U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Rec'd CAB 7/30

In the Matter of:

GEORGE B. BLACKIE, JR.,

COMPLAINANT,

v.

D. PIERCE TRANSPORTATION, INC.; DAVE PIERCE, SR.; DAVE PIERCE, JR.; SHAWN PIERCE; ERIC WEYANDT; et al.,

RESPONDENTS.

ARB CASE NO. 13-065

ALJ CASE NO. 2011-STA-055

DATE: JUL 24 2013

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BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

*For the Complainant*:
George B. Blackie, Jr.; *pro se*, Claysburg, Pennsylvania

*For the Respondents*:
Timothy Grant Wojton, Esq.; *Wojton & Wojton*, Pittsburgh, Pennsylvania

BEFORE: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge*. Judge Corchado, concurring.

## ORDER DENYING RESPONDENT'S MOTION TO STAY REINSTATEMENT ORDER

This case is before the Administrative Review Board on appeal from a U. S. Department of Labor Administrative Law Judge's (ALJ) Decision and Order (D. & O.) issued May 13, 2013, ruling in favor of Complainant George B. Blackie, Jr., on his whistleblower complaint filed pursuant to the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended.[1] The ALJ found in Blackie's favor, holding that his employer,

[1] 49 U.S.C.A. § 31105(a) (Thomson Reuters 2013). Regulations implementing the STAA are found at 29 C.F.R. Part 1978 (2012).

Respondent D. Pierce Transportation, Inc., (Pierce), violated the STAA when it terminated his employment because Blackie engaged in whistleblower-protected activity. The ALJ's order of relief included, among other awards, an order that Pierce extend to Blackie a bona fide offer of reinstatement and reinstate Blackie's and his wife's health, dental, and vision insurance upon his reinstatement.[2]

On appeal, Pierce has filed a Motion to Stay Reinstatement Order of the ALJ's order requiring Pierce to extend to Blackie a bona fide offer of reinstatement while its appeal is pending. In support of its motion, Pierce argues that Blackie indicated before the ALJ that he did not wish to be reinstated and the record contains evidence of "irreparable animosity" between Blackie and Pierce and its employees. Moreover, Pierce argues that it has a legitimate, non-discriminatory reason for not employing or reinstating Blackie as the record contains testimony establishing Blackie's lack of skill as a truck driver with Pierce and his subsequent employer.

One of the remedies a STAA whistleblower is entitled to as a matter of law upon successful conclusion of his or her litigation before an ALJ is an order "to reinstate the complainant to the former position with the same pay and terms and privileges of employment."[3] When reinstatement is impossible or impractical, alternative remedies such as front pay are available.[4] The ALJ's order requiring reinstatement becomes "effective immediately upon receipt of the decision by the respondent."[5]

Pursuant to 29 C.F.R. § 1978.110(b), "any order of reinstatement will be effective while review is conducted by the ARB, unless the ARB grants a motion by the respondent to stay that order based on exceptional circumstances." In comments accompanying section 1978.110(b)'s promulgation, the Occupational Safety and Health Administration (OSHA) stated that only "in *exceptional* circumstances" may the Board grant a motion to stay a preliminary order of reinstatement and that it "is only appropriate when the respondent can establish the necessary criteria for a stay, i.e., the respondent will suffer irreparable injury; the respondent is likely to succeed on the merits; a balancing of possible harms to the parties favors the respondent; and the public interest favors a stay."[6] Even more telling, the comments accompanying the promulgation of 29 C.F.R. § 1978.106(b), regarding the issuance of preliminary orders, note that "an important goal of STAA" is "to have unlawfully terminated employees reinstated as quickly as possible."[7]

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2 D. & O. at 27, 31.

3 49 U.S.C.A. § 31105(b)(3)(A)(ii); *see* 29 C.F.R. § 1978.109(d)(1).

4 *Assistant Sec'y & Bryant v. Bearden Trucking Co.*, ARB No. 04-014, ALJ No. 2003-STA-036, slip op. at 7-8 (ARB June 30, 2005).

5 29 C.F.R. § 1978.109(e).

6 77 Fed Reg. 44121, 44132 (July 27, 2012) (emphasis added).

7 77 Fed Reg. 44129. *See also Welch v. Cardinal Bankshares Corp.*, ARB No. 06-062, ALJ No. 2008-SOX-015, slip op. at 3-4 (ARB June 9, 2006) (Order Denying Stay) (addressing similar

In essence, OSHA's comments mirror the four-factor test the Board applies when determining whether it should stay agency action.[8] These factors are: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the Board grants the stay; and (4) the public interest in granting a stay.[9] Pierce fails to meet these criteria.

