U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 23 June 2009

CASE NO.: 2009–STA–00018

In the Matter of:
NAOMI CLARKE,
Claimant,

vs.

NAVAJO EXPRESS, INC.,
Employer.

Appearances: **Naomi Clarke,** *Pro se*
Colorado Springs, Colorado

Nancy Cornish Rodgers, Esq.
Kissinger & Fellman, P.C.
Denver, Colorado
For Employer

Before: **Russell D. Pulver**
Administrative Law Judge

Recommended Decision and Order

This case arises out of a complaint of retaliation filed pursuant to the employee protection provisions of Section 31105 of the Surface Transportation Assistance Act of 1982 ("STAA" or "the Act"), 49 U.S.C. § 31105. Naomi Clarke ("Complainant") alleged that her former employer, Navajo Express, Inc. ("Respondent") terminated her in December of 2007 because she complained of contamination coming from the heating, ventilating and air conditioning ("HVAC") system, and because she asked Respondent to cover the medical costs associated with health problems that arose out of the contamination. On December 27, 2007, Complainant lodged a formal complaint with Occupational Safety and Health Administration ("OSHA"), U.S. Department of Labor, for violation of the Act.

On January 30, 2009, Complainant objected to the determination made by OSHA and requested a hearing before the Office of Administrative Law Judges ("OALJ"), U.S. Department of Labor.[1] A hearing was held on the merits in Colorado Springs, Colorado on March 16, 2009.

[1] On January 28, 2009, OSHA issued a Findings and Order that denied relief to Complainant. However, OSHA's investigative findings were given no deference in this Court's *de novo* review of this case.

Respondent was represented by counsel and Complainant, appearing *pro se*, testified on her own behalf. Larry Barker and Tom Hrgich testified on behalf of Respondent. The parties had a full and fair opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. The following exhibits were admitted to the record: Administrative Law Judge's Exhibits ("AJX") 1-5; Complainant's Exhibits ("CX") 1-9, 11-15, and 17-18; and Respondent's Exhibits ("RX") A-M.

Stipulations

1) There was an employer/employee relationship at the time of the alleged adverse action. Trial Transcript ("TR") at 15:10.

2) Complainant was terminated on December 20, 2007. TR at 15:22.

Issues

1) Whether Complainant engaged in protected activity as defined by the STAA. TR at 17:12.

2) Whether the protected activity was a substantial factor in the adverse employment action against Complainant. TR 17:19-21.

Findings of Fact

Complainant began working for Respondent as an over-the-road trucker beginning on or about July 11, 2006. During her employment, up to the time of her termination, the record shows no negative performance reviews. TR at 168:24.

Approximately two months prior to her termination, Complainant began to notice a significant amount of unknown particles entering the cab of the truck through the vents of the HVAC system. TR at 62:18. Concurrently she began to experience symptoms reminiscent of an allergic reaction (burning eyes, post-nasal drip, skin irritations) which she attributed to either the use of soaps in various truck stops or reactions to pollen (or other similar agents) in different regions of the country in the late fall months. TR at 63:3; CX 2 at 1. However, the symptoms worsened as time wore on into the winter months and the influx of the unknown particles continued. CX 2 at 2. Her symptoms would lessen in intensity when away from the truck. *Id.*

Complainant began to notice pieces of debris originating from the HVAC vents landing on the instrument panel and dash as she drove, and suspected the debris was fiberglass particles. *Id.* She began to clean the dash regularly, only to see it become covered in the particles within one or two hours. *Id.*

In the Driver's Request for Work dated 12/7/07, Complainant notified Respondent that something in the truck's HVAC system was hurting her eyes, throat, and lungs. RX A. The truck was brought in for service at Respondent's primary yard in Denver. CX 2 at 2. On 12/8/07, Respondent's repair shop removed two cubic feet of fiberglass insulation found on top of the

engine that was blocking air flow to the HVAC system. RX A; CX 2 at 3. Complainant took the truck back out on the road, and her symptoms intensified greatly: her eyes, nose, throat, mouth and lungs all burned painfully while in the cab and her skin became greatly irritated. CX 2 at 3. She opines that because the bulk of the insulation that had been blocking air flow to the HVAC system had been removed, greater amounts of smaller fiberglass particles were then free to enter the HVAC system unobstructed. *Id.*

On 12/10/07, Complainant exchanged several messages with Respondent's dispatcher via the truck's Qualcomm communication system, notifying the dispatcher that particles were continuing to enter the truck cab and of the intensification of her symptoms. RX B at 1. Complainant wrote in one of these messages that the problem had persisted for several months, to which the dispatcher replied, "[T]hat is hard to believe you not telling anybody about it if it has been that long." RX B at 10.

