican Hat Restaurant, Inc. is an employer within the meaning of Section 2 of the Law.

2. Bryan E. Fontaine and Kevin J. McGarry are employees within the meaning of Section 2 of the Law.

3. On December 9, 1980 the National Labor Relations Board refused to issue complaints in similar cases filed with that agency because the employer's annual gross volume of business is less than $500,000.

Findings of Fact

Fontaine and McGarry were employed as waiters at Luana's Mexican Hat Restaurant, Inc. in South Attleboro. The restaurant was founded by Virginia Morra and is managed by her and her husband, Louis Morra.

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Fontaine was hired in June, 1980. In addition to performing duties as a waiter, he was also responsible for opening the restaurant and cleaning the restrooms approximately four days a week, and for watering 30-40 hanging plants from a ladder every Wednesday. McGarry was hired in September, 1980. Both were paid at the rate of $1.60 per hour.

In early October, 1980 McGarry called the Massachusetts Department of Labor and Industries to determine whether they were being paid the minimum wage under Massachusetts law. He was informed that the minimum wage for waiters at that time was $1.86 an hour.

He and Fontaine discussed the subject of wages between themselves, and also with other employees including busgirl Shirley Marshall, another waitress named Jan, the hostess, the chef and a kitchen employee. From these conversations it was discovered that other employees were being paid less than the minimum wage.

Busgirl Shirley Marshall asked McGarry to check with the Department of Labor and Industries concerning her wage rate of $2.65 an hour. McGarry checked, and learned that she should be receiving a minimum wage of $3.10 an hour.

On October 12, 1980 Fontaine and McGarry approached Louis Morra, and informed him that they were not receiving minimum wages. Mr. Morra at first denied he was covered by the minimum wage law, but later agreed to check and get back to them. On October 17, 1980 Mr. Morra admitted he had been underpaying them and said he would adjust their wage rates. During the last week in October, Mr. Morra also agreed to adjust Shirley Marshall's wage rate.[1]

Sometime after the discussions with Mr. Morra concerning minimum wages, McGarry again contacted Labor and Industries to find out whether it was proper to pay the waiters' rate of pay for work such as cleaning restrooms and watering plants. He learned that this work was required to be compensated at the regular minimum wage rate of $3.10 an hour.[2]

Fontaine was out of work for several weeks during late October and early November because of a back injury. During that time, a waitress named Virginia was hired to fill in for him.

On November 5, 1980 McGarry and Fontaine went to the restaurant to give Mrs. Morra a doctor's certificate stating that Fontaine was able to return to work. While she was examining the certificate, the two men went to the lounge to talk to the waitress, Janice, who was working behind the bar.

Mrs. Morra came down to the lounge and stated that while they were there,

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[1] Marshall was subsequently discharged. Her case is currently pending before the Commission.

[2] Upon further investigation, the Department denied a claim filed by the employees for such work on the ground that the time spent on such chores was minimal.

she wanted to explain to them "the way things were going to be from then on in." She told them that she did not intend to replace Shirley Marshall, but would keep on the new waitress, Virginia, full-time and hire a fourth waiter as well. McGarry asked whether she didn't think that having four waiters in an area formerly staffed by two would be "a little bit heavy." Mrs. Morra replied "No, that's fine." She also said that the busgirl would no longer work in the front room where Fontaine and McGarry waited on tables.

McGarry then told Mrs. Morra "that while we were straightening everything out...there were some other adjustments that" had to be made to their pay. He told her he had learned from the Minimum Wage Division that duties such as cleaning bathrooms and watering plants had to be compensated at a rate of $3.10 an hour. "Oh, really?" Mrs. Morra asked. "Yes," McGarry replied. "Well," Mrs. Morra responded, "in that case, then, you're both fired."

McGarry protested that he felt they had been good employees, and suggested that two nights earlier her husband told them that things were going well. Mrs. Morra replied that they "had been troublemakers for her", and that she "never had so much trouble with two people since she'd been there."