In its motion for stay, Pierce fails to articulate what reversible errors the ALJ made, much less demonstrate a likelihood of success on the merits for purposes of a stay. We find that Pierce's motion fails to demonstrate the likelihood of Pierce prevailing.[10]

Pierce also fails to show that it will suffer irreparable harm if we do not stay the ALJ's order regarding reinstatement. In essence, Pierce argues it would suffer irreparable harm due to the "hard feelings and emotions" that exist between the parties from the litigation of this case and the evidence of "irreparable animosity" between Blackie and Pierce and its employees. But any alleged irreparable harm "must be actual and not theoretical" and must be "certain to occur."[11] Pierce offers only generalized and unsubstantiated concerns of irreparable harm, which is insufficient to support a motion for a stay of reinstatement.

Pierce also argues, in essence, that a stay would not harm Blackie, as Pierce asserts that Blackie indicated before the ALJ that he did not wish to be reinstated. Although Blackie may have indicated to the ALJ that he did not want to be reinstated, in his response to the motion to stay he asks the Board to deny the motion to stay the ALJ's order requiring Pierce to extend a bona fide offer of reinstatement. The Board has held that a complainant cannot waive reinstatement until the employer makes a bona fide, unconditional offer of reinstatement.[12] No

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language from provisions in OSHA whistleblower regulations implementing the Sarbanes-Oxley Act of 2002, 18 U.S.C.A. § 1514A (West Supp. 2012), under 29 C.F.R. Part 1980 (2012)).

[8] *See Cefalu v. Roadway Express, Inc.*, ARB Nos. 04-103, 04-161; ALJ No. 2003-STA-055, slip op. at 2 (ARB May 12, 2006); *see also Welch,* ARB No. 06-062, slip op. at 4.

[9] *Cefalu,* ARB Nos. 04-103, 04-161; slip op. at 2; *see also Welch,* ARB No. 06-062, slip op. at 4.

[10] Our review upon consideration of the merits may or may not lead to a different conclusion; our focus for now is solely on the question of whether Pierce has in its motion for stay made a sufficient showing of the likelihood that it will prevail on the merits of its appeal.

[11] *Welch*, ARB No. 06-062, slip op. at 6.

[12] *See Dickey v. West Side Transp., Inc.*, ARB Nos. 06-151, 06-150; ALJ Nos. 2006-STA-026, -027; slip op. at 8-9 (ARB May 29, 2008); *Cook v. Guardian Lubricants, Inc.*, ARB No. 97-055, ALJ No. 1995-STA-043, slip op. at 3 (ARB May 30, 1997); *see also Heinrich Motors, Inc. v. NLRB*, 403 F.2d 145, 150 (2d Cir. 1968) (remarks indicating a disinterest in reinstatement are "of little value" when made before a company has offered reinstatement). To the contrary is *Young v. Park City Transp.,* ARB No. 11-048, ALJ No. 2010-STA-065 (ARB Aug. 29, 2012), which we view as limited to the facts of that case.

bona fide, unconditional offer of reinstatement having as yet been made, Pierce's waiver argument is thus to no avail in support of Pierce's contention that Blackie will suffer no harm if a stay order is granted. On the other hand, Blackie has waited to have his job, pay, and benefits restored. He will surely continue to suffer harm if the Board stays the ALJ's order of reinstatement.[13] Blackie's reinstatement is therefore appropriate to prevent his further harm.

Finally, "[t]he public interest militates against a stay" of the ALJ's order of reinstatement.[14] As OSHA's comments accompanying the promulgation of 29 C.F.R. § 1980.105, a similar, parallel regulation implementing the SOX, explain, "the purpose of interim relief, to . . . avoid a chill on whistleblowing activity, would be frustrated if reinstatement did not become effective until after the administrative adjudication was completed."[15] Thus, we find that granting Pierce's Motion to Stay Reinstatement Order in this case would not serve the public interest.

## CONCLUSION

For the foregoing reasons, Pierce's motion to stay the ALJ's order requiring Pierce to extend to Blackie a bona fide offer of reinstatement pending appeal is **DENIED**.

**SO ORDERED.**

**JOANNE ROYCE**
**Administrative Appeals Judge**

**E. COOPER BROWN**
**Deputy Chief Administrative Appeals Judge**

**Luis A. Corchado. Administrative Appeals Judge, concurring:**

I concur because Pierce failed to sufficiently articulate the basis upon which it is likely to succeed on the merits, including the issue of Blackie's alleged waiver of a reinstatement remedy. Pierce also failed to sufficiently articulate how it will suffer irreparable injury, making only general and unsubstantiated assertions of potential harm. These failures are fatal in seeking

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13 *See Welch*, ARB No. 06-062, slip op. at 7.

14 *Dutkiewicz v. Clean Harbors Environmental Servs., Inc.*, ARB No. 97-090, ALJ No. 1995-STA-034, slip op. at 3 (ARB June 11, 1997)(both Congress and the Department of Labor have determined that reinstatement should have immediate effect).

15 69 Fed Reg. 52109 (Aug. 24, 2004).

a motion to stay the reinstatement order in this case. Therefore, I find it unnecessary to address any other issues raised by the motion to stay and reserve further analysis for the decision on the merits.

**LUIS A. CORCHADO**
**Administrative Appeals Judge**