Respondent gave Complainant the go-ahead to bring the truck in for service at a Kenworth repair shop in Columbia, Missouri on 12/10/07. CX 2 at 4. A technician found that "hood insulation had fallen down and was going into the HVAC unit." RX C at 3. He cleaned out all of the debris and installed a new air filter for the HVAC system. *Id.* The repair shop noted that when the technician entered the cab to put the driver's bag back in its place after the service was finished, he "noticed fiberglass debris floating around in the cab. The technician started itching and described it as fiberglass dust." *Id.* While the truck was being serviced and the Complainant was outside the cab for a significant period of time, she noticed the skin irritation went away while her internal symptoms persisted. CX 2 at 4.

Complainant's symptoms continued despite the new air filter, and so she made a phone call to Jeri Bolt, Respondent's claims manager, who instructed her to see a doctor. CX 2 at 5; RX D at 2. Complainant went to the emergency room at Callaway Community Hospital in Fulton, Missouri on 12/11/07. RX E at 2. Her attending physician diagnosed the symptoms as seasonal allergies, but instructed Complainant to make an appointment with her own physician as soon as possible for further testing of her symptoms. RX E at 3, 5.

On 12/14/07, Complainant sent a message via the Qualcomm communication system to the dispatcher noting that there was still fiberglass dust blowing on her, which she believed was residual debris that the Kenworth technicians could not get out. RX F.

Complainant returned to Respondent's primary yard in Denver that same day, Friday, December 14. CX 3 at 1. At this time Complainant notified Larry Barker, Vice President of Safety, and Tom Hrgich, Director of Human Resources, that she felt the truck was fit to drive after the repairs made at the Kenworth shop, but that she still felt ill. *Id.* Barker and Hrgich told her she would be able to see a doctor Monday, 12/17/07. *Id.*

On 12/17, Complainant saw Dr. Thomas Blanchard, an occupational physician, who was on-site at Respondent's place of business to do physical examinations for new hires. CX 3 at 2. Dr. Blanchard and Jeri Bolt, Respondent's claims manager, agreed that the work-related medical diagnosis was "possible chemical-induced skin rash [and] pulmonary symptoms." *Id.* Complainant noted that during the examination, Dr. Blanchard repeatedly left the room to talk

with Ms. Bolt. *Id.* His diagnosis identified "no significant pathology" but referred Complainant to National Jewish Hospital National Asthma Center in Denver ("National Jewish") "for evaluation of symptoms." RX H at 1. Despite Complainant's description of her inhalation of fiberglass particles while in the truck, Dr. Blanchard said his professional opinion was that there was a less than 50% likelihood that her symptoms were part of a work-related condition. *Id.* at 2. He determined that Complainant was able to return to full work duty on 12/18/07. *Id.* at 1.

The next day (12/18/07), Complainant went to the Respondent's place of business to get a copy of Dr. Blanchard's report, make an appointment at National Jewish, and to get samples of the fiberglass debris from her truck to bring to National Jewish for analysis. CX 3 at 3. Mr. Barker did not allow her to go to her truck, and called a meeting in his office with Complainant and Paul Harris, Vice President of Operations for Respondent. *Id.* Mr. Barker informed Complainant that the costs for her to go to National Jewish would not be covered by Respondent because he did not believe her illness was work-related. Affidavit of Paul Harris ¶ 10. Mr. Barker stated he did not agree with Complainant that the fiberglass in the truck was making her sick. Affidavit of Larry E. Barker ¶ 9. He also stated that there was no fiberglass in the truck that could have made her sick. *Id.* The discussion between Complainant and the members of management present at the meeting became heated over these points, and the combative discussion went on for forty five minutes. TR at 161:9. Respondent scheduled for an air quality test to be done on the truck on 12/19/07, but Mr. Barker and the other members of management present at the meeting would not allow Complainant to collect samples of the fiberglass particles that remained embedded in her personal items still in the truck. *Id.* at 161:24. Mr. Barker concluded the meeting and asked Complainant to leave the property until the air quality test was completed. *Id.* at 167:2.

