U.S. Department of Labor

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

In the Matter of:

KENNETH C. CLIFTON,

COMPLAINANT,

v.

UNITED PARCEL SERVICE,

RESPONDENT.

ARB CASE NO. 97-045

ALJ CASE NO. 94-STA-0016

DATE: May 14, 1997

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

This case is before us pursuant to the employee protection provision of the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C.A. § 31105 (West 1996). On May 5, 1995, the Secretary of Labor determined that Respondent United Parcel Service (UPS) had discharged Complainant Kenneth C. Clifton (Clifton) in violation of the STAA. The Secretary directed UPS to reinstate Clifton and remanded the case to the Administrative Law Judge (ALJ) to determine damages. On July 18, 1996, the ALJ held a hearing in Nashville, Tennessee on the issue of damages. On January 15, 1997, the ALJ issued a Recommended Decision and Order (R. D. and O.) awarding Clifton back pay, front pay, and reimbursement for attorney's fees and lost medical benefits. After a careful review of the record the R. D. and O. is affirmed in part and denied in part.

DISCUSSION

Reinstatement

The ALJ held that, because Clifton was unlawfully dismissed and UPS has continued to ignore the Secretary's May 5, 1995 Order, Clifton is entitled to receive six months of front pay in lieu of reinstatement. R. D. and O. at 6. We disagree. Reestablishment of the employment relationship is a usual component of the remedy in discrimination cases. *McCuistion v. Tennessee Valley Authority*, Case No. 89-ERA-6, Sec. Dec. and Ord., Nov. 13, 1991, slip op.

at 23. The record does not indicate that a sufficient level of hostility exists between UPS and Clifton to warrant a reversal of our reinstatement order. In fact, UPS has stated that "there is absolutely no evidence in the record that Clifton would not be a suitable employee for reinstatement and since it has been ordered, there is no reason to assume that UPS would not comply with a final order once it is issued by the Secretary of Labor, if enforced by the Court of Appeals." Brief of United Parcel Service, February 14, 1997, page 11. We therefore do not accept the ALJ's determination that UPS is not required to reinstate Clifton.[1/]

Where the record reflects a sufficient level of hostility between an employer and employee that would cause irreparable damage to the employment relationship, it may be appropriate, at the request of the complainant, to order front pay in lieu of reinstatement. *Nolan v. AC Express,* Case No. 92-STA-37, Sec. Dec. and Ord., slip op. at 15-16. Since we find that reinstatement remains an appropriate remedy in this case, we do not accept, at this time and based upon this record, the ALJ's recommended front pay award.

Back Pay

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 committed a violation of the STAA. *Moravec v. HC & M Transportation, Inc.*, Case No. 90-STA-44, Sec. Dec. and Ord., Jan. 6, 1992. The purpose of a back pay award is to make the employee whole, that is, to restore the employee to the same position he would have been in if not discriminated against. Back pay awards should, therefore, be based on the earnings the employee would have received but for the discrimination. *Blackburn v. Metric Constructors, Inc.*, Case No. 86-ERA-4, Sec. Dec. and Ord., Oct. 30, 1991. A successful complainant normally is entitled to back pay from the date of termination until reinstatement, less any interim earnings, *Sprague v. American Nuclear Resources, Inc.*, Case No. 92-ERA-37, Sec. Dec. and Ord., Dec. 1, 1994, slip op. at 12, as well as interest on the back pay amount, at the rate specified for underpayment of Federal income tax, 26 U.S.C. § 6621. *Blackburn v. Metric Constructors, Inc.*, Case No. 86-ERA-4, Dec. and Order on Damages, Oct. 30, 1991, slip op. at 18-19, *aff'd in relevant part and rev'd on other grounds, Blackburn v. Martin,* 982 F.2d 125 (4th Cir. 1992).

A formula for computing back pay keyed to the earnings of a representative employee gives a reasonable approximation of what a complainant would have earned but for the discrimination. *Reed v. National Minerals Corp.*, Case No. 91-STA-34, Sec. Dec. and Ord., July 24, 1992. We agree with the ALJ's conclusion that Clifton's earnings should be keyed to the

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[1/] As of the date of this Order, UPS has not complied with the Secretary's May 5th reinstatement order, nor has it sought a stay of the reinstatement order. We remind UPS that although it has appealed the Secretary's May 5, 1995 order to the United States Court of Appeals for the Sixth Circuit, such an appeal does not automatically stay the Secretary's order of reinstatement. *See, e.g., Harrison v. Stone & Webster Engineering Group,* Case No. 93-ERA-44, Sec. Dec. and Ord., Dec. 13, 1995.

earnings of a fellow employee, James Fryer (Fryer), who was ranked in seniority just below Clifton at the time Clifton was fired. R. D. and O. at 2. We also agree with the ALJ's analysis, based on UPS' method of using seniority to determine promotions and the testimony of Clifton[2/] that he would have bid for the full-time position which Fryer was given after Clifton was terminated, that the use of Fryer as a representative employee would most accurately reflect the approximate earnings that Clifton would have earned had he not been unlawfully dismissed. R. D. and O. at 2.

UPS contends that "there is absolutely no evidence in the record to conclude that Clifton would have been the successful bidder for an opening on September 30, 1991." Brief of United Parcel Service at 8. We disagree. Between 1984 and 1985, Clifton bid on three different positions and was improperly passed over by UPS. In each case Clifton filed a grievance with the Union and was eventually awarded the position. T. 28-31. Additionally, at the time he was fired, Clifton held two part-time positions at UPS. We believe this more than adequately shows Clifton's desire to obtain full-time employment and that Clifton would have bid on the full time job given to Fryer.

