

# Union Activities: Court Holds Nursing Home Guilty Of Unfair Labor Practices.

In a recent opinion that has not been designated for publication in the Federal Reporter, the US Court of Appeals for the Third Circuit upheld charges of unfair labor practices filed by the National Labor Relations Board (NLRB) against a nursing home.

The NLRB filed the charges in response to complaints by a housekeeper and a certified nursing assistant who were terminated for alleged misconduct after they made their union membership known to their supervisors and became active in the efforts of the National Union of Hospital and Healthcare Employees, AFSCME, AFL-CIO to unionize employees at the nursing home.

## Three Union Elections

The NLRB conducted a vote of employees on the issue of union representation. The union won the election and nursing-home management appealed. The NLRB set aside the election, on grounds that were not specified in the court record, and ordered a second election.

In the second election the employees voted against bringing in the union.

It was during the interval between the first and second elections that management terminated the two employees who then filed unfair-labor-practice charges with the NLRB.

The NLRB found that the housekeeper, but not the nursing assistant, was terminated for his union activities. The NLRB ordered a third election.

The rulings concerning each employee's termination were appealed. The US Circuit Court of Appeals ruled both terminations were unlawful unfair labor practices committed by management in retaliation for union activities.

The US Circuit Court of Appeals did not specify the actual effect its ruling will have. In general, employees who have been victims of unfair labor practices can be reinstated with back pay, and the union itself can argue that the broader unionization process has been tainted by an overall atmosphere of management intimidation.

***An employer commits an unfair labor practice when the employer discriminates in regard to tenure of employment or any term or condition of employment to discourage membership in a labor organization or union activities by employees.***

***To prove that discharge of an employee or employees was an unfair labor practice, the employee, the employee's union or the NLRB representative has to show that employee conduct that is protected by the National Labor Relations Act (NLRA) preceded the employer's decision.***

***Then the burden of proof shifts to the employer to prove that the employer would have taken the same action even in the absence of pro-union activities by the employee.***

***The nursing home terminated a housekeeper and a certified nursing assistant after they announced their union membership and became active in the battle for union representation.***

***The nursing home had to disprove anti-union bias as its motivation in firing them for alleged misconduct.***

UNITED STATES COURT OF APPEALS  
THIRD CIRCUIT  
NOT SELECTED FOR PUBLICATION  
May 8, 2003

## Employer Must Be Able

### To Justify Disciplinary Actions

When the NLRB or a US Circuit Court of Appeals analyzes these cases the decision often turns on the legal issue of burden of proof. The employer is often faced with the task of having to disprove an unfair labor practice accusation brought by an employee whom a supervisor knows is actively involved with the union.

When disciplinary action is taken against an employee involved with the union, such as termination, demotion, suspension, failure to promote, etc., the employee, or an NLRB representative acting on the employee's behalf, has a *prima facie* case of an unfair labor practice.

The employer must be able to prove the employee committed the alleged misconduct, the misconduct was serious enough to justify the disciplinary action taken and the employer has had the same response to the same misconduct with other employees who were not active with the union.

In this case the housekeeper allegedly failed to clean his assigned rooms and was found to be absent from his floor.

However, an NLRB representative, arguing on behalf of the employee, convinced the Circuit Court that management did not start documenting his allegedly substandard performance and never issued any warnings until after the first union election which favored the union and which management wanted set aside.

The nursing assistant allegedly neglected a patient and was disrespectful toward another resident's family.

In her case also the NLRB convinced the Circuit Court that she was an exemplary employee with a clean disciplinary record until after the first union election.

In legal parlance, the nursing home failed to meet its burden of proof to rebut the employees' *prima facie* cases of unfair labor practices, so the US Circuit Court of Appeals ruled that anti-union bias was the employer's basic motivation. **N.L.R.B. v. Lincoln Park Subacute and Rehab Center, Inc., 2003 WL 21027913 (3rd Cir., May 8, 2003).**