



STATE OF ILLINOIS

HUMAN RIGHTS COMMISSION

IN THE MATTER OF)
)
 Johnny Littleton,)
 Complainant)
 and)
)
 Overnite Express Company,)
 Respondent)

Charge No.: 1998CF2406
 EEOC No.: 21BA 981884
 ALS No.: 10850R

SUPPLEMENTAL
RECOMMENDED ORDER AND DECISION

The Recommended Order and Decision (ROD) in this matter was forwarded to the Commission on December 29, 2004. Both Complainant and Respondent timely filed exceptions to the ROD. Complainant stated that his (former) attorney, Jonathan T. Green, served him with a purported “attorney’s lien” claiming a percentage of the monetary award recommended in this matter. Attorney Green did not file a petition for fees and costs on behalf of Complainant after the public hearing even though the post-hearing order made provision for it.

Respondent’s exceptions included five grounds on which it disagreed with the ROD and asked the Commission for relief: a) the recommended back pay award was barred by *res judicata*; b) the award exceeded the Commission’s jurisdiction by basing the back pay award on a finding of retaliation; c) the award is not related to the “discriminatory” behavior of Respondent and unlawfully exceeds the Commission’s statutory mandate to only make a prevailing

complainant whole; d) the award is arbitrarily based on conduct occurring after the default ruling; and, e) the award is against the manifest weight of the evidence in that there is no evidence connecting Respondent's "discriminatory" conduct to Complainant's physical injuries or his termination.

The exceptions of both parties subsequently were duly considered by a panel of the Commission. In its order of May 6, 2005, the panel declined jurisdiction over the subject matter of Complainant's exceptions. Although given the opportunity to file a petition for fees and costs, none was submitted by Attorney Green on behalf of Complainant and the time for doing so has long expired. This served as a waiver for an award of fees and costs. Further, there is no provision in the Illinois Human Rights Act for the entry or enforcement of an "attorney's lien." Therefore, the original recommendation that there be no award by the Commission of fees and costs was affirmed by the panel.

In response to Respondent's exceptions, the panel remanded the case for clarification of the ROD. While doing so, the panel sustained the findings in the ROD regarding the liability of Respondent for the allegation of racial discrimination in Charge No. 1998CF2406 as determined in the order of default entered by the Commission against Respondent on June 2, 1999. Further, the panel specifically found there was no need for a new hearing. Therefore, the purpose of this Supplemental Recommended Order and Decision (SROD) is to clarify the earlier ROD as directed by the Commission in light of the exceptions raised by Respondent. The original ROD is attached to this SROD for ready

reference (page numbers have been added to the ROD for the convenience of the reader).

Statement of the Case

The Statement of the Case included in the ROD remains unchanged and, taken with the introductory material stated above, provides an overview of the history and current procedural posture of the case.

Findings of Fact

The nine findings of fact included in the ROD are adopted in their entirety for the purposes of this SROD except that Findings Nos. 5 and 9 are revised as shown below. No additional findings of fact are necessary to support the clarification of the ROD as requested by the Commission.

5. Complainant is entitled to an award of \$225,333.41 as back pay.

The calculations supporting this award are found in the ROD and are incorporated in this finding of fact.

9. Respondent's claim that Complainant was discharged in July, 1999 because he was on disability for a non-work related injury for one year is not supported by a preponderance of the evidence in this matter. By persisting in this claim throughout the public hearing, post-hearing briefing and filing of exceptions before the Commission, Respondent is attempting to thwart the Commission in meeting its mandated responsibility to make this Complainant whole through a full award of back pay.

Conclusions of Law

The five conclusions of law included in the ROD are adopted in their entirety for the purposes of this SROD, except that Conclusion No. 4 is revised as indicated below. Further, an additional conclusion of law, Conclusion No. 6, is added as clarification of the ROD.

4. Based on the default of Respondent and its failure to effectively counter with credible evidence the requests made by Complainant with regard to an award for back pay, Complainant is entitled to an award for back pay in order to be made whole. The details of the award are presented both in the ROD and SROD and are incorporated in this conclusion of law.
6. No finding is made in this SROD or in the previously filed ROD concerning the allegation of retaliation made by Complainant against Respondent in Charge No. 2000CF0565. The latter was dismissed for lack of substantial evidence by the Department of Human Rights and Complainant did not file a request for review of that determination. Consequently, this allegation was not before the Commission and no finding was made regarding it. See Wallace v. Human Rights Comm'n, 261 Ill.App.3d 564, 633 N.E.,2d 851, 199 Ill. Dec. 55 (1st Dist. 1994).

Discussion

A. Default

The Commission's order of May 6, 2005 sustained the finding of liability for racial discrimination established in the order of default entered on June 2, 1999 and described in detail in the ROD. Nothing in the remanding order or the exceptions submitted by either party appear to require any further clarification regarding the issue of default.