The air quality test conducted on 12/19/07 showed nothing abnormal in the air quality of the cab or the cab blower system. RX G. Complainant urges that the test was insufficient to fully diagnose her health problems and confirm them as work-related, because: (1) The actual particles in the cab that had allegedly caused her illness were never tested or analyzed, and (2) Complainant stipulated that the air quality of the cab had already been improved (by the maintenance done on 12/10/07) and thus the air quality of the cab on 12/19/07 was not at issue. *Id.* at 102:13-21.

Complainant was called in on 12/20/07 by Tom Hrgich to retrieve her personal items from her truck. *Id.* at 190:15-21. She was informed that the air quality test had come up negative, and that she was terminated. *Id.* at 190:19-20, 192:1.

Explanations for the reason for Complainant's termination differ. Mr. Barker stated in writing that Complainant was terminated because of her refusal to drive, for two reasons: (1) Mr. Barker disagreed with Complainant's assertions that the truck was unsafe, as it had been repaired, and (2) Barker disagreed with Complainant that she was unfit to drive after reading Dr. Blanchard's report that had cleared her to full work duty and had doubted the possibility of the illness being work-related. Affidavit of Larry E. Barker ¶ 15. However, Complainant testified she never expressed refusal to drive the truck. TR 18:25. Mr. Barker later testified that Complainant was terminated on the basis of insubordination at the December 18 meeting. TR at 166:11-16.

Conclusions of Law

The STAA employee protection provision prohibits disciplining or discriminating against an employee who has made protected safety complaints or refused to drive in certain circumstances:

> (1) A person may not discharge an employee or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because–
>
> > (A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or
> >
> > (B) the employee refuses to operate a vehicle because– (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.
>
> (2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

49 U.S.C. § 31105(a). Subsections (A) and (B) of the quoted provision are referred to as the "complaint" clause and the "refusal to drive" clause, respectively. *LaRosa v. Barcelo Plant Growers, Inc.*, Case No. 96-STA-10, Rem. Ord., Aug. 6, 1996, slip op. at 1-3.

In order to prevail on an STAA complaint, a complainant must establish that: (1) She engaged in protected activity, (2) she was subject to adverse employment action, and (3) there was a causal link between her protected activity and the adverse action of her employer. *See Moon v. Transp. Drivers*, 836 F.2d 226, 229 (6th Cir. 1987). Under the STAA, the ultimate burden of proof usually remains on the complainant throughout the proceeding. *Byrd v. Consol. Motor Freight*, ARB Case No. 98-064, ALJ Case No. 97-STA-9, Final Dec. and Ord., May 5, 1998, slip op. at 4 n.2.

Protected Activity

The STAA provides that an employer may not discharge an employee as retaliation for engaging in protected activity. Protected activity under the STAA includes (A) filing a complaint or beginning a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, ***or*** (B) refusing to operate a vehicle because (i) that operation would violate a regulation, standard, or order of related to commercial motor vehicle safety, or (ii) a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition. 49 U.S.C. § 31105(a)(1). Complainant can prevail by proving her conduct falls under *either* the "complaint" clause, *or* the "refusal to drive" clause. Since

Complainant testified that she never at any point refused to drive her truck (TR 18:25), she must prove that her complaints amount to protected activity under the "complaint" clause.

Under the "complaint" clause, a complaint must fulfill the following requirements to be considered protected activity:

(1) The employee must raise a concern, either formally or informally. *Asst. Sec'y & Freeze v. Consolidated Freightways*, ARB Case No. 99-030, 1999 DOL Ad. Rev. Bd. LEXIS 44 (ARB Apr. 2 1999). An internal complaint about a violation of commercial motor vehicle regulations may be oral, informal or unofficial. *Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 20 (1st Cir. 1998), citing *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 228-29 (6th Cir. 1987). The complaint must, however, be communicated to management. *Id.*

(2) The complaint must be in regard to commercial motor vehicle safety standards. *Asst. Sec'y & Freeze v. Consolidated Freightways*, ARB Case No. 99-030, 1999 DOL Ad. Rev. Bd. LEXIS 44 (ARB Apr. 2 1999).

