U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 10 March 2006

Case No.: 2003–STA–00028

ARB No.: 03–109

In the Matter of:

ROBERT PALMER,
Complainant

v.

TRIPLE R TRUCKING.
Respondent.

Appearance: Robert Palmer,
Complainant

Before: Russell D. Pulver
Administrative Law Judge

RECOMMENDED DECISION AND ORDER ON REMAND

This claim arises under Section 405 of the Surface Transportation Assistance Act ("the Act" or "STAA"), 49 U.S.C. § 31104. The Act protects employees from discharge, discipline, or discrimination for filing a complaint about commercial motor vehicle safety and for refusing to operate a vehicle when such operation constitutes a violation of federal vehicle safety regulations or because of the employee's reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment.

Congress included Section 405 to ensure that employees in the commercial motor vehicle transportation industry who make safety complaints, participate in STAA proceedings, or refuse to commit unsafe acts, do not suffer adverse employment consequences because of their actions. *See Brock v. Roadway Express, Inc.*, 481 U.S. 252, 262 (1987) *citing* 129 Cong. Rec. 29192, 32510 (1982). The Act prohibits discipline of trucking employees who raise questions about violations of commercial vehicle rules or other unsafe activities. *See Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 356 (6th Cir. 1992) and *Lewis Grocer Co. v. Holloway*, 874 F.2d 1009 (5th Cir. 1989).

On March 13, 2002, Complainant filed an STAA complaint against Respondent with the Secretary of Labor. Following an investigation, on March 13, 2003, the Secretary denied the claim finding Respondent had not violated the Act. Complainant requested a formal hearing with the Office of Administrative Law Judges ("OALJ"). On May 21, 2003, the undersigned held a hearing in Long Beach at which Complainant appeared *in pro per*. Respondent failed to appear, but instead responded by brief generally denying Complainant's claims. On June 19, 2003, the undersigned issued a recommended order finding Respondent had violated the Act, ordering Respondent to pay $70,875 in back pay for the 13 months, plus an additional $4,037 per month as a wage differential until Respondent made full payment on the order.

On August 31, 2005, the U.S. Department of Labor Administrative Review Board ("ARB") issued a Final Decision and Order of Remand ("the order"). In the order, the ARB affirmed my conclusion that Respondent violated the Act based on the record. However, the ARB vacated the award of damages, held that reinstatement is the appropriate remedy, and remanded the case back to the undersigned for determination of the issues below.

On October 27, 2005, the undersigned held a supplemental hearing in Long Beach, California at which only Complainant appeared. The only issue before the court was Complainant's damages. The following findings are based on a complete review of the record, the evidence, both hearing transcripts, the ARB's order and remand, statutes, regulations, and pertinent precedent. For the reasons set forth below, the undersigned grants Complainant's request for benefits.

ISSUES

1. Whether Complainant would benefit from an order for his reinstatement with Respondent.

2. How Complainant's damages should be calculated.

STATEMENT OF FACTS

From January 19, 2002 to February 17, 2002, Respondent employed Complainant to haul leased trailers on Complainant's own rig. For this service, Respondent paid Complainant approximately $5,250 per month. As a condition of employment, the leasing company inspected Complainant's rig and Respondent agreed to administer the U.S. Department of Transportation ("DOT") required driving test, drug screening, and physical examination. Although Respondent sent Complainant on four separate runs, Complainant complained to his manager, Mr. Richard, because Respondent never administered the tests. After his last run Complainant repeated his complaint and threatened to complain directly to the DOT. Because of this last complaint, Mr. Richard fired him and Respondent never fully paid Complainant for the runs he made. Complainant searched for employment through the second half of 2002 and the beginning of 2003 but was unable to find a job. During those thirteen months he had no income and was forced to sell his rig. On April 1, 2003, another company hired Complainant as a maintenance man at $7 per hour, or $1,213 per month.

The following facts remain effective for purposes of this analysis because Complainant established them in the prior hearing, the undersigned credited them after that hearing, and the ARB bound itself to them:

1. Respondent violated the Act on February 17, 2005 and is liable to Complainant for damages thereunder.

2. Complainant's salary with Respondent was $5,250 per month.

3. Complainant worked for Respondent from January 19, 2002 to February 17, 2002.

4. Because he had been fired and could not keep up with payments, Complainant sold his rig on April 1, 2003.

5. From February 17, 2002 to April 1, 2003, Complainant earned no income.

6. From April 1, 2003 to June 19, 2003, Complainant earned $1,213 per month.

FINDINGS OF FACT

Based on the record, the undersigned also finds that:

1. Complainant has honestly and diligently sought suitable alternative employment for all periods up to the date of this recommended order.