B. Damages

Back Pay -- All of the exceptions to the ROD registered by the Respondent relate to the recommended award of back pay included in the ROD. Taken in their best light, the exceptions exhibit a profound lack of understanding on the part of Respondent regarding the methodology employed by the Commission in arriving at back pay awards, and, worse, may even be described as an apparent attempt by Respondent to intentionally mislead the reviewing Commission panel regarding this issue. The legal principles and methodology utilized by the Commission will be reviewed here in order to fully clarify the recommended award for back pay in this matter.

When crafting a recommended award for back pay, it is the Commission's general principle that any ambiguity presented by the evidence "should be resolved against the discriminating employer, since the employer's wrongful act gave rise to the uncertainty." Clark v. Human Rights Comm'n, 141 Ill.App.3d 178, 183, 490 N.E.2d 29, 95 Ill.Dec. 556 (1st Dist. 1986). An award by the Commission may provide for the reinstatement of a complainant and back pay.

775 ILCS 5/8A-104(C). The purpose of the award is to “make complainant whole,” to include “awards of interest on the complainant’s actual damages and backpay from the date of the civil rights violation.” 775 ILCS 5/8A-104(J).

After a determination of liability against a respondent, back pay will be considered in any case where the unlawful discriminatory action results in the complainant receiving salary or other primary compensation that is less than that he or she would have received if the discrimination did not occur. Most often, this will apply when the complainant is either discharged altogether from his or her employment, or where the discriminatory act deprives the complainant of a promotion or other personnel action that results in an increase in compensation. Unless an event intervenes that either tolls or ends the eligibility for back pay, it will accumulate without interruption at least through the date of the public hearing in the matter.

When traversing the timeline extending from the date of the discriminatory act through the date of public hearing, there are a variety of events that will cause the flow of back pay to end entirely. The most common of these intervening events occurs when a discharged complainant obtains new employment at a rate of pay equal to or in excess of the compensation last received from the respondent, or the promotion or other favorable personnel action, along with the appropriate increase in compensation, is eventually granted to the complainant. The present case is one in which the Complainant was unlawfully deprived of a favorable personnel action by the Respondent, *i.e.*, assignment to the driving route to which he was entitled based on his seniority.

He is, therefore, entitled to a back pay award that reflects the difference in compensation between what he actually received following the discriminatory act and the remuneration he would have received if his choice of routes had been granted.

In the ROD, consideration of back pay was allocated among three distinct time periods (Period A, Period B and Period C) because quite different policy considerations were involved in calculating the back pay, if any, that Complainant should be awarded for each such period. Period A extends from March 26, 1998 to July 2, 1998. During this time, Complainant should have been assigned to the truck route of his choice based on his seniority. He was an active, full-time employee of Respondent during the 15 pay periods included in Period A and the actual compensation he received (\$14,176.59) is clearly set forth in Respondent's (Hearing) Exhibit 2 (RX-2). Complainant testified that if he 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 calculations in the ROD credit him with 10 hours of such duties per week. His average compensation for the 15 pay periods, therefore, would have 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.

At the public hearing, Respondent sought to establish that the measure of back pay in Period A was a comparison between the compensation paid to

Complainant during that period with that paid to Scott Barney, the primary driver who actually drove the route which was denied to Complainant by the discriminatory action of Respondent. Respondent asserts that Mr. Barney received \$211.09 more in compensation than did Complainant during Period A and it proposed that this is the amount Complainant should be awarded as back pay. In its exceptions, Respondent describes the method of back pay calculation utilized in the ROD as “speculative and thereby not supported by substantial, reasonable evidence.”

Serendipitously, the latter statement echoes the legal principles followed in general by the Commission when it reviews the recommendations of an administrative law judge. In making recommendations to the Commission, the administrative law judge must base them on a preponderance of the evidence presented at the public hearing and he or she is constrained from basing them on speculation. When the Commission is called upon to review the recommendations of an administrative law judge, it searches the record to ascertain whether or not there is “substantial, reasonable evidence” supporting those recommendations. It will not overturn the recommendations unless they are against the manifest weight of the evidence.

However, both the Commission and the Appellate Court, in its review of Commission cases, recognized long ago that calculation of a back pay award is inherently speculative in that it is not possible to know precisely what events may or may not transpire during the relevant back pay period that would influence the amount earned by a person. That is to say, there is no way to anticipate with

mathematical certainty such factors as overtime (given or taken away), disability, family leave, raises, demotions or the host of other events that can impact the compensation paid to a given employee. The legal standard that is currently applied is again found in Clark, as cited above. In Clark, the court endorsed the concept from federal law that an “individualized remedy” should be formed in order to “best compensate the victims of discrimination, without unfairly penalizing the employer.” Clark at 183, *citing Stewart v. General Motors Corp.*, 542 F.2d 445 (7th Cir. 1976).