(1) *Informally Raising a Concern to Management*

Complainant informally communicated her health and safety concerns to members of Respondent's management. Complainant sent messages via the truck's Qualcomm communication system and made several phone calls that outlined the problems with the HVAC system along with her health concerns. Further, her conversations with Mr. Barker, Mr. Harris, Ms. Bolt, and others constitute communication of these concerns to management.

(2) *Relating to Commercial Motor Vehicle Standards*

Respondent's brief claims Complainant's complaints arose under 44 C.F.R. 392.3 (2008). This provision states a "motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired. . .through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle." 44 C.F.R. 392.3. On the basis of this characterization, Respondent contends that once Dr. Blanchard's report cleared Complainant to full work duty, no violation of 44 C.F.R. 393.3 existed, and thus any further complaints by her were no longer protected activity. If Complainant's complaints were limited to *purely* health concerns, Respondent would be correct. The conduct could not be considered protected activity, as Dr. Blanchard's clearance to work would prove any complaint made under 44 C.F.R. 392.3 moot.

However, Complainant's concerns communicated to Respondent did not arise solely under 44 C.F.R. 392.3 as Respondent contends. 44 C.F.R. 393.77(a)(4) (2008) prohibits "heaters permitting air contamination" on commercial vehicles, describing these as:

> Any heater taking air, heated or to be heated, from the engine compartment or from direct contact with any portion of the exhaust system; or any heater taking air in ducts from the outside atmosphere to be conveyed through the engine compartment, unless said ducts

are so constructed and installed as to prevent contamination of the air so conveyed by exhaust or engine compartment gases.

Complainant's concern over particles entering the truck's cab through the HVAC implicates the safety concerns expressed and remedial efforts mandated by 44 C.F.R. 393.77(a)(4). This C.F.R. provision aims at protecting commercial drivers from exposure to the air contaminants present in engine compartments. It achieves this by requiring the use of sealed HVAC systems. Complainant's HVAC system was not, evidently, sealed against contamination from insulation particles and the potentially other unknown pollutants originating from the truck's engine compartment. Her complaints about the particles infiltrating her truck's HVAC system come within the purview of 44 C.F.R. 393.77(a)(4) as a result.

Respondent's Post-Hearing Brief hastily dismisses the notion that Complainant made any complaints related to a safety hazard or condition related to the truck. Complainant testified that the truck was in fine working order at the time of her termination, and Respondent concludes on the basis of that testimony that Complainant had no complaints whatsoever about the safe operation of the truck.

While Complainant's complaints were substantially related to her health ailments, they were not the independent cause of her complaints as Respondent argues. Rather, Complainant notified Respondent repeatedly of the contamination problem with the HVAC, describing to Respondent the health problems because they *arose* from that contamination problem with the HVAC system: a problem substantially similar to those described in 44 C.F.R. 393.77(a)(4). Complainant's extensive descriptions of her ailments and symptoms were intended not merely as a demonstration of her impaired driving status, but as an indicator of the severity of the contamination emanating from the HVAC system. Because Respondent categorized Complainant's complaints as arising only under 44 C.F.R. 392.3 (impairment of ability to drive safely because of fatigue or illness), Respondent erroneously contends that Complainant's clearance to full work duty precluded all possibility of protected activity.

Respondent made minimal effort to investigate the health problems described by Complainant that resulted from contamination emanating from the HVAC system. In the face of evidence to the contrary, Respondent refused to believe that Claimant's health problems were work-related, and even refused to allow Complainant to procure samples of the alleged harmful substance in order to facilitate full diagnosis of her persistent health symptoms. During the meeting of 12/18/07, Complainant attempted to notify Respondent of the full extent of the health maladies resulting directly from a safety violation under 44 C.F.R. 393.77(a)(4). By informally reporting complaints to management related to violations of commercial motor vehicle safety regulations (44 C.F.R. 393.77(a)(4) and 44 C.F.R. 392.3), Complainant engaged in protected activity under 49 U.S.C. § 31105.

Complainant should not be prejudiced for her failure to identify the federal regulation on which her whistleblower case rests. Her failure is the result of her limited ability to correctly characterize her complaints to Respondent on the papers and at trial, based on her *pro se* status. Courts have traditionally construed *pro se* petitions liberally.

Subject to Adverse Employment Action

It is undisputed that Respondent officially terminated Complainant, thus constituting an adverse employment action.

