

U.S. DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
Suite 700-1111 20th Street, N.W.  
Washington, D.C. 20036



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In the Matter of :  
: STEVE L. MUNCEY, :  
: Complainant :  
: :  
: v. :  
: ANTONIO LEVESQUE & SONS, INC., :  
: Respondent :  
.....

Case No. 82-WPA-32

USDOL  
ALJ LAW LIBRARY

James R. Crotteau, Esq.  
For the Complainant  
  
Gerald E. Rudman, Esq.  
For the Respondent

BEFORE: Everette E. Thomas  
Deputy Chief Judge

DECISION AND ORDER

This proceeding arises under the Wagner-Peyser Act of 1933, 29 U.S.C. §49, et seq., and the regulations governing the Job Service system at 20 C.F.R. Part 658, as well as the temporary alien labor certification procedures provided for by the Immigration and Nationality Act, 8 U.S.C. §1101, et seq., and the regulations promulgated thereunder at 20 C.F.R. Part 655.

The parties have agreed to submit the case for decision on the administrative file (hereinafter referred to as "AF", with the state level hearing transcript designated as "tr.") and the written arguments of the parties. The Complainant has submitted a brief in this matter, the Respondent has not.

STATEMENT OF THE CASE

On December 29, 1980, the Complainant filed an Employment Service complaint with the local Job Service Office in Houlton, Maine, in which he alleged that the Respondent terminated him from his employment without good cause and on the basis of his activities as a shop steward for the United Paperworkers International Union. The Respondent utilized the Services of the U.S. Employment Services system for temporary labor certification of Canadian workmen to be employed in its logging operation at the time of Complainant's termination,

thus bringing this personnel action within the purview of the Job Service regulations.

Following the Monitor Advocate's investigation and finding in favor of the Respondent, the Complainant filed a request for state level hearing on February 9, 1981. On January 19, 1982, the Maine Department of Labor, Bureau of Employment Security, held a hearing on the issue of whether the Respondent had rejected the Complainant, a U.S. worker, for other than a lawful job related reason in violation of the applicable regulations.

On February 25, 1982, the State hearing officer issued a decision in which he found the Respondent in violation of 20 C.F.R. §655.203(c) for refusing employment to the Complainant for other than a lawful job related reason. On March 24, 1982, the Employer filed an appeal to the Regional Administrator. Thereafter, on May 20, 1982, the Regional Administrator issued a determination affirming the decision of the State hearing officer. On May 25, 1982, the Respondent appealed this determination to the Office of Administrative Law Judges.

#### ISSUES

The sole issue to be decided on appeal here is whether the Respondent refused employment to the Complainant for other than a lawful job related reason in violation of 20 C.F.R. §655.203(c).

#### FINDINGS OF FACT

1. The Complainant was employed by Respondent from December 15, 1979, to September 29, 1980 (AF tr. pp.5,25). On February 4, 1980, the Complainant injured his right wrist while at work and was on worker's compensation leave thereafter, returning to work on June 16, 1980, following the company's routine spring lay-off (AF tr. pp.6-7,26).

2. As of June 1, 1980, a union contract was in effect between the Respondent and the United Paperworkers International Union (AF tab F). A contract with this same union was in effect during the 1979-80 season when the Complainant was initially hired by the Respondent (AF tr. p.47). The Complainant testified that he was shop steward for the Union, Local 1977, from June, 1980, until his termination by the Respondent (AF tr. p.11). Although there was no official notification by the Union to the Respondent regarding Complainant's representative status, the Respondent conceded

having knowledge of the Complainant's position as shop steward (AF tr. pp.46-7). While there had been no complaints about the Complainant's work performance during the period of December, 1979 - February, 1980, several tension-producing situations arose between the Complainant and his supervisors following his return to work in June, 1980 (AF tr. pp.6,27-32).

On June 16, 1980, the Complainant signed his job description as prepared by Respondent, with reservation, based on his dissatisfaction with a provision requiring individual workmen to be responsible for maintenance of skidder machines used to transport logs at the work site (AF tr. p.9; tab F). On July 29, 1980, the Complainant filed a union grievance charging discriminatory treatment by the Respondent on the basis of the Complainant's American nationality in violation of Article 15 of the union contract (AF tab F). Thereafter, the Respondent began to prepare written records of complaints regarding the Complainant's work performance, and presented the following at hearing:

August 4, 1980 - inspection report [refers to fellow workers as well as to Complainant] notes insufficient production (AF tr. pp.27-8; tab F);

August 13, 1980 - land company reports poor performance, "Muncey crew seems to have most of these problems plus the fact that he is uncooperative" (AF tr.p.29; tab F);

August 14, 1980 - written warning regarding Steve Muncey and Floyd Muncey crew as "uncooperative and ... hard to control", also "very poor limbing" practices noted (AF tr. pp.29-30; tab F);

September 18, 1980 - Complainant "given verbal warning for poor forest practices and the fact he hadn't properly cleaned up his cutting area" (AF tr.p.30).

