U.S. Department of Labor

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

In the Matter of:

CYNTHIA SHANNON, **ARB CASE NO. 98-051**

COMPLAINANT, **ALJ CASE NO. 96-STA-15**

v. **DATE: April 15, 1998**

CONSOLIDATED FREIGHTWAYS,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

This case arises under the employee protection (whistleblower) provision of the Surface Transportation Assistance Act (STAA), 49 U.S.C. §31105 (1994), and implementing regulations. 29 C.F.R. Part 1978 (1997). The complaint alleges that Respondent discharged Complainant in violation of STAA section 31105(a)(1)(A) (protected safety complaint) and section 31105(a)(1)(B) (protected work refusal). The safety standard underlying Complainant's charge is a Department of Transportation (DOT) regulation that limits a driver's "maximum driving time" in order to avoid driver fatigue: "No motor carrier shall permit or require a driver of a commercial motor vehicle to drive, nor shall any driver drive ... for any period after [h]aving been on-duty 70 hours in any period of 8 consecutive days ...." 49 C.F.R. §395.3(b)(2) (1996).

In defending, Respondent advances a legitimate nondiscriminatory reason for the decision to discharge Complainant, *i.e.,* that she threatened a co-worker with physical harm. This threat caused Respondent to institute discharge proceedings as provided under the applicable collective bargaining agreement (National Master Freight Agreement (NMFA)).[1/] Respondent also argues that it discharged Complainant based on her "overall work record" which included several warning letters which she received for alleged infractions of work rules immediately preceding the initial (local) NMFA discharge hearing.

[1/] Complainant was represented by Teamsters Local 413 under the National collective bargaining agreement, which was supplemented by regional and State riders.

In a Recommended Decision and Order (R.D.) issued on December 16, 1997, the Administrative Law Judge (ALJ) recommended dismissal of the complaint, finding that the discharge was motivated solely by the co-worker confrontation. R.D. at 10-11. On a preliminary issue, the ALJ declined to defer to the outcome of the related grievance proceeding as provided under 29 C.F.R. §1978.112(c). *Id.* at 7. We agree, for the reasons cited by the ALJ, that deferral is not appropriate in this case, and we adopt this finding without extended discussion.[2/] We accept the ALJ's merits recommendation, as explained below.

BACKGROUND

A. *Facts*

From 1990 until her discharge in 1994, Complainant Cynthia Shannon was employed as an over-the-road truck driver or "transport operator" by Respondent Consolidated Freightways Corporation (CF), a commercial motor carrier.[3/] She was employed initially by CF on the "extra" board. In early 1994, Shannon successfully bid on the Columbus, Ohio -- Chicago/Peru, Illinois, freight run. Hearing Transcript (T.) 377. The bid also could include intermediate stops (or "VIA's") at Cincinnati and Sidney, Ohio. Shannon was dispatched out of the CF Columbus, Ohio, regional terminal where Stuart Koble was employed as assistant terminal manager for linehaul operations.

1. The Dowler incident

On July 20, 1994, Shannon confronted Debby Dowler, linehaul secretary, between two vending machines in a corner of the drivers' breakroom at the Columbus terminal. Evidence of the confrontation consists of Shannon's testimony, T. 281-287, 391-402, a notarized statement by Shannon (Respondent's Exhibit (RX) N) and an undated, unnotarized typed statement signed by Dowler (RX AAA). Dowler did not testify at the STAA hearing, nor did she participate at any level of the NMFA proceeding arising out of the discharge. T. 473. While Shannon's and Dowler's accounts of the confrontation differ markedly, they agree at minimum (1) that Shannon charged Dowler with interfering in, and admonished Dowler to stay out of, her (Shannon's) "personal life"

[2/] The Ohio Joint State Grievance Commission ultimately determined that Respondent's discharge decision, reached after the local hearing, was proper. The ALJ found that deferral was not appropriate because the commission hearing did not deal adequately with the Complainant's alleged protected activity, the hearing dealt almost exclusively with issues and evidence not addressed at the local hearing, and the decision consisted of a single sentence upholding the discharge. The ALJ found it "unclear, from this brief statement, what factors the committee actually considered and decided." R.D. at 7. Deferral is appropriate only if "it [is] clear that [the] proceedings dealt adequately with all the factual issues, that the proceedings were fair, regular and free from procedural infirmities, and that the outcome of the proceedings was not repugnant to the purpose and policy of the [STAA]." 29 C.F.R. §1978.112(c).