Causal Link Between the Protected Activity and the Adverse Action

Pursuant to the STAA, an employer may not discharge and employee because the employee has filed a complaint of a violation of a commercial motor vehicle regulation. An employer's discharge decision must be motivated by retaliation to be actionable. *Cleveland v. Milwaukee Transp. Servs., Inc.*, ARB 02-025, ALJ 2001-STA-6 (ARB Aug. 29, 2003).

To rebut a prima facie case of discrimination, the respondent's burden is one of production only. The respondent must merely articulate a legitimate, non-discriminatory reason for taking the adverse employment action, and is not required to "persuade the court that it was actually motivated by the proffered reason[]." *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981). The evidence, however, must be sufficient to raise a genuine issue of fact as to whether the respondent discriminated against the complainant. "The explanation provided must be legally sufficient to justify a judgment for the [employer]." *Id.* at 255.

For a complainant to prevail against a respondent's proffered non-discriminatory reason, she must establish, by a preponderance of the evidence, that the proffered reason is a pretext for discrimination, and that he or she was disciplined or discharged because of engaging in protected activity. *Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998); *Byrd*, slip op. at 4. Thus, "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147-48 (2000).

There is one exception to the burden of proof remaining on the complainant. Under the "dual motive" analysis, where the trier of fact finds that there are legitimate reasons for the employer's adverse action in addition to unlawful reasons, the burden of proof shifts to the respondent to show, by a preponderance of the evidence, that it would have taken the same adverse action even if the complainant had not engaged in any protected activity. *Clean Harbors*, 146 F.3d at 21-22; *Carroll v. U.S. Dep't of Labor*, 78 F.3d 352, 357 (8th Cir. 1996) (under employee protection provision of Energy Reorganization Act).

Respondent asserts two non-discriminatory reasons for terminating Complainant. Mr. Barker first stated in writing that Complainant was terminated because of her refusal to drive. Affidavit of Larry E. Barker ¶ 15. After Complainant testified she never refused to drive the truck (TR 18:25), Barker later testified that Complainant was terminated on the basis of insubordination at the 12/18/07 meeting. TR at 166:11-16. This meeting was the site of an approximately forty-five-minute heated argument. Complainant essentially demanded Respondent recognize the severity of the prior contamination problem, allow her to test the harmful substance that caused the ailment in order to aid in diagnosing the ailment, and pay for the treatment of the ailment suffered while working for Respondent.

In *Kenneway v. Matlack, Inc.*, Case No. 88-STA-20, 1989 DOL Sec. Labor LEXIS 47, D&O of SOL (Sec'y June 15, 1989), abusive language took place in a discussion between an employee and employer related to protected activity. The Labor Secretary held that the right to engage in statutorily protected activity permits some leeway for impulsive behavior. This leeway is balanced against the employer's right to maintain order and respect in its business by correcting insubordinate acts. The "leeway doctrine" takes into consideration the following factors: (1) Did the impulsive behavior cause any harm to the employer? (2) Was the impulsive behavior so opprobrious as to carry a complainant beyond STAA protection? *Id.* at 13-15.

Here, Complainant's conduct in the December 18 meeting seems to be within the limits of the "leeway doctrine." First, no considerable harm resulted from Complainant's impulsive behavior. The heated discussion on 12/18/07 took place inside closed doors and was between Complainant and management: away from all other employees. Further even if it the behavior took place in the presence of other employees, Complainant's language was not insubordinate in that it was not in defiance to management authority, and it did not represent a refusal to follow reasonable instructions.

Second, the Complainant's objectionable behavior does not preclude her from STAA protection. Her behavior was a temporary, uncalculated emotional outburst incidental to the protected activity. It can be understood that Complainant became emotional after having dealt with the aforementioned health problems for more than two months. The outburst was plainly incidental to the protected activity, as Complainant had presented a great deal of evidence to Respondent in regards to the contamination of the HVAC unit only to have Respondent roundly refuse to recognize her ailments as work-related. Further, the outburst was limited to a one-time, forty-five-minute discussion, and appeared to be calculated only for the objectives outlined above in relation to the protected activity.