After leaving the restaurant, McGarry and Fontaine met Mr. Morra who told them that there was no question but they had done an excellent job. He commended them for being topnotch waiters, and told them they could get a job anywhere. He suggested that "the reason his wife had fired (them) had nothing to do with (their) performance, but, rather, that (they) had caused a dissension amongst her staff that she was unhappy about."

Before being fired, McGarry and Fontaine had received compliments from Mr. and Mrs. Morra and had never been criticized for their work or told that it was unsatisfactory.

Opinion

Section 3 of the Law guarantees employees the right to engage in concerted activities for the purpose of mutual aid or protection. Section 4(3) makes it an unfair labor practice for an employer to discriminate against employees for exercising rights guaranteed in Section 3. Moreover, such discrimination derivatively constitutes restraint and coercion of employees in violation of Section 4(1) of the Law.

That McGarry and Fontaine insisted that the Employer raise their pay to the statutory standard is uncontested. They communicated the Employer's departure from the minimum wage laws to most other employees, and actively investigated the Employer's pay practices in regard to busgirl Shirley Marshall. The scope of their activity demonstrates it to be concerted, since it extended beyond their own self-interest. It is well-established that such acts as demanding wage increases from an employer and meeting with co-workers to discuss wages are protected under Sections 8(a)(3) and (1) of the National Labor Relations Act, which provisions are virtually identical to Sections 4(3) and (1) of G.L. c.150A. White's Gas and Appliance, Inc., 202 NLRB No.60, 82 LRRM 1545 (1973); United Camp

Corp., 194 NLRB No.160, 79 LRRM 1161 (1972); Synadyne Corp., 228 NLRB No.93, 96 LRRM 1587 (1977); A-1 Bus Lines, Inc., 232 NLRB No.102, 96 LRRM 1343 (1977); United Inventories of Dallas, Inc., 239 NLRB No.202, 100 LRRM 1275 (1979); NLRB v. Waco Insulation, Inc., 97 LRRM 2090 (4th Cir., 1977). In a significant number of these cases, the employer unsuccessfully sought to justify the discharges by asserting that the employees were "troublemakers" and had attempted to "undermine" the employer.

The employees' early efforts were initially tolerated, and the Employer corrected its pay practices once the error was pointed out. Their continuing efforts, however, were not tolerated. The conversation between McGarry and Mrs. Morra shows that the precipitating incident, the one which specifically triggered the discharges, was their claim of a higher wage for cleaning the restrooms and watering the plants. The employees were discharged immediately after the words left McGarry's mouth.

The discriminatory nature of the discharges does not depend upon whether the claim of higher pay for the cleaning and watering was justified. For example, in Waco Insulation, supra at 2092, the Court stated that

> The "reasonableness" of Rexrode and his co-workers' decision to present their demands for a wage increase shortly after they were hired is irrelevant to a determination of whether Rexrode was engaged in protected concerted activity.

In Trustees of Forbes Library, 6 MLC 1216 (1979), the discharged employee had advanced a number of dubious claims, including a claim that certain work he was performing was outside his job description and a claim that the library employees were entitled to the same benefits as City workers. Nevertheless, the Commission held that his pursuit of those claims constituted protected activity under Chapter 150A.

Mrs. Morra gave no initial explanation for discharging the employees other than to state that they were "troublemakers." Mr. Morra told them that his wife had fired them because they "had created a dissension amongst her staff that she was very unhappy about." What Mr. Morra meant by "dissension" was clarified by Mrs. Morra's direct testimony:

> Between the three of them, they created such a dissension amongst all the employees.... They were going around and telling them they would be underpaid, and they wanted everybody to get together, gang up on my husband and myself.

Her own words constitute an admission that the primary motive for terminating McGarry and Fontaine was their discussions with other employees regarding their sub-minimum wages.