UPS had a collective bargaining agreement with the Teamsters Union (Union). Under the agreement, positions at UPS were made available to employees according to seniority. Employees who desired an available position were allowed to bid on it, and the position would be given to the employee who had the most seniority. Transcript of July 18, 1996 hearing (T.) at 23-32. UPS has failed to offer any evidence suggesting that there were circumstances under which the most senior employee bidding on a position failed to receive the position. Therefore, we agree with the ALJ's conclusion that Clifton would have been awarded the full time position given to Fryer had he not been wrongfully terminated by UPS. We note that any uncertainties in back pay awards are resolved in favor of the successful complainant and against the discriminating party. *Nichols v. Bechtel Construction Inc.*, Case No. 87-ERA-44 Sec. Dec. and Ord. Nov. 18, 1993, slip op. at 10, aff'd sub nom. *Bechtel Construction Co. v. Sec'y of Labor*, 50 F.3d 926 (11th Cir. 1995).

UPS contends that because Clifton resigned from subsequent employment at Warioto Farm in 1996, he failed to use reasonable diligence in obtaining comparable employment and therefore the back pay award should not extend past the time of that employment. Clifton testified at the July 18, 1996 hearing that he quit the job at Warioto Farm after only one month because he was being required to work seven days a week, which was not required at his former position with UPS. Where an employer is found to have violated the STAA and the claimant is found to be entitled to an offer of reinstatement to his former position with back pay, the claimant does not breach the obligation to mitigate damages by declining a job that is not substantially equivalent to his or her former position. *Polewsky v. B & L Lines, Inc.*, Case No. 90-STA-21, Sec. Dec. and Ord., May 29, 1991. Once a discriminatory discharge has been proven, as here, and the issue to be decided is that of the amount of back pay to be awarded, the

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[2/] The ALJ found Clifton's testimony credible.

burden is on the employer to prove that the complainant failed to mitigate damages by the exercise of reasonable diligence in seeking and maintaining other suitable employment. *Moyer v. Yellow Freight System, Inc.*, Case No. 89-STA-7, Sec. Dec. and Order, Aug. 21, 1995, slip op. at 9. We agree with the ALJ's conclusion that UPS has not shown that Clifton failed to exercise reasonable diligence in mitigating his damages. R. D. and O. at 4.

The period for which Clifton shall receive back pay will run from the date on which Clifton was fired until either UPS reinstates Clifton or Clifton refuses a bona fide offer of reinstatement from UPS. Since Clifton was dismissed on March 18, 1991 and Fryer did not begin his new full-time position until September 30, 1991, R. D. and O. at 2, Clifton's back pay for the time period of March 18, 1991 through September 30, 1991 will be based upon his actual average weekly wage before dismissal. Thus Clifton is entitled to $8,668.24 for that period.

Clifton's back pay for the period from October 1, 1991 through the date of this decision will be based upon the earnings of Fryer for that same time period as a representative employee. For the period between October 1, 1991 through December 31, 1991, Fryer earned $7,880.40. In 1992, Fryer earned $37,425.22. In 1993, Fryer earned $42,988.78. In 1994, Fryer earned $45,426.26. In 1995, Fryer earned $46,836.99. In 1996, Fryer earned $49,084.88.

Clifton's remaining back pay award will be calculated based on Fryer's last known weekly wage of $943.94. There are nineteen weeks between January 1, 1997 through the date of this decision, therefore the total for this period is $17,934.86. Thus, the total of Clifton's lost wages at UPS as of the date of this decision is $256,245.63. Clifton's back pay award will continue to accrue at the rate of $943.94 per week,[3/] until UPS complies with our order to reinstate, subject to Clifton's obligation to mitigate damages and less his interim earnings.

Clifton's interim earnings at other employment, up to the date of this decision, will be subtracted from the total amount calculated above. These interim earnings have been calculated by the ALJ in the amount of $50,061.00. R. D. at O. at 4. Thus Clifton's total back pay award is $206,184.63. Clifton will also receive interest on his back pay total, calculated in accordance with 26 U.S.C. 6621, and such interest shall accrue until such time as the back pay amount is paid. *Phillips v. MJB Contractors*, Case No. 92-STA-22, Sec. Dec. and Ord., Oct. 6, 1992.

Fees and Costs

We accept the ALJ's determination that Clifton suffered lost health and welfare benefits in the amount of $834.17, bankruptcy costs totaling $661.00, attorney's fees and costs totaling $3,940.22, and $119.00 for storage costs. R. D. and O. at 4-6. We hereby award $5,554.39 to cover those fees and expenses.

[3/] We note that should UPS continue to ignore our order to reinstate Clifton, his back pay award is subject to change to the extent that Fryer's pay is modified.

ORDER

1. Reinstate Clifton to his former position;

2. Pay Clifton back pay in the amount of $206,184.63 with interest, to be calculated pursuant to 26 U.S.C. § 6621, to cover his loss from the time of the wrongful termination to the date of this decision;

3. Pay to Clifton the amount of $943.94 per week until UPS complies with our order to reinstate, subject to his obligation to mitigate and less Clifton's interim earnings, with interest to accrue on any unpaid amounts to be calculated pursuant to 26 U.S.C. §6621; and

4. Pay Clifton the amount of $5,554.39 for reimbursement of fees and expenses.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member