Even if Respondent's action is deemed to be subject to "dual motive" analysis (presence of legitimate as well as unlawful reasons for the employer's adverse action), the burden of proof shifts to the respondent to show, by a preponderance of the evidence, that it would have taken the same adverse action even if the complainant had not engaged in any protected activity. Here, Complainant's "insubordination" took place only because she was engaging in protected activity. The Respondent fails to show that it would have taken the same adverse action absent that protected activity, because the discussion arose from her complaint in relation to 44 C.F.R. 393.77(a)(4) and thus her "insubordination" was itself incidental to her protected activity.

Under the "leeway doctrine", and absent any conflicting evidence under "dual motive" analysis, Complainant's insubordinate conduct during the meeting of 12/18/07 is permissible since it was directly incidental to her protected activity. Respondent terminated Complainant as a result of her demand for Respondent to recognize an ailment that resulted directly from a violation of a federal commercial motor vehicle safety standard (44 C.F.R. 393.77(a)(4)).

Relief

Based on the above findings of fact and conclusions of law, Complainant is entitled to remedies due her under the STAA.

Reinstatement

Reinstatement, i.e., reestablishment of the employer/employee relationship, is a usual component of the remedy in discrimination cases. *McCuistion v. Tenn. Valley Auth.*, 89-ERA-6, slip op. at 23 (Sec'y Nov. 13, 1991). 49 U.S.C.A. § 31105(b)(3)(A)(ii); *Carter v. Marten Transport, Ltd.* ("Carter"), USDOL/OALJ Reporter ARB Nos. 06-101, 06-159, ALJ No. 2005-STA-63, Slip op. at 14, (DOL Adm.Rev.Bd. June 30, 2008). In *Dutile v. Tighe Trucking, Inc.*, 93-STA-31 (Sec'y Oct. 31, 1994), the Secretary held that, "If there is such hostility between the parties that reinstatement would not be wise because of irreparable damage to the employment relationship, the [administrative law judge] may decide not to order it. If, however, the complainant gives no strong reason for not returning to his former position, reinstatement should be ordered." Slip op. at 4-5.

On this record, there is not substantial evidence of irreparable animosity between the parties, nor has the Complainant expressed a strong reason against reinstatement to her position. Therefore, Complainant shall be granted reinstatement to her previous position of employment with Respondent under the same terms, conditions, and privileges of employment, retroactive to the date of discharge, with no loss of seniority or benefits.

Back Pay

In addition to reinstatement, Complainant is also entitled to back pay. 49 U.S.C. § 31105(b)(3)(A)(iii). "An award of back pay under the STAA is not a matter of discretion but is mandated once it is determined that an employer has violated the STAA." *Assistant Sec'y & Moravec v. HC & M Transp., Inc.*, 90-STA-44 (Sec'y Jan. 6, 1992), citing *Hufstetler v. Roadway Express, Inc.*, 85-STA-8, slip op. at 50 (Sec'y Aug. 21, 1986); *Carter* at 14. To make a person "whole for injuries suffered for past discrimination," the Act mandates an award of back pay as compensatory damages to run from the date of discrimination until either the complainant receives a bona fide offer of reinstatement, is reinstated, or obtains comparable employment. *Nelson v. Walker Freight Lines, Inc.*, 87 STA 24 (Sec'y Jan. 15, 1988), slip op. at 5; *Polwesky v. B & L Lines, Inc.*, 90 STA 21 (Sec'y May 29, 1991); *Moravec v. HC & M Transportation, Inc.*, 90 STA 44 (Sec'y Jan. 6, 1992); *Polgar v. Florida Stage Lines*, 94 STA 46 (ARB Mar. 31, 1996). Although the calculation of back pay must be reasonable and based on the evidence, the determination of back wages does not require "unrealistic exactitude." *Cook v. Guardian Lubricants, Inc.*, 95 STA 43 (ARB May 30, 1997), slip op. at 11-12, n.12. Any uncertainty concerning the amount of back pay is resolved against the discriminating party. *Clay v. Castle Coal & Oil Co., Inc.*, 90 STA 37 (Sec'y June 3, 1994); *Kovas v. Morin Transport, Inc.*, 92 STA 41 (Sec'y Oct. 1, 1993).

