U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 07 January 2013

CASE NO.: 2010-STA-00020

In the Matter of:

ALPHONSE MADDIN,
Complainant,

v.

TRANS AM TRUCKING, INC.,
Respondent.

Appearances: Robert D. Fetter, Esq.
Miller Cohen, PLC
For Complainant

Timothy J. Davis, Esq.
Seigfreid, Bingham, Levy, Selzer & Gee, PC
For Respondent

Before: Paul C. Johnson, Jr.
Associate Chief Administrative Law Judge

FINAL DECISION AND ORDER

On October 26, 2012, I issued an Interim Decision and Order[1] finding that Complainant Alphonse Maddin had engaged in protected activity under the Surface Transportation Assistance Act, 49 U.S.C. § 31105 ("STAA" or "the Act") and its implementing regulations. I further found that Respondent Trans Am Trucking knew of the protected activity, that the protected activity was a contributing factor to Respondent's decision to terminate Complainant, and that Respondent did not show by clear and convincing evidence that it would have terminated Mr. Maddin absent the protected activities. I ordered that Complainant be reinstated and that Respondent pay certain compensatory damages to Complainant. I additionally reopened the record to receive evidence relevant to an award of back pay. The parties have submitted evidence on that issue. Based on that evidence, I will make an award of back pay. In addition, Complainant submitted evidence that Respondent made a negative employment report to ISIS, and Respondent will be ordered to have such reports removed.

[1] The Interim Decision and Order is incorporated herein by reference.

Back Pay

Complainant's Position

Complainant argues that he should be awarded back pay at the annual rate of $52,000, or $1,000 per week. In support of his position, he submitted a copy of a page from Respondent's website representing that "first-year student drivers earn an average of over $40,000 per year" and that "[d]rivers with experience earn an average of $52,000 per year." [Maddin Declaration, Exhibit 1.] In addition, Complainant detailed his efforts to obtain employment as well as his meager earnings since his termination by Respondent. His gross earnings for 2009-2012 totaled $42,791.05. After deducting expenses, his net earnings for 2009-2012 were negative for tax purposes. He received no unemployment compensation after his termination. Mr. Maddin applied for dozens of jobs, including driving jobs as well as other types of positions.

Respondent's Position

The first few pages of Respondent's submission re-argue the merits of the case, and are largely irrelevant to the current issue. One matter, however, requires additional discussion, as it was mentioned only briefly in a footnote in my Interim Decision and Order. Employer makes much of the fact that by failing to respond to its requests for admissions, it is established that "Complainant was terminated for unhooking trailer #185907 and driving off to get fuel on January 14, 2009." [Request for Admission No. 15.] Employer argues that because of this admission, it is conclusively established Complainant was terminated for violating company policy, and not for any improper purpose, and the complaint should be denied as a matter of law. However, respondent is liable for retaliatory discharge if Mr. Maddin's protected activity was a contributing factor in the company's decision to discharge him. *Ass't Sec'y v. Bailey & Koch Foods*, ARB No. 10-001, ALJ No. 2008-STA-061 (ARB Sep. 30, 2011); *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052 (ARB Jan. 31, 2011); *Riess v. NuCor Corp*., ARB No. 08-137, ALJ No. 2008-STA-011 (ARB Nov. 30, 2010). A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Williams, supra*, ARB No. 09-092, slip op. at 6, citing *Sievers v. Alaska Airlines, Inc.*, ARB No. 05-109, ALJ No. 2004-AIR-028, slip op. at 4 (ARB Jan. 30, 2008). Mr. Maddin's admission that he was terminated for violating company policy does not establish that the violation was the sole basis for his termination. One additional basis was Mr. Maddin's engaging in protected activity, as thoroughly discussed in my Interim Decision and Order. The protected activity was a factor which, in connection with his violation of company policy, led to the company's decision to fire him. Respondent's argument that Mr. Maddin's admission requires a denial of his claim as a matter of law is without merit.

