

STATE OF ILLINOIS

HUMAN RIGHTS COMMISSION

In The Matter Of:)		
)		
JOHNNY LITTLETON,)		
)		
Complainant,)	Charge No.	1998CF2406
)	EEOC No.	21BA981884
and)	ALS No.	10850
)		
OVERNITE TRANSPORTATION CO.,)		
)		
Respondent.)		

ORDER AND DECISION

March 28, 2006

The Commission by a panel of three:

Commissioners Sakhawat Hussain, Spencer Leak and Rozanne Ronen, presiding.

On review of the recommended orders of David J. Brent, Administrative Law Judge.

For Complainant: Jonathan T. Green
Law Offices of Jonathan T. Green

For Respondent: Mark J. Sheppard, Esq.
McGuireWoods LLP

Illinois Human Rights Commission: James E. Snyder, General Counsel,
Matthew Z. Hammoudeh, Asst. General Counsel.

This matter comes before the Commission pursuant to a Supplemental Recommended Order and Decision issued by Administrative Law Judge David J. Brent and the exceptions filed thereto.

On review of Judge Brent's recommendations, the public hearing record and the exceptions filed by the Respondent and for the reasons set forth herein, the Recommended Order and Decision is MODIFIED in part and incorporated herein as our final Order and Decision.

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I. Nature of the Case

The Complainant, Johnny Littleton, filed a charge of discrimination alleging that the Respondent, Overnight Transportation Company, discriminated against him based on his race where he claims that the Respondent prevented him from obtaining a desirable truck-driving route due to his race.

II. Proceedings

The Complainant filed two charges of discrimination against the Respondent with the Department of Human Rights. On April 6, 1998, the Complainant filed charge number 1998CF2406 alleging that the Respondent discriminated against him on the basis of his race in the assignment of a desirable truck-driving route. On September 22, 1999, the Complainant filed charge number 2000CF2565 alleging that the Respondent discharged him in retaliation for filing the first charge.

The Department of Human Rights issued a notice of default for charge number 1998CF2406 and filed a petition for a hearing to determine damages with the Commission. The Commission entered a default order and a public hearing on damages was scheduled for Charge Number 1998CF2406.

The Department of Human Rights dismissed the Charge of retaliation (Charge Number 2000CF2565) on February 18, 2000 and issued a Notice of Dismissal for Failure to Proceed. The Department provided that “the Complainant’s charge is dismissed for the Complainant’s failure to adequately respond to the reasonable requests by the Department”.

In its’ Notice of Dismissal, the Department provided that the Complainant could request review of that dismissal by the Chief Legal Counsel by filing a “Request for Review” within 30 days. The record does indicate that the Complainant filed a Request for Review on the Charge of retaliation but that the Chief Legal Counsel sustained the dismissal because the Complainant did “not establish good cause for his failure to attend the fact finding conference”.

A public hearing on the matter of damages in the race discrimination case (1998CF2406) was held before a Commission hearing officer. No hearing was held on the retaliation charge (2000CF2565), as it has been dismissed. The Complainant did not appeal that dismissal.

Administrative Law Judge Brent entered a Recommended Order and Decision on December 29, 2004 and concluded that in accordance with the default order entered by

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the Commission, the Respondent is liable for a violation of the provisions of the Illinois Human Rights Act that prohibit discrimination based on the race of an employee.

Judge Brent recommended that 1) the Complainant be awarded \$225,333.41 in back pay with interest; 2) the Complainant be reinstated to employment with the Respondent 3) the public contract currently held by the Respondent be terminated and that the Respondent be barred from participating in any public contract for three years; 4) the Respondent cease and desist from any discriminatory actions and attend training to prevent future civil rights violations; and 5) the Complainant personnel file or any other file kept by the Respondent be purged of any reference to the discrimination charge and litigation.