[3/] Shannon was an experienced driver. She had been employed as a driver by Roadway Express, Incorporated, between 1979 and 1990. Hearing Transcript (T.) 376.

or "personal business" and (2) that Shannon threatened Dowler with harm upon leaving the workplace.

On July 21, Koble met with Shannon and a Teamsters local union representative to discuss the incident involving Dowler. Koble announced that he intended to initiate discharge proceedings against Shannon because of the confrontation. T. 403-405. A hearing regarding the incident, scheduled initially for August 2, eventually was convened on August 30 following several postponements. By letter of August 31, CF advised Shannon that "[b]ased on [her] overall work record and the facts presented [at the hearing], the Company has no alternative but to take the position of discharge." RX Z. Shannon was allowed to remain on the job until the discharge decision was sustained under the NMFA by the Ohio Joint State Grievance Commission.

2. "Overall work record" and "the Sidney incident"

Although CF's initial rationale for initiating disciplinary proceedings against Shannon was the Dowler confrontation, the scope of the charge ultimately was expanded to include alleged dissatisfaction with her "overall work record." Shannon's overall work record included three warning letters received as the result of a run from Columbus, Ohio, to Peru, Illinois, and return to Columbus via Sidney, Ohio, immediately preceding the August 30 local discharge hearing. The warning letters cite Shannon for "late logs" (RX Q), "failure to follow instructions" (RX R) and "delay of freight" (RX U). In particular, on August 25, CF determined that it had not received Shannon's logs (record of duty status) for August 22 and 23. Under CF policy, these logs must be submitted at the "home domicile" daily or immediately upon completion of the "tour of duty." *See* RX A at 56. [4/] On August 22, Shannon allegedly submitted an incomplete hours of service card. On August 25, Shannon allegedly "delayed freight" by failing to recontact the CF Columbus dispatch for a period of about 45 minutes following an initial contact. The delay occurred after Shannon ceased driving because she had exhausted her maximum available on-duty hours under 49 C.F.R. §395.3(b)(2), and accordingly was prohibited by regulation from operating a commercial motor vehicle. Shannon discovered the warning letters posted at the Columbus terminal upon returning from Peru via Sidney on August 26. The letters arose in the following context, denominated the "Sidney incident."

On August 24, Shannon had departed Columbus on the run to Peru, after advising CF that she had only 20.75 on-duty hours remaining for the period August 18 through August 25. Under CF work rules, Shannon was authorized to depart Columbus with a minimum 20 hours of on-duty time remaining. T. 236-237. Due to unanticipated delays, Shannon departed Peru on the return run with a mere 8.25 hours in which to reach Columbus, via a stop in Sidney. Lacking alternative drivers, the Peru dispatcher pressured Shannon to run the Sidney VIA, even though he recognized that she would exhaust her hours before completing the return to Columbus. RX EE. Shannon was hauling 2,700 pounds of "hot" freight for delivery to Whirlpool Corporation in Sidney and other freight

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[4/] This expeditious filing of the logs is an internal CF policy. The DOT regulations require that "[t]he driver shall submit or forward by mail the original driver's record of duty status to the regular employing motor carrier within 13 days of the completion of the form." 49 C.F.R. §395.8(i).

which, if not technically "hot," at least was "expedited."[5/] Throughout the trip, Shannon apprised the various dispatchers of her dwindling on-duty hours.

While Shannon was in Sidney delivering cargo and awaiting dispatch, Columbus dispatcher Jody White instructed her to log off duty. This instruction was an attempt by White to conserve Shannon's available driving hours. T. 246. Shannon complained that the procedure was illegal under DOT regulations, but did not refuse the order to depart Sidney with the shipment. Shannon refused, however, to log the delay as off duty hours (as White had directed), and as a result exceeded the 70-hour limitation according to her log book.[6/] The alleged protected "work refusal" is this refusal to log hours worked as CF directed, *i.e.,* a refusal to operate a commercial motor vehicle having logged work hours incorrectly.