On August 18, 1980, the Complainant was examined by his orthopedic surgeon because his right wrist was irritating him (AF tr.p.16; tab F). The physician prepared a letter in which he stated that the Complainant's condition was caused by "ulnar nerve irritation" and that the Complainant could not operate a chainsaw for about two months from that time (AF tab F).

On September 16, 1980, the Complainant went to the nearby Hayden Brook work site to talk to fellow employees regarding union membership and to sign up members. As required by the union contract in effect at the time, this union activity was conducted after work hours (AF tr. pp.14-6).

3. The Complainant's last day at work was September 18, 1980 (AF tr. pp.19-21, 66-9). On that day, the Complainant had a discussion with his foreman, Don Tardie. Mr. Tardie visited the Complainant at his work site, and commented upon the Complainant's union activities at Hayden Brook two days before (AF tr. pp.66-7). Mr. Tardie testified that he and another supervisor, Earl Pelletier, instructed Complainant to return to work on the next day and clean up wood strewn about the worksite, to which Complainant agreed (AF tr. p.68). The Complainant did not return to work on the next day, a Friday (AF tr. p.68). According to Complainant's job description, work on Fridays was optional (AF tab F). However, the Complainant testified that he had notified his immediate foreman, Andre Cyr, on that Thursday, that he had to leave work to take care of business but did not explain further his need to be absent (AF tr. pp.19-20).

Following his exchange with the Complainant on September 18, Mr. Tardie instructed a company secretary to phone the Complainant's physician to verify the extent of Complainant's disability. Mr. Tardie testified that the physician confirmed that the Complainant was unable to operate a chainsaw but could operate a skidder at that time (AF tr. p.68). This diagnosis was the same as that presented in the physician's letter dated August 19, 1980 (AF tab F).

4. On Sunday, September 21, 1980, Mr. Tardie telephoned the Complainant and discussed the latter's inability to operate a chainsaw, the resulting diminished production of the crew, and the Respondent's decision to add an extra chopper to Complainant's crew. According to Mr. Tardie, the Complainant replied that he would have to speak to his attorney (AF tr. p.69). Mr. Tardie then demanded that Complainant return to work the following day (AF tr. p.69). Complainant testified that he told Mr. Tardie that he was unable to "run the machine" because his arm irritated him (AF tr. p.21). Complainant also testified that he contacted his attorney within a few days following September 18 regarding his renewed workers' compensation claim (AF tr. p.21).

5. The Respondent dismissed the Complainant by notice dated September 29, 1980, which cites these reasons for the termination:

"No warning of leaving job"; "Has failed to contact Office Personal [sic] Manager"; and "Regarding Union Contract articles = 13-2, 13-8, 13-11, 13-12, 13-14, 13-15, 13-16" (AF tab F).

The Respondent testified that a copy of this notice was mailed to Complainant immediately after being prepared on September 29 (AF tr. pp.24,69), but the Complainant testified that he had received no written or oral notice of his termination until he telephoned the Respondent on November 25, 1980 (AF tr. pp.22-3). While there is no evidence of direct communication between the Respondent and the Complainant during the period that Complainant was absent on workers' compensation leave, September 22 to November 25, 1980, (AF tr. pp.69-70), the Complainant's attorney did notify the Respondent's insurance agent, George F. Snow with Liberty Mutual Insurance Company, regarding the Complainant's claim for workers' compensation benefits (AF tr. p.74). In addition, the Complainant picked up his first benefits check issued during this period at the Respondent's Office (AF tr.p.66).

6. The Complainant telephoned the Employer on November 25, 1980, to inquire regarding his return to work following workers' compensation leave and was told that his employment had been terminated and that he could not return to his position with Respondent (AF tr. pp.21-3,42-3). Thereafter, on December 13, 1980, the Complainant received, by mail, the written notice of his termination dated September 29, 1980.

Complainant was totally unemployed for a period of four weeks following his rejection by the Respondent on November 25, 1980, with a loss of wages amounting to \$1,750.40 (AF tab G).

#### CONCLUSIONS OF LAW

The regulations pertinent to the rejection of a U.S. worker by an employer utilizing the alien labor certification procedures available through local Job Service offices are found at 20 C.F.R. Part 655, Subpart C, specifically §655.203 (c). That section requires, as part of the recruitment process requisite to certification of alien employees that "No U.S. worker ... be rejected for employment for other than a lawful job-related reason." In addition, regulations providing for the filing of complaints against employers who are alleged to have violated the "terms and conditions of the job order" are found at 20 C.F.R. Part 658, specifically, §658.401(a)(1). The conditions recited in §655.203, including that at paragraph (c), which is cited above and which forms the regulatory basis for this Complaint, are inherent provisions of any job order processed by the Job Service in its handling of applications for temporary alien labor certification.

The Complainant alleges that the Respondent's refusal to rehire him following his worker's compensation absence was not based on discharge for cause, but was motivated by a discriminatory intent connected with the Complainant's union participation. The Respondent contends that the various infractions listed on the dismissal notice dated September 29, 1980, were the grounds for its rejection of the Complainant on November 25, 1980.