With regard to back pay, Respondent argues that Mr. Maddin would not be working for them at present even if he had not been terminated, and submits a declaration from Jami Droescher, its director of human resources in support of that position. Ms. Droescher stated that since Complainant's termination, TransAm has hired 4,889 company drivers, and that the drivers have a turnover rate of 239%. Only 48 drivers (out of an average of 560) who were employed by TransAm in 2009 remain employed as of December 2012. According to Ms. Droescher, the

trucking industry in general, including Respondent, has a high turnover rate as drivers are terminated, leave for other companies, or leave the profession altogether.

Respondent also submitted printouts of the pay details for each of the weekly paychecks earned by Complainant during his employment with TransAm. The first five paychecks covered a training period during which Mr. Maddin earned a flat rate of $350.00 per week. The other 13 paychecks covered the period during which Mr. Maddin was actually driving for Respondent, and the documents reflect the wages earned based on mileage, payment of per diem travel allowances, and deductions for taxes and other purposes. Respondent calculates Complainant's weekly earnings for the time he worked as a driver (as opposed to training) as $383.69, and argues that any award should be based on that amount rather than on the higher amount suggested by Mr. Maddin, which Respondent characterizes as speculative.

Respondent further argues that any award should begin on the date that Complainant filed his objections to the adverse OSHA decision to the Office of Administrative Law Judges, rather than the date of termination. Respondent suggests that the OSHA determination absolved it of any wrongdoing for the period between Complainant's termination and the date he filed objections.

Discussion

At the outset, I reject Respondent's argument that any award should begin on the date that Complainant filed his objections to the OSHA findings. First, the remedial provisions of the STA are make-whole provisions. Indeed, the purpose of a back pay award is to return the wronged employee to the position he would have been in had his employer not retaliated against him." *Ass't Sec'y &Bryant v Mendenhall Acquisition Corp.*, ARB No. 04-014, ALJ No. 2003-STA-36 (ARB June 30, 2005) (internal citations omitted). "Back pay awards to successful whistleblower complainants are calculated in accordance with the make-whole remedial scheme embodied in Title VII of the Civil Rights Act." *Id.* To begin the award on a date more than a year after Mr. Maddin was terminated would result in a total loss of earnings for that year, which is contrary to the make-whole purpose of the Act.

Second, because this proceeding is de novo, the results of the OSHA investigation have no bearing on the matters at hand. I have therefore not reviewed Exhibit 3 to Respondent's submission and will not consider it for any purpose.

In addition, I reject Respondent's argument that if Mr. Maddin had not been terminated, he would nonetheless not have remained in Respondent's employ. Statistically, Respondent may be correct, but the argument is speculative – around 10% of the drivers who were on the books in January of 2009 remain employed by Respondent, and Mr. Maddin has made no representation that he would have voluntarily left employment. I agree with Respondent that Mr. Maddin's position on wages is speculative, and I hold Respondent to the same standard with regard to his continuing employment.

I agree in general with Respondent's position that Complainant's position on back wages is speculative. Although Respondent may have made some representations on its website and to

its applicants that its drivers earned substantially more than they actually do, those representations do not amount to an agreement or an obligation to pay that amount.[2] The best evidence of Complainant's future earnings is his actual earnings while he was employed by TransAm. For this purpose, I disregard the flat payments of $350.00 made during training, and will base my decision on Complainant's earnings once he began driving for Respondent. The evidence shows that Complainant earned the following:

Pay Date	Mileage-Based Earnings	Per Diem Travel Allowances	Total
11/14/08	316.00	158.00	474.00
11/21/08	574.80	262.40	837.20
11/28/08	61.40	30.70	92.10
12/5/08	747.80	306.40	1054.20
12/12/08	298.20	149.10	447.30
12/19/08	563.40	181.70	745.10
12/26/08	531.40	255.70	787.10
1/2/09	366.40	163.20	529.60
1/9/09	352.40	176.20	528.60
1/16/09	454.60	187.30	641.90
1/23/09	248.60	124.30	372.90
1/30/09	267.80	113.90	381.70
2/6/09	205.20	82.60	287.80
Total	**4988.00**	**2191.50**	**7323.50**