The alleged protected "complaints" focused on Shannon's expressed concerns that White's order to log off duty was illegal and that any drive time from Sidney to Columbus violated 49 C.F.R. §395.3(b)(2). Because the freight scheduled for delivery to Pocono via Columbus was expedited, Shannon waited at the Sidney terminal during the 45 minute period that White directed her to log off duty. Koble reportedly directed the Sidney dispatch "that they were to get [Shannon] out of the terminal quickly due to the fact that she was carrying a hot load that needed to get to the customer as soon as possible and that she was running short of hours." R.D. at 4. Under DOT regulations, off duty time is time "when the driver is not on-duty, is not required to be in readiness to work, or is not under any responsibility for performing work." 49 C.F.R. §395.8(h)(1). On-duty time is all time from the time a driver begins to work or is required to be in readiness to work until the time [s]he is relieved from work and all responsibility for performing work. The regulations enumerate nine examples of on-duty time, *e.g.,* time at carrier property waiting to be dispatched; time spent inspecting, servicing or conditioning the vehicle; driving time; time attending a vehicle being loaded or unloaded, remaining in readiness to operate the vehicle. 49 C.F.R. §395.2 ("on-duty time" defined).

[5/] CF dispatched Shannon from Peru with a set of trailers. One of the trailers contained the hot shipment bound for Sidney. The second trailer contained a "prime time" shipment with an expedited delivery date bound for Pocono, Pennsylvania, via Sidney and Columbus. A hot load is "an expedited shipment requiring expedited service." T. 109 (Koble). "Prime time is a service that [CF] offers to be competitive with air freight companies. [CF] charges a premium rate to perform an expedited service." In either circumstance, "time is of the essence." T. 331-332 (Koble).

[6/] Shannon was "out of hours," under her construction, when she departed Sidney. She ceased driving, however, near Troy, Ohio, when her hours were exhausted under White's direction to log the wait time in Sidney as off duty. T. 477-480, 487-488. The record evinces confusion as to whether Shannon was directed to "go to bed," *i.e.,* rest at a motel for a required eight hours, when her 70 on-duty hours expired, or whether CF communicated an intent to "cushion her in," *i.e.,* send another driver to complete the trip to Columbus with Shannon as a passenger in the "buddy seat."

In its August 31 "position of discharge" issued as a result of the August 30 local NMFA hearing, CF listed "five major infractions" as grounds for the decision to terminate Shannon: (1) excessive absenteeism; (2) "insubordination and physically threatening the well being of [a co-worker]" (the Dowler confrontation); (3) falsifying pay sheets or time cards; (4) "[f]ailure to comply with Federal Motor Carrier Safety Regulation 395;" and (5) failure to submit monthly log recaps. RX Z. The record supports some absenteeism; the July 20 threat; an incomplete service card (Aug. 22); the Aug. 22 and 23 "late logs," a violation of CF policy but apparently not a DOT violation; the August 25 complaint about violative drive time and refusal to log off duty; the August 25 "delay of freight;" and the failure to submit monthly recaps, a violation of CF policy. The record contains no evidence of pay sheet or time card falsification.

B. *The ALJ's recommended decision*

The ALJ found that CF's single motivation in discharging Shannon was the unprotected co-worker confrontation and that "no evidence" demonstrated that adverse action "was in any way motivated by [Shannon's] engagement in alleged protected activity." R.D. at 11. According to the ALJ, since Shannon "failed to establish that her discharge was motivated by any protected reason, her claim must be dismissed." *Id.* The ALJ employed elements of a "pretext" analysis, *see* discussion *infra,* namely that CF articulated a legitimate nondiscriminatory reason for discharging Shannon -- the Dowler confrontation. The ALJ reasoned: "Therefore, [Shannon] must prove, by a preponderance of the evidence, that the legitimate reason proffered by [CF] is a pretext for discrimination." *Id.* at 10. In holding that Shannon failed to meet this burden, the ALJ rejected evidence of disparate treatment, *i.e.,* similarly situated employees allegedly treated differently than Shannon, and relied heavily on the testimony of linehaul manager Koble that he intended to discharge Shannon "based on the episode of July 20, 1994." *Id.* The ALJ also cited Koble's testimony as the basis for a finding arguably relevant to a "dual motive" analysis (discussed *infra*): "I further find that [Shannon] would have been discharged had this formal [August 30] hearing taken place as scheduled [on August 2], which was well prior to [Shannon's] run to Peru, Illinois" on August 24-25. *Id.* at 11. In other words, the ALJ found that Shannon would have been discharged in the absence of any protected activity.