The Commission reviewed exceptions filed by both parties and entered an Order on May 6, 2005 remanding the matter with instructions. That Order adopted Judge Brent's findings regarding the race discrimination charge and requested clarification and reconsideration of the recommended awards.

Judge Brent entered a Supplemental Recommended Order and Decision on August 22, 2005. Judge Brent recommends that 1) the Complainant be awarded \$225,333.41 in back pay with interest; 2) the prior recommendation that the Complainant be reinstated to employment with the Respondent be rescinded in its entirety to include the award of \$950.00 per week from and after January 1, 2005; 3) the public contract currently held by the Respondent be terminated and that the Respondent be barred from participating in any public contract for three years; 4) the Respondent cease and desist from any discriminatory actions and attend training to prevent future civil rights violations; and 5) the Complainant personnel file or any other file kept by the Respondent be purged of any reference to the discrimination charge and litigation.

On October 11, 2005 the Respondent filed exceptions to the Supplemental Recommended Order and Decision; the Complainant did not file exceptions or a response to the Respondent's exceptions.

III. Exceptions and Responses

In reviewing an Administrative Law Judges' Recommendation Order and Decision, the Commission does not conduct a de novo review of the evidence; rather, the Commission will adopt the Judge's findings unless they are contrary to the manifest weight of the evidence presented at the hearing. 775 ILCS 5/8A-103(E)(2). The Commission reviews a question of law de novo, and is empowered to modify, reverse, or sustain the Judge's recommendations in whole or in part. 775 ILCS 5/8A-103(E).

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Respondent's Exceptions

The Respondent argues that 1) the ALJ's recommended back pay award is inconsistent with the Commission's Remand Order; 2) the ALJ's recommended back pay award is barred by *res judicata* and collateral *estoppel* because it was based on a retaliation charge that was dismissed by the Department of Human Rights prior to the entry of the default order; 3) the ALJ exceeded his jurisdictional authority by recommending a back pay award based upon termination claims where the damages awarded have no connection to the Respondent's denial of his bid route; 4) the ALJ's recommendation violates the Respondent's due process rights by arbitrarily basing the damages award on conduct occurring after the default ruling; and 5) the ALJ's recommendation is against the manifest weight of the evidence.

The Respondent asks the Commission to reverse Judge Brent's recommendation regarding damage amounts and award the Complainant \$211.00 or in the alternative, remand the matter for a new hearing regarding the Complainant's damages.

Findings

The Respondent discriminated against the Complainant on the basis of his race in the assignment of a desirable truck-driving route. The Complainant was discharged from employment in July 1999; however, the Complainant's charge alleging that he was discharged in retaliation for his initial charge of discrimination was dismissed by the Department of Human Rights. Therefore, the Complainant was lawfully terminated from employment in July 1999.

Respondent's liability on the race charge (1998CF2406) was established by default in contrast to the retaliation charge (2000CF2565) which was dismissed by the Department of Human Rights. Based on the entry of the Default Order, all issues of liability regarding the race discrimination charge are resolved against the Respondent. Determination of the Complainant's damages resulting from the Respondent's unlawful conduct, namely denial of a desirable truck-driving route, is the only issue before the Commission. Accordingly, the Complainant's damages are only those coming from that race discrimination finding. That is, the difference in his compensation as a result of the Respondent's unlawful denial of a desirable truck-driving route from the time when he was unlawfully denied that route to when the Complainant was lawfully discharged.

The Complainant is entitled to an award for that period of time where he was unlawfully denied a desirable truck route because of his race. The relevant period of time for this calculation is from March 26, 1998 to July 2, 1998 and from February 2, 1999 to July 7, 1999.