In this case, Respondent’s evidence regarding Mr. Barney only established what Mr. Barney earned during Period A while driving the route that should have been assigned to Complainant. The evidence is silent on such matters as whether Mr. Barney attempted to maximize his earnings during the relevant time period or if he drove the route on every possible occasion when it was available to him. In addition to failing to cross-examine Complainant about his assertions concerning his estimate of compensation for driving the subject route, Respondent’s own evidence did not refute the estimates advanced by Complainant as to the value of the route if he had been given the opportunity to drive it. Instead, an ambiguity is created as to the value of the route and, under Clark, that ambiguity must be resolved in favor of Complainant. Therefore, the award previously recommended as back pay for Period A will remain in effect in this SROD, *i.e.*, \$3,733.41.

Respondent apparently agrees with the conclusion in the ROD concerning Period B and the panel did not indicate that any point related to this period was in

need of clarification. Period B extends from July 3, 1998 to February 1, 1999, the period of time during which it is undisputed that Complainant was unable to work due to a physical disability (although it is disputed whether this disability was caused by an injury sustained on- or off-duty from Complainant's employment with Respondent, the key to determining if Complainant is eligible for a back pay award for Period C; see *below*). 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. Banks and American Airlines, Inc., Ill. H.R.C. Rep. (Charge Nos. 185CF0174, 1986CF0026 & 1986CF1502, June 11, 1993). Therefore, no back pay was recommended for Period B in the ROD and that recommendation will not be disturbed in this SROD.

The portion of the recommended award of back pay attributable to Period C is the source of Respondent's most strident objections, going so far as to base its arguments on a premise that is completely unsupported by the record in this case, which, it should be noted, arises from Charge No. 1998CF2406. Respondent contends that the back pay award for Period C is derived from a finding that Respondent retaliated against Complainant for filing the charge in this matter by discharging him in February or July of 1999, as alleged in Complainant's Charge No. 2000CF0565. Charge No. 2000CF0565 was dismissed by the Department of Human Rights for lack of substantial evidence and Complainant did not request review of that determination, which then became a final disposition of the charge. Therefore, no complaint regarding the alleged retaliation was ever filed with the Commission and that issue was not

before the Commission during the public hearing held in this matter. In cases where the Department has found no substantial evidence to file a complaint with the Commission, and the complainant either fails to file a request for review or the request for review is denied, the allegation cannot later be revived before the Commission. In effect, the action before the Department is *res judicata* with regard to prosecuting the same allegation before the Commission. Wallace v. Human Rights Comm'n, 261 Ill.App.3d 564, 633 N.E.2d 851, 199 Ill.Dec. 55 (1st Dist. 1994).

Here, no evidence or testimony was presented by either party regarding “retaliation” during the public hearing. While Respondent made a vague reference to Charge No. 2000CF0565 in its post-hearing reply brief (although in doing so, it did not state the charge number and it inaccurately characterized its dismissal as an action of the Commission rather than that of the Department), the term “retaliation” was not used by either party in any of the post-hearing briefs. The ROD never refers to Charge No. 2000CF0565 for any purpose and no finding of fact or conclusion of law regarding “retaliation” is included in the ROD. Simply stated, the term “retaliation” never appears in the ROD for any reason or in any context, and no inference of a finding of “retaliation” can be drawn from the discussion in the text of the ROD.

Yet, in its exceptions to the ROD, Respondent disingenuously asserts the existence of the completely fictional finding that the ROD includes an “erroneous finding that (Respondent’s) denial of light duty to (Complainant) and his termination were in retaliation for his filing the charge of discrimination regarding

the denied bid route.” Respondent’s Exceptions, at 13. The ROD, however, speaks for itself: Again, there is no mention of Charge No. 2000CF0565; there are no findings of fact or conclusions of law that even remotely deal with “retaliation;” there is no discussion in the body of the ROD regarding “retaliation;” and, no element of the award section cites “retaliation” as a reason for that award. In fact, Complainant’s retaliation allegation in Charge No. 2000CF0565 was not considered directly or indirectly in any way during the drafting of the ROD in this matter.

The discharge and the circumstances surrounding it do have a significance for this case and the nature of the back pay award to be recommended for Period C. However, this significance has absolutely nothing to do with any allegation of “retaliation” regarding that discharge. Instead, the issue at hand is whether the flow of back pay, after it is tolled by the period of disability, will resume. In this case, the evidence and testimony at the public hearing showed by (and beyond) a preponderance of the evidence that Respondent did not act in good faith in discharging Complainant and it persisted in vouching for this deceitful course of conduct at the public hearing. In doing so, it was seeking to benefit from its utter disregard of its own policy regarding employees returning from disability leave by limiting Complainant’s award of back pay.