DISCUSSION

To prevail on a whistleblower complaint, a complainant must establish that the respondent took adverse employment action because she engaged in protected activity. A complainant initially may show, for example under a "pretext" analysis,[7/] that a protected activity likely motivated the adverse action. *Guttman v. Passaic Valley Sewerage Comm'rs,* Case No. 85-WPC-2, Sec. Dec. Mar. 13, 1992, slip op. at 9, *aff'd sub nom. Passaic Valley Sewerage v. Department of Labor,* 992 F.2d

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[7/] *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-803 (1973); *Kahn v. United States Sec'y of Labor,* 64 F.3d 271, 277 (7th Cir. 1995) (court saw "no reason" not to extend *McDonnell Douglas* inferential method of proving discrimination employed in civil rights area to other discrimination cases arising under other congressional statutes, including Federal whistleblower statutes). *See Roadway Express, Inc. v. Brock,* 830 F.2d 179, 181 n.6 (11th Cir. 1987) (endorsing Secretary's allocation of proof in whistleblower cases).

474 (3d Cir.), *cert. denied,* 114 S.Ct. 439 (1993). A complainant meets this burden by proving (1) that she engaged in protected activity, (2) that the respondent was aware of the activity, (3) that she suffered adverse employment action, and (4) the existence of a "causal link" or "nexus," *e.g.,* that the adverse action followed the protected activity so closely in time as to justify an inference of retaliatory motive. *Kahn v. United States Sec'y of Labor,* 64 F.3d 271, 277 (7th Cir. 1995); *Bechtel Const. Co. v. Sec'y of Labor,* 50 F.3d 926, 933-934 (11th Cir. 1995); *Simon v. Simmons Foods, Inc.,* 49 F.3d 386, 389 (8th Cir. 1995); *Couty v. Dole,* 886 F.2d 147 (8th Cir. 1989). A respondent may rebut this *prima facie* showing by producing evidence that the adverse action was motivated by a legitimate nondiscriminatory reason. The complainant then must prove that the proffered reason was not the true reason for the adverse action and that the protected activity *was* the reason for the action. *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 506-508 (1993).[8/]

Alternatively, under a "dual motive" analysis, a complainant may prove, by a preponderance of the evidence, that a respondent took adverse action *in part* because she engaged in protected activity. For example, a respondent may admit, or direct evidence may establish, that protected activity provided part of the motive for the adverse action. In this event, the burden of persuasion shifts to the respondent to demonstrate that the complainant would have been disciplined *even if* she had not engaged in the protected activity. *Pogue v. U.S. Dep't of Labor,* 940 F.2d 1287, 1289-1290 (9th Cir. 1991) (dual motive test set forth in *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977), applies where it was "undisputed" that complainant engaged in protected activity and "that this was a motive for disciplinary action"); *Passaic Valley Sewerage v. United States Dep't of Labor,* 992 F.2d at 481; *Mackowiak v. Univ. Nuclear Sys., Inc.,* 735 F.2d 1159, 1163-1164 (9th Cir. 1984). The burden of persuasion shifts under the "dual motive" model because the complainant has proved retaliation, *i.e.,* that the respondent took adverse action "because" the complainant engaged in protected activity. 49 U.S.C. §31105(a)(1)(A) and (B). A violator then must establish a form of affirmative defense in order to avoid liability. "The employer's burden in ... a 'dual motive' case resembles an 'affirmative defense: the plaintiff must persuade the fact finder on one point, and then the employer, if it wishes to prevail, must persuade it on another.'" *Ass't Sec'y on behalf of Lansdale v. Intermodal Cartage Co., Ltd.,* No. 94-STA-22, 1995 WL 848152, at *3 n.1 (DOL Off. Adm. App. Jul. 26, 1995), *quoting Price Waterhouse v. Hopkins,* 490 U.S. 228, 246 (1989).

