



In the Matter of:

HARRY SMITH,

ARB CASE NO. 11-087

COMPLAINANT,

ALJ CASE NO. 2006-STA-032

v.

DATE: November 20, 2012

LAKE CITY ENTERPRISES, INC.,

and

CRYSTLE L. MORGAN,

RESPONDENTS.

Appearances:

For the Complainant:

Richard R. Renner, Esq., Washington, District of Columbia

For the Respondent:

Brent L. English, Esq., Cleveland, Ohio

Before: Paul M. Igasaki, Chief Administrative Appeals Judge; E. Cooper Brown, Deputy Chief Administrative Appeals Judge; and Lisa Edwards Wilson, Administrative Appeals Judge

FINAL DECISION AND ORDER ON REMAND

Harry Smith filed a complaint under the whistleblower protection provisions of the Surface Transportation Assistance Act (STAA)¹ and its implementing regulations.²

¹ 49 U.S.C.A. § 31105 (Thomson/West 2012)(STAA).

² 29 C.F.R. Part 1978 (2012).

After a hearing, an Administrative Law Judge (ALJ) determined that Smith's employer, Lake City Enterprises, Inc. (LCE), violated the STAA and awarded Smith back pay and compensatory damages. The ALJ also found that LCE's owner, Crystle L. Morgan, was personally liable for damages.³

The Administrative Review Board affirmed the ALJ's decision but remanded the case for him to consider Smith's motion to re-open the record, recalculate the amount of back pay, determine if front pay was appropriate, and assess the interest and amount of Smith's insurance benefits.⁴ On remand, the ALJ awarded Smith an additional \$19,162.44 in back pay, which included insurance benefits, for a total of \$36,961.63 plus interest but denied front pay.⁵ Smith appealed to the ARB.

Meanwhile, the United States Bankruptcy Court for the Northern District of Ohio, Eastern Division granted Crystle Morgan's motion to sever her Chapter 13 bankruptcy from Donald Morgan's, Case No. 05-52119, and convert her case into a Chapter 7 bankruptcy, Case No. 11-52267. On September 22, 2011, Crystle Morgan filed a motion to stay the proceedings before the Board due to her newly-filed bankruptcy case. On September 26, 2011, Smith joined in the motion to stay. The court documents filed with Crystle Morgan's motion listed Smith as an unsecured creditor.

The ARB then stayed further proceedings in accord with the Bankruptcy Code's automatic stay provision.⁶ Subsequently, the Bankruptcy Court modified the stay in Case No. 52267 to permit Smith to continue proceedings before the ARB.⁷ We now address the ALJ's decision following our remand.

Proceedings on remand

In response to Smith's motion, the ALJ re-opened the hearing on April 5, 2011, in Canton, Ohio. He admitted into the record a State of Delaware Certificate of Dissolution

³ *Smith v. Lake City Enters., Inc.*, ALJ No. 2006-STA-032 (ALJ May 21, 2008).

⁴ *Smith v. Lake City Enters., Inc.*, ARB Nos. 08-091, 09-033; ALJ No. 2006-STA-032 (Sept. 28, 2010).

⁵ *Smith v. Lake City Enters., Inc.*, ALJ No. 2006-STA-032 (Aug. 24, 2011).

⁶ 11 U.S.C.A. § 362(a)(1)(2011).

⁷ Order Modifying Automatic Stay, Case No. 11-52267 (Oct. 27, 2011).

of LCE and two Schedule C forms from Smith's 2008 tax return, but rejected two other exhibits.⁸

The ALJ then calculated the back pay due to Smith from the date of the initial hearing, May 9, 2007, until LCE's dissolution on May 15, 2008, as the ARB had instructed. The ALJ found that Smith's average weekly wage was \$1,087.00, that there were 53 weeks between the hearing to dissolution, and that LCE owed Smith \$57,611.00, less the \$46,000.00 he earned during that period while driving as an owner-operator. The ALJ thus awarded \$11,611.00, but added to that amount \$7,551.44 in additional health benefits for the same period, for a total of \$19,162.44.⁹

Turning to the issue of front pay, the ALJ noted that a wrongfully discharged complainant must mitigate his damages by exercising reasonable diligence in seeking alternative employment. He found that Smith sold his truck in April 2008 and earned only \$4,997.00 for the rest of 2008. The ALJ also found that Smith did not work at all in 2009. In 2010 Smith worked for one month, earning \$452.00. He had a heart attack in June 2010 and carpal tunnel surgery in February and April 2011. Based on Smith's testimony concerning his efforts to find work in the trucking industry, the ALJ determined that Smith was not entitled to any front pay because he failed to mitigate his damages.¹⁰

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB the authority to issue final agency decisions under the STAA and its implementing regulations at 29 C.F.R. Part 1978.¹¹ In reviewing STAA cases, the ARB is bound by the ALJ's factual findings if

⁸ Respondent's Exhibit (RX) 1, Complainant's Exhibit (CX) 37. The ALJ rejected a document showing the year-to-date earnings of Crystle Morgan and a lease purchase form, CX 38 and 39, on the grounds of hearsay. 20 C.F.R. § 18.801(c).

⁹ Recommended Decision and Order on Remand (R. D. & O.) at 10-11.

¹⁰ *Id.* at 15-16.