The purpose of the temporary alien labor certification procedures under the Immigration and Nationality Act and the Wagner-Peyser Act is to ensure protection of the interests of the U.S. labor force while providing a means by which alien labor resources may be tapped when qualified U.S. workers are not available. Accordingly, the rejection of a U.S. worker by an employer who is employing alien labor must be closely scrutinized.

Thus, a proper analysis of this case requires that the emphasis be placed on the issue of whether the Respondent actually refused to rehire the Complainant on the basis of its dissatisfaction with his personnel record, rather than whether, when faced with the Complaint in this case, the Respondent has retrospectively cited "lawful job-related" reasons upon which it could have terminated the Complainant in September, 1980. The Respondent's offer of employment made to the Complainant on September 21 undermines the credibility of Respondent's testimony on this issue. As queried in the findings of the State hearing officer, had the Respondent found the Complainant's performance prior to September 21 unsatisfactory, why did the Respondent offer the Complainant continued employment on September 21? It is improbable that the Respondent was willing to overlook the employee's personnel record on September 21 but not on November 25, 1980. The intervening factor, the Complainant's absence on workers' compensation leave, cannot be cited as basis for the Respondent's termination of the Complainant on the facts of this case.

While an employer does not have to hold a position open for an employee who is absent on workers' compensation leave, neither can the employer terminate the employee for filing such claim. Thus, only if the employer has no appropriate positions open at the time the employee is physically able to return to work can it refuse employment to the employee. Such was not the case here as there was no evidence of a lack of work available in Respondent's employ, on November 25, 1980.

Although the Respondent relies upon the failure of the Complainant to directly notify the Company personnel office of his status during his workers' compensation leave from September - November, this factor does not constitute good cause upon which a termination and refusal to rehire can be based: not only did the Complainant's notice regarding his workers' compensation claim, made through his attorney to the Respondent's insurance carrier, effect constructive notice to the Respondent, but also the exchanges between the Complainant and his supervisors on September 18 and 21 were adequate to put the Respondent on inquiry notice as to the Complainant's disabled condition.

The circumstances leading up to Respondent's rejection of Complainant on November 25 indicate that Respondent was pursuing a course of retaliation against the Complainant which was engendered by the Complainant's assertion of his rights under the terms and conditions of his employment, including those set forth in the union contract then in effect. The Complainant's absence on workers' compensation leave is the final factor that precipitated the Respondent's termination of Complainant, a factor which will not support a finding of termination for good cause in this case. The Respondent's contention that it refused employment to the Complainant on November 25, 1980, on the basis of its dissatisfaction with his previous work performance is simply not supported by credible evidence in the case record.

As a result of the Respondent's violation of 20 C.F.R. §655.203(c), the State hearing officer found the Respondent liable for the total wages lost by the Complainant during the four week period of total unemployment subsequent to November 25, 1980. Compensation for wages lost by U.S. workers who have been refused employment by employers utilizing the temporary labor certification services of the U.S. Employment Service is an appropriate remedy under the Wagner-Peyser Act. David E. MacArthur, 82-TAE-1 (Dec. 13, 1982); See 20 C.F.R. §§658.418(a)(4), .425(a)(4). Accordingly, Complainant is hereby awarded back pay, plus interest on that amount, for wages lost during the aforesaid four weeks of unemployment. In accordance with 20 C.F.R. §§658.425(a)(4), .501(a)(5), .504(a)(2), employment services provided by the State Job Service to the Respondent will be discontinued pending the Respondent's satisfaction of the judgment hereby awarded to Complainant.

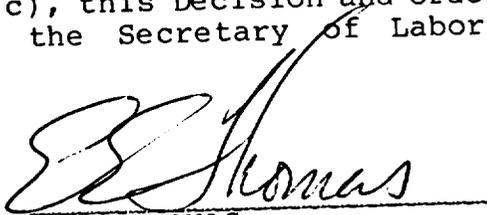
ORDER

It is hereby ORDERED that Respondent Antonio Levesque and Sons, Inc. pay to Complainant Steve L. Muncey back pay at an hourly rate of \$10.94, for four weeks/one hundred sixty

hours, totalling \$1,750.40 plus interest to be computed based on the rate established by the Secretary of the Treasury for use in computing interest on government contracts as adopted by the Office of the Assistant Secretary for Administration and Management. Such interest shall be computed from the date each salary payment would have been paid to Respondent had he been employed with Complainant until the date paid.

It is further ORDERED that the Maine Job Service initiate proceedings to discontinue employment services to Respondent until such time as Respondent satisfies the Regional Administrator that the award of back pay plus interest has been fully paid to Complainant.

Pursuant to 20 C.F.R. §658.425(c), this Decision and Order constitutes the final decision of the Secretary of Labor.

  
E.E. THOMAS  
Deputy Chief Judge

Dated: DEC 20 1983  
Washington, D.C.

EET/JB/fm

SERVICE SHEET

Case Name: Steve L. Muncey

Case No.: 82-WPA-32

Title of Document: Decision and Order

A copy of the above document has been sent to the following:

  
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