The ALJ identified the protected activity in the case exclusively in terms of Shannon's allegations:

[8/] Although the "pretext" analysis permits a shifting of the burden of production, the ultimate burden of persuasion remains with the complainant throughout the proceeding. Once a respondent produces evidence sufficient to rebut the "presumed" retaliation raised by a *prima facie* case, the inference "simply drops out of the picture," and "the trier of fact proceeds to decide the ultimate question." *St. Mary's Honor Center v. Hicks,* 509 U.S. at 510-511. *See Carroll v. United States Dep't of Labor,* 78 F.3d 352, 356 (8th Cir. 1996) (whether the complainant previously established a *prima facie* case becomes irrelevant once the respondent has produced evidence of a legitimate nondiscriminatory reason for the adverse action); *Roadway Express, Inc. v. Dole,* 929 F.2d 1060, 1063 (5th Cir. 1991) (court declined to revisit sufficiency of *prima facie* case; "[b]ecause the case has been fully tried and we thus have a fully developed record before us, the focus of our inquiry is on the ultimate question of discrimination").

> The Complainant asserts that her protected activity consisted of her complaints to Jody White that she could not be relieved of duty at the terminal in Sidney, Ohio, as well as her notation of this safety regulation violation in her logs. Additionally, the Complainant alleges that her refusal to log her time in Sidney as off-duty constituted a refusal to operate a motor vehicle in a manner contrary to federal law pursuant to [49 U.S.C. §31105(a)(1)(B)].

R.D. at 9. Without making associated findings, the ALJ proceeded to consider CF's proffered reason for discharge and to discuss the ultimate burden of persuasion under the pretext model. Absent from the analysis is discussion of the possible reference to protected activity (failure to comply with 49 C.F.R. §395) as one of the "five major infractions" fueling the discharge decision. RX Z (CF position of discharge). Moreover, Koble, the manager who initiated discharge proceedings, testified that while "[his] decision to discharge Ms. Shannon took place on July 21," the events in late August also "w[ere] part of her discharge." T. 116. *See* T. 194-195 (Shannon discharged on basis of "overall work record"). If protected activity is shown to have entered into the adverse employment decision, then analysis under the "dual motive" (rather than "pretext") model is appropriate.

We find that Shannon at minimum engaged in protected activity under STAA section 31105(a)(1)(A) (protected safety complaint) when she disagreed with, and expressed concerns to, the CF dispatchers about logging improprieties and continuing to drive when her permissible hours were exhausted. *Cf. Transfleet Enterprises, Inc. v. Boone,* 987 F.2d 1000, 1004 (4th Cir. 1992) (court found it "eminently reasonable" that the STAA "was intended to protect drivers from having to begin trips when their employer has exerted pressure to violate the federal rules at some point during the trip"). Shannon annotated her logs to reflect that the Columbus dispatcher improperly had relieved her of duty at the Sidney terminal. RX S. Additionally, Shannon appealed to union representatives who interceded on her behalf in raising the concerns with CF dispatchers and management, including Koble. These communications about a regulatory safety violation strike us as sufficiently definitive, specific and sustained to satisfy the "complaint" criterion. *American Nuclear Resources, Inc. v. United States Dep't of Labor,* 134 F.3d 1292, 1295 (6th Cir. 1998); *Bechtel Const. Co. v. Sec'y of Labor,* 50 F.3d at 931 ("particular, repeated concerns about safety procedures" were "tantamount to a complaint").

We agree with Shannon that the evidence does not support a finding that completely discounts protected activity as a motivation for discharge. We adopt the ALJ's recommendation, nonetheless, because CF demonstrated that it would have discharged Shannon absent any protected activity. Substantial evidence supports this ALJ finding, rendering it conclusive. 29 C.F.R. §1978.109(c)(3). The ALJ credited Koble's testimony that he decided to discharge Shannon upon learning about the July 20 confrontation and immediately initiated discharge proceedings, meeting with Shannon and her representative on July 21 to notify them of his intent and scheduling a discharge hearing for August 2. Koble testified as to his understanding of the threat:

> Immediately after [the confrontation], Debbie [Dowler], my secretary, came into my office very abruptly, in tears, shaking, very upset, and explained to me what happened. [S]he was cornered when she came out of the ladies' room by Ms. Shannon between the vending machines and the door exiting the bathroom. That she

> physically threatened her, cussed and swore at her, and told her that sooner or later, she had to leave the terminal, and that she better watch her back side ....