Other reasons the Employer advanced for their termination are unsupported by the evidence, inconsistent, and shifting. Mr. Morra attributed the discharge to the fact that "they had a little clique going" with Shirley Marshall, and to their personal conduct on the premises:

> They got very personal with the customers. They were bad-mouthing my wife and I as far as being employers; I mean, getting too involved with the customers and things like that.

No specific instances of bad-mouthing or personal involvement with customers were cited. Further, Mr. Morra's testimony was weakened by his admission that he worked downstairs and "didn't really know what went on upstairs" in the dining room. Mrs. Morra did not accuse the employees of bad-mouthing their employer to the customers. Her complaint was that they spent time talking to customers while the food got cold. Again, no specific instances were cited, and the employees denied the accusation. McGarry testified that when he was first hired Mrs. Morra

> encouraged us to get to know her customers and, if we could pick up their names and remember their names, to do that; because it was an excellent way to remember them, to treat them--They liked to be remembered. And, obviously, by being remembered, they'd be better tippers.

Another reason Mrs. Morra advanced for the discharge was McGarry's alleged demand that she fire Virginia, the waitress hired to fill in for Fontaine while he was out with a back injury. McGarry denied that he made the demand. He responded to Mrs. Morra's announcement that she was planning to retain Virginia and hire a fourth waiter as well to cover a dining room that two waiters had previously serviced by asking whether she didn't think it was "a little bit heavy." It was not at this point in the conversation that they were fired, but only after McGarry raised the subject of a wage adjustment for time spent performing non-waiter duties. Inconsistent or shifting reasons for a discharge is a factor often considered in determining the existence of improper motivation. Town of Hopkinton, 4 MLC 1072 (H.O. 1977), aff'd. 4 MLC 1731 (1978); St. Elizabeth's Hospital v. Labor Relations Commission, 321 N.E.2d 837 (1975).

It is significant that McGarry and Fontaine were never criticized, warned or disciplined for the conduct for which they were allegedly discharged. Town of Somerset, 3 MLC 1618 (1977).

For the foregoing reasons, we rule that McGarry and Fontaine were discharged because they engaged in concerted activities for the purpose of mutual aid or protection in violation of Sections 4(3) and (1) of the Law.

ORDER

WHEREFORE, IT IS HEREBY ORDERED pursuant to Section 6(c) of the Law, that the Employer shall:

1. Cease and desist from:

   a. Restraining, coercing and intimidating its employees in the exercise of rights protected by Section 3 of the Law;

b. Discriminating against Bryan E. Fontaine and Kevin J. McGarry because they have engaged in activity protected by Section 3 of the Law.

2. Immediately offer Bryan E. Fontaine and Kevin J. McGarry reinstatement to their former positions as waiters, and make them whole for any loss of wages or other benefits which they have suffered as a result of their wrongful discharge, together with interest on any sums owing computed at the rate of ten percent (10%) compounded quarterly from the date of discharge.

3. Preserve, and upon request, make available to the Commission all records, documents, and information necessary to determine the amounts owed under the preceding paragraph of this Order.

4. Post in Luana's Mexican Hat Restaurant, 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

PHILLIPS AXTEN, Chairman
JOAN G. DOLAN, Commissioner
GARY D. ALTMAN, Commissioner

Luana's Mexican Hat Restaurant, Inc. and Bryan E. Fontaine, and Luana's Mexican Hat Restaurant, Inc. and Kevin J. McGarry, 8 MLC 1207

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

Chapter 150A of the General Laws gives all employees the right:

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

WE WILL NOT do anything that interferes with these rights.

More specifically,

WE WILL NOT discriminate in regard to hiring, tenure, promotion, or any other term or condition of employment in order to discourage employees from engaging in lawful concerted activities to improve their wages, hours or working conditions.

WE WILL offer Bryan E. Fontaine and Kevin J. McGarry the position of waiter in this restaurant and will make them whole for any rights, benefits, privileges and monies lost by them as a result of their discirminatory discharge.

LUANA'S MEXICAN HAT RESTAURANT, INC.

By: _____
VIRGINIA MORRA

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LOUIS F. MORRA