2. Complainant expressly disclaimed reinstatement as a remedy because Claimant lost his truck and without a truck it is impossible for Triple R to reinstate him. Hearing Transcript ("TR") at 49. In addition, there is animosity between the two parties that would cause reinstatement to be an impossible or impracticable remedy in this situation. TR at 51.

3. Complainant found employment as a Maintenance Man. TR at 54.

4. Complainant started this position on or about April 1, 2003 making approximately $1,213 per month at $7 per hour. TR at 54.

5. On or about April 1, 2004, Complainant received a raise to $8.50 per hour or approximately $1,470 per month. TR at 55.

6. On or about October 1, 2004, Complainant received a raise to $10 per hour or approximately $1,730 per month. TR at 55.

STATEMENT OF LAW

I. Reinstatement as the General Rule.

In every recent case discussing remedial reinstatement under the Act, the ARB has relied heavily on the Secretary of Labor's decision in *Dutile v. Tighe Trucking, Inc.*, 93–STA–31 (Sec'y October 31, 1994). In *Dutile*, the Secretary reiterated his 1993 decision in the same case

that the employer had violated the Act. *Id.* at 1. At that hearing, the Secretary asked complainant whether he would seek reinstatement. *Id.* The complainant replied that he did not wish reinstatement. *Id*. Therefore, the Secretary ordered the employer to pay back pay from the date of discharge, "and continuing until payment of the award."[1] *Id.* at 3. Although the question before the Secretary was the award total from the prior order, the Secretary scrutinized the policy of honoring a discharged employee's waiver of the reinstatement remedy: "In the past, the Secretary has found that where the complainant states that he does not desire reinstatement, back pay continues to accrue until compliance with the order." *Dutile citing Chapman v. T.O. Haas Tire Co.*, 94–STA-02 (1994). However, where reinstatement is not ordered, the employee might gain a windfall as back pay accumulates. Therefore, the Secretary articulated a new rule:

> In the future, when a complainant states at the hearing that he does not desire reinstatement, the parties or the ALJ should inquire as to *why*. If there is strong hostility between the parties that reinstatement would not be wise … the ALJ 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. *Id.* at 2. [Emphasis added.]

Thus, generally, back pay continues to accumulate until the employer makes a bona fide offer of reinstatement. *Id.* The Secretary acknowledged that although this decision was harsh, the employer may protect itself, terminating or reducing back pay, by offering reinstatement or showing the complainant's failure to mitigate. *Id.* at 2–3. Under this rule, the Secretary ordered the employer to pay indefinite weekly compensation as back pay until the whole was paid. *Id.*

II. Front Pay as an Alternative to Reinstatement.

Many subsequent decisions have applied *Dutile* to cases where the complainant expressed a desire not to seek reinstatement. For instance, in *Dale v. Step 1 Stairworks, Inc. (Dale I)*, 04-003, 2002–STA–00030 (ARB March 31, 2005), the employer terminated the employee–truck driver because he complained his truck was unsafe to drive. *Dale I* at 1–2. In the earlier decision, the ALJ held the employer liable under the Act and ordered only monetary damages because the employee did not seek reinstatement. *Id.* at 3. The ARB restated the *Dutile* rule, emphasizing that "[r]einstatement not only vindicates the rights of the complainant … but also provides concrete evidence to other employees … that the legal protections of the whistleblower statutes are real and effective." *Id. citing Hobby v. Georgia Power Co.*, ARB Nos. 98–166, 98–169, ALJ No. 90–ERA–30 (2001). The ARB concluded that reinstatement is the presumptive remedy, but if the parties have demonstrated the impossibility of a productive and amicable working relationship, front pay may be awarded instead. *Id.* at 3–4. Thus, front pay is appropriate where the working relationship is impossible or impractical, including: circumstances where an amicable relationship is impossible, where the employer no longer employs workers in the pertinent job classification, or where the employer no long has positions for which the complainant is qualified. *Id.* at 3. However, reinstatement should not be denied because of mere friction between the parties or where merely inconvenient to the employer. *Id.* at

[1] This vague phrase seems to allow the employer to terminate payments of back pay upon the payment of the total back pay then-owed. Although the "order" section of the Secretary's decision does not explicitly state so, the cases (including *Dutile*) also tell us that back pay can be terminated upon a bona fide offer of reinstatement or the impossibility or impracticability of reinstatement, as is discussed further in this section.