¹¹ Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378 (Nov. 16, 2012); 29 C.F.R. § 1978.109(a).

they are supported by substantial evidence on the record considered as a whole.¹² The ARB reviews the ALJ's conclusions of law de novo.¹³

DISCUSSION

Smith argues on appeal that the ALJ erred in deducting \$46,000.00 from his back pay award because the record shows that he suffered a net loss of income while working as an owner-operator before selling his truck in April 2008. Further, Smith contends that LCE waived the affirmative defense of Smith's failure to mitigate damages after LCE dissolved by failing to raise the issue before the ALJ.¹⁴ Smith added that LCE failed to produce evidence of suitable alternative employment.

The STAA provides that, if the Secretary decides on the basis of a complaint that a person violated the STAA, the Secretary shall order the person to (1) take affirmative action to abate the violation; (2) reinstate the complainant to the former position with the same pay and terms and privileges of employment; and (3) pay compensatory damages, including back pay.¹⁵ The functional equivalent of reinstatement is front pay, which provides the complainant with the same benefit (or as close an approximation as possible) as he or she would have received with reinstatement. Thus, front pay is designed to place the complainant "in the identical financial position that he would have occupied had he been reinstated."¹⁶

The back-pay award

Since the purpose of the STAA's remedies is to return the wronged employee to the position he would have been in had his employer not retaliated against him, back-pay awards are ordinarily reduced by the amount of an employee's interim earnings prior to reinstatement.¹⁷ Without such reduction, a back-pay award could place the employee

¹² 29 C.F.R. § 1978.109(c)(3); *Jackson v. Eagle Logistics, Inc.*, ARB No. 07-005, ALJ No. 2006-STA-003, slip op. at 3 (ARB June 30, 2008) (citations omitted).

¹³ *Olson v. Hi-Valley Constr. Co.*, ARB No. 03-049, ALJ No. 2002-STA-012, slip op. at 2 (ARB May 28, 2004).

¹⁴ Complainant's Brief at 3-8. The Respondent did not file a brief on appeal.

¹⁵ 49 U.S.C.A. § 31105(b)(3)(A).

¹⁶ *Assistant Sec'y & Bryant v. Mendenhall Acquisition Corp.*, ARB No. 04-014, ALJ No. 2003-STA-036, slip op. at 8-9 (ARB June 30, 2005).

¹⁷ *Pollock v. Cont'l Express*, ARB Nos. 07-073, 08-051; ALJ No. 2006-STA-001, slip op. at 17 (ARB Apr. 7, 2010).

injured by his employer's discrimination in a better position than he was when employed.¹⁸

In this case, however, Smith proffered evidence that he had no taxable income from the \$45,321.00 he earned as an owner-operator in 2008. In fact, his Schedule C for IRS (Internal Revenue Service) Form 1040 shows a loss of \$21,400.¹⁹ As a successful complainant, Smith is entitled to the earnings he would have received had LCE not fired him. Therefore, the ALJ erred in deducting his earnings as an owner-operator. Smith is entitled to the full amount of back pay from the date of his discharge until LCE's dissolution on May 15, 2008. LCE shall pay Smith the \$57,611.00, the amount the ALJ calculated, plus \$7,551.44 in health benefits for a total of \$65,162.44 in back pay.

The front-pay award

As we have said, front pay is a substitute award when, as in this case, reinstatement is not possible. The purpose is to restore the wrongfully fired employee to the identical financial position that he would have occupied had he been reinstated.²⁰

In this case, however, the LCE's dissolution is a superseding intervening event that has foreclosed any possibility of LCE reinstating Smith and blocked any enforcement of a front-pay award.²¹ LCE went out of business in May 2008 and would not have employed Smith beyond that date. After the dissolution, Smith would have been without a job with LCE, the identical financial position he would have been in had LCE not fired him in 2005. Therefore, we affirm the ALJ's denial of front pay on this basis.²²

¹⁸ *Smith*, ARB Nos. 08-091, 09-033.

¹⁹ CX 37. In *Bryant*, ARB No. 04-014, slip op. at 5, the ARB held that an ALJ erred when, in determining the back-pay award, he deducted the complainant's truck payment, taxes, operating expenses, license fees, social security, Medicare, and income taxes from his gross income to find an average weekly income. The facts in that case distinguish it from Smith's because he netted no income from his work as an owner-operator.

²⁰ *Fleeman v. Nebraska Pork Partners*, ARB Nos. 09-059, -096; ALJ No. 2008-STA-015, slip op. at 7 (ARB May 28, 2010).

²¹ *Kalkunte v. DVI Fin. Servs., Inc.*, ARB Nos. 05-139, -140; ALJ No. 2004-SOX-056, slip op. at 14 (ARB Feb. 27, 2009).

²² The ALJ erred in analyzing Smith's duty to mitigate his damages. R. D. & O. at 11-16. The employer has the burden of proving that a complainant failed to mitigate by establishing that substantially equivalent positions were available to the complainant and that the complainant failed to use reasonable diligence in attempting to secure such positions. *Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, ALJ No. 2002-STA-030, slip op. at 6-7 (ARB Mar. 31, 2005). Here, LCE failed to raise this affirmative defense at the hearing or to

CONCLUSION

For the foregoing reasons, we **MODIFY** the ALJ's grant of back pay and order LCE to pay Smith \$57,611, plus \$7,551.44 in health benefits for a total amount of \$65,162.44, and **AFFIRM** the ALJ's order denying front pay.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge

introduce any evidence of alternative suitable work. *Pettit v. Am. Concrete Prods., Inc.*, ARB No. 00-053, ALJ No. 1999-STA-047, slip op. at 5 (ARB Aug. 27, 2002).