T. 174. Dowler then ceased work for the day. According to Koble, Dowler "felt, obviously, very threatened by what had happened. And she also feared for the safety [of] her children. So, she went home." T. 175. Koble requested that Shannon "not talk to or communicate in any way with Debbie Dowler" as a condition of continued employment pending resolution of the discharge proceedings. RXX M, O. *See* R.D. at 11 (reference to "immediate discharge as opposed to a discharge that allowed [Shannon] to continue work pending [NMFA] review"). The evidence does not dispute the ALJ's finding that Shannon would have been discharged had the hearing convened on August 2 as scheduled.

Koble's actions were consistent with treatment of two other CF employees who confronted co-workers. T. 137, 180-182; Complainant's Exhibit (CX) 42, RXX WW, CCC. On one occasion, Koble prohibited the offending employee from entering the CF terminal or premises pending discharge. That employee, J.H. Comstock, telephoned the linehaul department threatening to come to the terminal with an AK-47 and "spray" everyone, including Koble. Comstock then telephoned Koble's residence threatening Koble's life and the lives of family members. RX WW. While perhaps not as egregious as this initial example, Shannon's circumstances certainly are comparable to those involving the second employee where the time frame involving warning letter, hearing and termination notice approached that at issue here. Upon being questioned about an incorrect pay sheet submitted following a November 7, 1994, work call, the employee, Robert Ruff, "became insubordinate, cussing and swearing to the supervisors on duty." CX 42. On November 10, CF issued Ruff a warning letter for failure to follow instructions, insubordination, delay of freight and dishonesty. A hearing was scheduled for November 18. Ruff was discharged. The last day worked is listed on the termination notice as November 28. RX CCC. Both of these examples show that Koble, who had assumed the linehaul manager position shortly before Shannon's confrontation with Dowler, instituted and implemented procedures for addressing disruptive behavior in the workplace. The ALJ addressed this evidence, albeit under the "pretext" model:

> Two employees, who did threaten and/or have a confrontation with a co-worker, were terminated by [CF]. As [CF] has asserted that [Shannon] was discharged because of her confrontation with Mrs. Dowler, the only similarly-situated employees of [CF] were those that were involved in such a confrontation. As both such employees were also terminated, I find that [CF] has dealt consistently with the discipline of its employees, specifically with [Shannon]. Although not conclusive in and of itself, I note that [CF] followed the proper procedural steps in disciplining this employee. There are no irregularities in this regard which would indicate that [CF] was utilizing the confrontation with Mrs. Dowler as pretext for an unlawful motive.

R.D. at 10 (citations omitted). Finally, this analysis comports with case precedent. *American Nuclear Resources, Inc. v. United States Dep't of Labor,* 134 F.3d at 1293, 1296 (even if employee had engaged in protected activity, employer discharged him because of "interpersonal problems," including "rude and abrasive" behavior); *Kahn v. United States Sec'y of Labor,* 64 F.3d at 279-280

(employee's abusive and inappropriate behavior toward co-workers, rather than whistleblowing activity, was the legitimate nondiscriminatory reason for discharge); *Lockert v. United States Dep't of Labor,* 867 F.2d 513, 519 (9th Cir. 1989) (employee disobedience motivated discharge); *Dunham v. Brock,* 794 F.2d 1037, 1041 (5th Cir. 1986) (employee's legitimate discharge occasioned by cavalier attitude, abusive language and defiant conduct).

CONCLUSION

The Complainant engaged in protected activity when she complained about a violation of Department of Transportation safety regulations as an aspect of the "Sidney incident." Respondent discharged Complainant on the basis of her "overall work record," which included both this protected activity and unprotected activity. Respondent would have discharged Complainant regardless of the protected activity, however, based solely on a legitimate nondiscriminatory reason -- a confrontation with a co-worker. Accordingly, Respondent is not liable for violation of STAA section 31105. The complaint hereby **IS DISMISSED**.

SO ORDERED.

KARL J. SANDSTROM
Member

PAUL GREENBERG
Member