According to Respondent's calculations, these payments equate to weekly earnings of $383.69. Respondent is right if one only considers the mileage-based earnings and excludes the per diem travel allowances. The precise nature of the travel allowances is unclear – were they part of a driver's compensation, or were they intended to offset expenses? It does not appear that they were intended to offset expenses, as the pay stubs submitted by Respondent show reimbursement for expenses as a separate line item. I conclude, therefore, that the travel allowances were part of Mr. Maddin's compensation, as they were clearly paid whenever Complainant was driving for TransAm, and they are properly included in his lost earnings. When per diem is included, the weekly earnings average $552.27. Additionally, it appears that only the mileage-based earnings were subject to withholding, and the per diem payments were not.

I find, therefore, that Complainant is entitled to an award based on weekly taxable earnings of $383.69 and weekly non-taxable earnings of $168.58. He is entitled to payment of those amounts for each weekly pay date beginning one week after his last paycheck, or

[2] Although I do not have the authority to order it, I suggest that Respondent consider removing the puffery on its website. Contrary to its representations of $40,000 per year for new drivers and $52,000 per year for experienced drivers, Ms. Droescher's declaration establishes that the average weekly pay for all drivers is $443.28, which annualizes to just over $23,000. This is slightly over half of what Respondent's website claims its new drivers make, and somewhat less than half of what Respondent's website claims its experienced drivers make.

beginning on February 13, 2009, and that the entitlement continues to the date of his reinstatement.

In addition, Complainant is entitled to interest on the unpaid earnings. Under 29 C.F.R. § 1978.105(a)(1), "[i]nterest on backpay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621" – generally the short-term Federal rate plus three percent – "and will be compounded daily." Respondent will be ordered to calculate and pay such interest. Each of the weekly paychecks must be separately calculated, as Section 6621 interest rate changes monthly.

Finally, I find that Respondent is entitled to no credit for the amounts earned by Mr. Maddin since his employment was terminated. His uncontradicted evidence shows that his gross earnings were more than offset by expenses, and that the expenses would not have been incurred but for his termination by Respondent. I further find that Mr. Maddin successfully mitigated his damages by making every effort to find alternate employment after his termination. The uncontradicted evidence shows that he applied for dozens of positions, and that he obtained some driver positions although those jobs did not last long. The burden to show a lack of mitigation falls on Respondent, and TransAm has produced no evidence and made no argument that Mr. Maddin failed to mitigate damages.

ORDER

Based on the foregoing, IT IS ORDERED, in addition to the relief ordered in the Interim Decision and Order of October 26, 2012:

1. Respondent shall pay to Complainant all back wages to which he is entitled, as discussed above. Specifically, Respondent shall pay an amount equal to $552.37 per week, less withholding only for the mileage-based amount ($383.69), for every week beginning on February 13, 2009 and continuing until the date Complainant was reinstated to employment with Respondent;
2. Respondent shall additionally pay interest on the back wages, calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. § 6621 (the short-term Federal rate plus three percent), and shall calculate the interest separately for each weekly pay;
3. Respondent shall take steps to remove all negative reports based on made concerning Complainant and/or his termination to ISIS, to any other industry or consumer reporting agency, and to any other entity, and shall report continuous employment with Respondent; and

4. Counsel for Complainant may, not later than 30 days after the date of this Final Decision and Order, file a fully-supported application for attorney's fees and costs, after which Respondent is allowed 21 days to file objections thereto.

SO ORDERED.

Digitally signed by PAUL JOHNSON
DN: CN=PAUL JOHNSON, OU=ADMINISTRATIVE LAW JUDGE, O=Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington DC

PAUL C. JOHNSON, JR.
Associate Chief Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, the Associate Solicitor, Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1978.110(b).

The preliminary order of reinstatement dated October 26, 2012 is effective immediately upon receipt of the decision by the Respondent and is not stayed by the filing of a petition for review by the Administrative Review Board. 29 C.F.R. § 1978.109(e). If a case is accepted for review, the decision of the administrative law judge is inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board unless the Board grants a motion by the respondent to stay that order based on exceptional circumstances. 29 C.F.R. § 1978.110(b).