The Complainant was an active, full-time employee of the Respondent during the 15 pay periods included in the March 26, 1998 to July 2, 1998 time period and the actual

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compensation he received was \$14,176.59. The Complainant testified that if had instead driven the desired route, he would have traveled 2,500 miles per week plus 300 miles of overtime, for a total of 2,800 miles at a rate of \$0.38 per mile. In addition he would have received \$13.00 per hour for work related activities other than driving such as drop-off, hook-up and fueling; the Complainant had 10 hours of these duties per week. The Complainant's average compensation would have therefore been \$1,194.00 per week, or a total of \$17,910.00. The difference between the compensation he actually received and the amount he should have received is \$3,733.41.

It is undisputed that from July 3, 1998 to February 1, 1999, the Complainant was unable to work due to a physical disability. When a period of disability intervenes during the time continuum during which a complainant is eligible for back pay, the award for back pay is tolled.

The Complainant's period of disability ended on February 2, 1999 in which he was cleared for light duty. Judge Brent found that the Respondent refused to give Complainant light duty assignments in contradiction to their own policy. Judge Brent found and the manifest weight of the evidence supports the contention that the Complainant should have been working from February 2, 1999 until July 7, 1999. The award for back pay is not tolled for this period of time; therefore the Complainant is entitled to the amount he would have earned for light duty from February 2, 1999 until July 7, 1999.

As noted by Judge Brent in his December 29, 2004 Recommended Order and Decision, it is reasonable to assume that a driver on light duty would be paid at least the average amount paid to a driver working full time, but without overtime and extra compensation for non-travel activities. As indicated above, the Complainant would have driven 2,500 miles per week with 300 miles of overtime (at \$ 0.38 per mile) if he had received the assignment unlawfully denied to him by the Respondent, along with \$13.00 per hour for non-travel activities. Therefore, without overtime and the additional compensation for non-travel activities, the Complainant's compensation for light duty would be at least be equivalent of driving 2,500 miles at \$0.38 per mile, or \$950.00 per week.

The Complainant is therefore entitled to the amount he would have earned for light duty from February 2, 1999 until July 7, 1999, for a total of 25 weeks or \$23,750.00.

The Complainant was discharged on July 7, 1999. This discharge was investigated by the Department and dismissed. The Respondent contends that the Complainant was discharged in July 1999 because he was injured off-duty and could not return to work without restriction.

Judge Brent found that the Respondent terminated him in 'bad faith' and recommends that the back pay continue after his termination until the date of the public hearing. We disagree. The manifest weight of the evidence shows that the Complainant filed a Charge

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of Discrimination alleging that he was fired as a result of retaliation. The Department of Human Rights investigated allegations related to his discharge and dismissed that charge. Therefore, the Complainant's termination has already been investigated and dismissed. The Complainant did not appeal that dismissal. Furthermore, the Complainant did not amend his charge or complainant to include the allegation that he was terminated because of his race. In contrast, he filed a charge alleging that he was fired in retaliation for filing his first charge. That charge has been dismissed by the agency responsible for initiating charges of discrimination under the Illinois Human Rights Act. A conclusion can be drawn from that dismissal; namely, that the termination alleged was not a result of unlawful conduct under the Illinois Human Rights Act.

For the reasons stated above, the Recommended Order & Decision issued in this case is MODIFIED in part and is incorporated herein as our Order & Decision.

IT IS HEREBY ORDERED THAT:

1. The Respondent pay to the Complainant back pay in the amount of \$27,483.41
2. The Respondent pay the Complainant interest on all elements of this award contemplated by Section 8A-104(J) of the Human Rights Act and calculated as provided in 56 Ill. Adm. Code §5300.1145, to accrue until payment is made by Respondent.
3. The Complainant's personnel file or any other file kept by the Respondent concerning the Complainant shall be purged of any reference to this discrimination charge, this litigation and the outcome of the litigation;
4. The Respondent cease and desist from any discriminatory actions; and
5. The Respondent attend training to prevent future civil rights violations.

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Entered this 6th day of May 2005.

Commissioner Sakhawat Hussain



Commissioner Spencer Leak, Sr.



Commissioner Rozanne Ronen