The employer, and not the complainant, bears the burden of proving a deduction from back pay on account of interim earnings. The burden of showing that a complainant failed to make reasonable efforts to mitigate his damages is on the employer. *Polwesky*, 90 STA 21, citing *Carrero v. N.Y. Hous. Auth*., 890 F.2d 569 (2nd Cir. 1989); *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614 (6th Cir. 1983). While the complainant need only make reasonable efforts to mitigate her damages and is not held to the highest standards of diligence, and doubt is resolved in the complainant's favor [*Moyer v. Yellow Freight System, Inc*. 89 STA 7 (Sec'y Aug. 21, 1995)], the employer may carry the evidentiary burden by showing that jobs for the complainant were available during the back pay period. *Polwesky*, 90 STA 21. The reasonableness of the effort to find substantially equivalent employment should be evaluated in terms of the complainant's background and experience in relation to the relevant job market. *Intermodal Cartage Co., Ltd. v. Reich*, No. 96-3131, 1997 U.S. App. LEXIS 9044 (6th Cir. Apr. 24, 1997) (case below 94 STA 22). In this case, complainant testified as to her unsuccessful attempts to locate employment. Employer has not shown the availability of other jobs. Accordingly, complainant has met her burden of proof and is entitled to back pay.

The Complainant will be awarded back pay from December 20, 2007 (the date of discharge) until complainant is reinstated, or the date that complainant receives a bone fide offer of reinstatement, or the date that complainant procures other comparable employment. This back pay will be awarded at the average of her wages for the preceding twelve months prior to her discharge and in line with the terms, conditions, and privileges of her reinstatement, less any amounts she received during that time period in unemployment insurance, workers compensation payments or from alternate forms of employment, if any.

Interest.

As part of a compensatory damage award, a complainant is entitled to prejudgment interest to compensate for the loss of use of her wages. *Hufstetler v. Roadway Express, Inc.* 85 STA 8 (Sec'y Aug. 21 1986), *rev'd on other grounds, Roadway Express, Inc. v. Brock*, 830 F.2d 179 (11th Cir. 1987). Similarly, a complainant may receive post-judgment interest on back pay. *Ass't Sec'y & Bryant v. Mendenhall Acquisition Corp. d/b/a Bearden Trucking*, 03 STA 36, slip op. at 10, (ARB June 30, 2005). In calculating the interest on STAA back pay awards, the rate used is that charged for underpayment of federal taxes. *See Bryant* and 26 U.S.C. § 6621(a)(2). The interest is compounded quarterly, until the damage award is paid. *Bryant*, slip op. at 10, and *Doyle v. Hydro Nuclear Servs.*, 89 ERA 22, slip op. at 18-19 (ARB May 17, 2000), *rev'd on other grounds, Doyle v. U.S. Secretary of Labor*, No. 00-1589 and 00-2035 (3rd Cir. May 27, 2002). In light of the above principles, Complainant is entitled to prejudgment and postjudgment interest on her back pay award. The interest will be calculated in accordance with 26 U.S.C. § 6621(a)(2) and compounded quarterly.

Conclusion

Thus, Complainant Naomi Clarke has prevailed on the merits of her complaint and is entitled to reinstatement and back pay as articulated above.

ORDER

Accordingly pursuant to 49 U.S.C. § 31105 (b)(3) it is hereby **ORDERED** that Respondent do the following:

1. Purge Clarke's employment file of any reference to her protected activity and discharge;

2. Reinstate Clarke to her former position without loss of benefits or other privileges;

3. Compensate Clarke for lost back pay by payment of her average weekly wage based on an average of her preceding twelve months' pay from December 20, 2007 to reinstatement.

4. Pay Clarke interest on back due wages in accord with 29 CFR § 20.58(a) (IRS rate for underpayment of taxes).

5. Post a copy of this Recommended Decision and Order at all Respondent's terminals for a period of ninety (90) days.

A

Russell D. Pulver
Administrative Law Judge

NOTICE OF REVIEW: The administrative law judge's Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. *See* 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002).

Within thirty (30) days of the date of issuance of the administrative law judge's Recommended Decision and Order, the parties may file briefs with the Board in support of, or in opposition to, the administrative law judge's decision unless the Board, upon notice to the parties, establishes a different briefing schedule. See 29 C.F.R. § 1978.109(c)(2). All further inquiries and correspondence in this matter should be directed to the Board.

The order directing reinstatement of the complainant is effective immediately upon receipt of the decision by the respondent. All other relief ordered in the Recommended Decision and Order is stayed pending review by the Secretary. 29 C.F.R. § 1978.109(b).