4. The ARB remanded the case for, *inter alia*, a determination of whether reinstatement was appropriate.[2] *Id.* at 7.

III. Economics and Front Pay.

On the issue of front pay as an alternative to reinstatement, the ARB has determined that the complainant's economic problems may make reinstatement impossible. In *Bryant v. Mendenhall Acquisition Corp.*, ARB No. 04–014, 2003–STA–36, 1 (2005), the complainant started out with the employer as an owner–operator. During a particular run, a series of delays caused him to drive for eleven consecutive hours. *Id.* DOT regulations specified that drivers who exceed ten consecutive hours must have eight hours of rest prior to their next run. *Id.* at 1–2. However, his manager insisted that he begin a new run only four and one half hours later, which would have caused the complainant to violate the regulations. *Id.* The complainant refused the new run and the employer fired him. *Id.* Although the complainant obtained alternate work, because the workload was light and the pay was insufficient, the complainant sold his rig rather than missing payments. *Id.* at 2–3. Later, a stable employer hired him as an employee driver, so when the violating employer offered to reinstate him, the complainant declined because he made more in his then current position. *Id.* at 3. At about that time, the complainant filed a complaint with the Department of Labor alleging his former employer's violations of the Act. *Id.* The OSHA investigator found that the employer had violated the Act and awarded damages. *Id.* The employer requested a hearing before the ALJ. *Id.* The ALJ concluded that although reinstatement was not feasible and the complainant had mitigated, front pay and compensation for the lost truck were inappropriate.[3] *Id.*

On review, the ARB affirmed the finding of violation, but questioned whether front pay was appropriate. *Id.* at 5. Restating the rule that victorious complainants are entitled to reinstatement under the Act, the ARB noted that although front pay is not enumerated under the Act, it is an appropriate remedy for cases where reinstatement is impossible or impractical. *Id. citing Michaud v. BSP Transp., Inc.*, ARB No. 97-113, 95-STA-29 (1997). "Front pay is the functional equivalent of reinstatement because it is a substitute remedy that affords the complainant the same benefit … as he or she would have received with reinstatement." *Id.* at 6 *citing Williams v. Pharmacia,* 137 F.3d 944 (7th Cir. 1998). Because the complainant would have been worse off taking the lower-paying company driver position, reinstatement was impractical

[2] In *Dale v. Step 1 Stairworks (Dale II)*, 2002–STA–00030, 2–3 (August 11, 2005), after several failed attempts to show that back pay should be tolled, the employer finally offered reinstatement to the employee. The ALJ ordered payment of an exact amount of back pay, fixing the amount from the date of termination until the date the employer finally offered reinstatement (which was rejected by the employee). *Id.* at 4 and 8. The ALJ contrasted *Dutile* with several decisions holding that a *pro se* complainant's deliberate decision not to seek reinstatement must be respected. *Id.* at 3 *citing Moravec v. H.C. & M. Trans. Inc.*, 90–STA–44 (Sec'y 1992) *appeal docketed*, No. 92–70102 (9th Cir. 1992), *Nidy v. Benton Enter.*, 90–STA–11 (Sec'y 1991), and *Nix v. Nehi–RC Bottling, Inc.*, 84–STA–1 (Sec'y 1984).

[3] The ALJ originally denied front pay because Bryant was "economically better off in terms of average weekly disposable income at [his current employer as an employee driver] than when he worked for [his former employer as an owner–driver]." *Bryant* at 6. The ARB rejected the "weekly disposable income" test and used his gross income instead. *Id.*

and the complainant was entitled to front pay. *Id.* Therefore the ALJ erred in denying front pay in lieu of reinstatement.[4] *Id.*

IV. Calculation of Front Pay.

Calculation of front pay requires the complainant to provide the court "with essential data necessary to calculate a reasonably certain front pay award." *Bryant* at 7 *citing McKnight v. General Motors Corp.*, 973 F.2d 1366 (7th Cir. 1992). The ARB listed the following essential data:

- The amount of the proposed award;
- The length of time the complainant expects to work; and
- The applicable discount rate.

The ARB cautioned that front pay awards cannot be unduly speculative, noting the longer the proposed period, the more speculative the damages become. *Id. citing Hybert v. Hearts Corp.*, 900 F.2d 1050 (7th Cir. 1990). Thus the ARB required both parties to "submit relevant evidence demonstrating both the amount and the duration of a front pay award."[5] *Bryant* at 7.

The ARB was easily able to calculate front pay from the time he sold his truck (the "date of impossibility") to the time his subsequent employment ended. *Id.* at 6. For those fourteen weeks, the complainant received the difference in his monthly pay at his former employer and his monthly pay at his subsequent employer. *Id.* However, the ARB was unable to continue the calculation to make the complainant whole, because the OALJ record failed to include facts on the complainant's then present circumstances. *Id.* at 7. Therefore on remand, the ARB ordered the ALJ to reopen the record to take evidence on the complainant's subsequent work history. *Id.*

DISCUSSION

1. Reinstatement

The ARB's Final Decision and Order of Remand ordered this court to address reinstatement. Based on the cases, this issue becomes whether Respondent must offer reinstatement or whether front pay is an appropriate remedy under the Act. Under these cases front pay is appropriate when reinstatement is impractical or impossible. Reinstatement is impractical or impossible where the relationship between the parties is no longer amicable, where employer has no positions for which the complainant is qualified, or where accepting a position would be economically impractical for the complainant.

[4] The employer is appealing before the United States Court of Appeals for the Fourth Circuit. *See* the ALJ's September 20, 2005, Disposition Order, *Bryant v. Mendenhall Corp.*, 2003–STA–36 (2005). The clerk at the Fourth Circuit's Office of the Clerk revealed that the case has been docketed with the Fourth Circuit as case No. 05-1965.

[5] The ARB referred the ALJ to *Doyle v. Hydro Nuclear Servs., Inc*., ARB Nos. 99-041, 99-042, 00-012, ALJ No. 89-ERA-22, slip op. at 7-8 (ARB Sept. 6, 1996) rev'd on other grounds sub nom. *Doyle v. United States Sec'y of Labor*, 285 F.3d 243, 251 (3d Cir. 2002) for questions on how to calculate front pay. *Byrant* at 7.

Here, there is evidence in the record that there exists such animosity between the Employer and Complainant as to make reinstatement impossible or impracticable as a remedy. TR at 53. Also Complainant had to sell his truck when Triple R did not pay him, and without a truck, there would be no open or available positions with this company who does not own or operate its own rigs. Similarly, in *Bryant*, Complainant sold his rig because he could no longer make the payments. In selling his rig, he could no longer return to his former position as owner–driver. Respondent has been conspicuously absent from these hearings, despite receiving all notices and being threatened with an over $70,000 award. That award continued to grow and Respondent could have capped it simply by offering Complainant a comparable job. Because Respondent failed to do so, this court finds that Respondent never had suitable alternative employment to offer. Because Complainant sold his rig and because Respondent has no suitable alternative employment, reinstatement is impossible. The date Complainant sold his rig became the date his return to work with Respondent became impossible ("date of impossibility.")

2. Calculation of Front Pay

Under the cases, back pay ends at the time of impossibility. Front pay runs from the time of impossibility until some reasonable time in the future proven by the parties.[6] Here, that period runs from the date of impossibility to the time Complainant is financially able to purchase a new rig. Specifically, Complainant will be so able on the date Respondent pays Complainant on this judgment or on the date Complainant turns 65 years of age.

For the period between the date of impossibility and the ALJ's final decision, front pay is the difference between what Respondent paid Complainant in his or her prior position and what each subsequent employer actually paid Complainant during the reasonable time period.

RECOMMENDED ORDER

Accordingly, it is ORDERED:

1. Respondent shall pay Complainant back pay from February 17, 2002 (Complainant's date of termination) until April 1, 2003 (the date of impossibility). At his then monthly salary of $5,250, he should receive $70,875 as ordered in the ALJ's earlier decision.

2. Respondent shall pay Complainant front pay from April 1, 2003 until June 19, 2003, eleven weeks and three days. The monthly salary rate ($5,250) shall be decreased by the amount he actually earned during that period ($1,213), or $4,037 per week.[7] The total is $46,829.20.

[6] In *Doyle*, 89–ERA–22, 6 (ARB Sep. 6, 1996) (see note 6), as to the "reasonable period" the ARB seems to articulate the rule that front pay is available during a period that the employee is not employable. However, they state that "[f]ront pay is calculated by determining the present value of [the complainant's] future earnings in the [respondent's] industry. From that amount, the present value of [the complainant's] anticipated future earnings must be subtracted.]" *Id.* The ARB concluded that the "reasonable period" for complainant's front pay calculation was five years based on expert testimony that the respondent's violation caused the complainant psychiatric problems requiring five years of therapy. *Id.* The court determined simply that "evidence shows it will take about five years to make [the complainant] employable again. *Id.*

[7] Absent evidence to the contrary, this court finds that respondent worked a standard five-day work week.

3. Respondent shall pay Complainant front pay from June 19, 2003 to August 31, 2005. The monthly rate, ($5,250), shall be decreased by the amount he actually earned during that period. The total is $88,653.

4. Respondent shall pay Complainant front pay from August 31, 2005 until Complainant has repurchased his rig, the Complainant has paid all money otherwise due under this order (including interest), or Complainant has reached age 65.

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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, 200 Constitution Ave., NW, Washington, D.C. 20210. *See* 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, paragraph 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 relief ordered in the Recommended Decision and Order is stayed pending review by the Secretary. 29 C.F.R. § 1978.109(b).