As noted in the ROD, the evidence presented at the public hearing showed that Respondent’s policy regarding return to duty following a period of disability differs depending on whether the disabling condition came about due to an on-duty or off-duty cause. If the disabled employee is cleared to return to

work with restrictions, he or she will be given light duty only if the disabling injury occurred while on-duty. If it was off-duty, the employee is terminated if he or she cannot return to full duty before one year has elapsed after the commencement of the leave.

In this case, Complainant presented a note from his physician on February 2, 1999, after some seven months of disability leave, in which he was cleared for light duty. Respondent's manager refused to give Complainant a light duty assignment, stating that these were only given to employees who sustained their injuries on-duty, while the manager insisted that Complainant's injury was the result of an off-duty event. Consequently, Complainant was discharged on July 7, 1999 because he did not return to work within one year after the beginning of his disability leave. However, at the public hearing, Complainant credibly established by a preponderance of the evidence that the injury prompting his disability leave was, in fact, sustained by him on-duty.

An analysis of the testimony presented by Complainant and Respondent at the public hearing, along with the admitted documentary evidence, reveals that Complainant presented a preponderance of credible evidence that his disabling injury occurred on duty. The documentary evidence consisted of a settlement agreement (CX-7) for a worker's compensation matter between Complainant and Respondent with respect to an injury sustained during the time period relevant to this case. The ROD points out that Respondent had ample opportunity to examine Complainant at every stage of the public hearing regarding the nature of his disabling injury, but did not do so. There was cross-examination

and re-cross-examination following Complainant's direct examination and more cross-examination was made available to Respondent after Complainant's rebuttal testimony, the subject of which was the questionable validity of the documentation submitted by Respondent to support its assertion that Complainant's injury occurred off-duty. Further, Respondent did not call Complainant as an adverse witness during its own case in chief to further explore his assertions about the nature of the injury in question. Finally, considerable doubt as to the authenticity of Respondent's documentary evidence concerning the nature of the injury was raised by Complainant who testified that he never saw the completed leave form, that it was blank when he signed it, and that much of the information regarding the purported off-duty nature of the injury was entered in the handwriting of another (unknown) person. Tr. 85 (discussing RX-7). As clearly stated in the ROD, the testimony of Respondent's on-site manager (and only witness at the public hearing) was not credible, especially concerning the on-duty injury sustained by Complainant that led to the worker's compensation case settlement.

The attempt by Respondent to deceive the Commission to accept the premise that Complainant was discharged because he did not return to work for full duty within one year after an off-duty disabling injury cannot be rewarded by, in essence, ending this Complainant's back pay award when Period B, the disability leave, commenced. Under its own policy, Complainant should have been granted light duty status on or about February 2, 1999 when he presented the note from his physician that released him for light duty. On February 2, 1999,

Respondent knew that Complainant was the claimant for an on-duty injury that led to his need for disability leave. Its policy regarding return from disability leave stated that Complainant was eligible for light duty because his disabling injury occurred on-duty. Instead, in February, 1999 and persisting to and including the public hearing, Respondent affirmatively and deceptively continued to insist that Complainant was ultimately discharged in July, 1999 because he was injured off-duty and could not return to work without restriction. The flow of back pay cannot be ended in response to this deception. The back pay award for Period C must be allowed to stand and will be included as a recommendation in this SROD.

The calculation of the back pay award for Period C, which extends from February 2, 1999 to the date of the ROD, December 29, 2004, is presented in detail in the ROD. There is nothing in Respondent's exceptions or the remand order to indicate that a further clarification of the calculation of the award is necessary. Therefore, the net back pay award for Period C in the amount of \$221,600.00 will be included in the SROD. The total back pay award recommended in this case, to include both Periods A and C, remains at \$225,333.41.

Reinstatement -- The Commission's request for clarification of the award recommended in this matter has led to a reconsideration of the recommendation for reinstatement. In this matter, Complainant requested reinstatement at the public hearing (Tr. 23) and such a recommendation was included in the ROD. However, upon further reflection, that recommendation is not going to be included in the SROD. The award of back pay noted above

extends to the date upon which the ROD was released. The calculation of back pay for Period C, which results in the bulk of the back pay award, was prompted by Respondent's bad faith attempt to disregard its own policy regarding return to duty following a period of disability, thereby depriving the Commission of its mandated responsibility to make Complainant whole. The continuation of back pay until the date of the ROD is an appropriate recognition of this bad faith conduct. Reinstatement is not appropriate in this case because the award of back pay, the primary means of making this Complainant whole under Charge No. 1998CF2406, sufficiently redresses the discriminatory act for which this Respondent is liable. Therefore, the recommendation for reinstatement will not be included in this SROD.

* * *

The recommended award in this matter, reaffirmed or revised as discussed above, is specified in the recommendation summary below.

Recommendation

The recommendations made in this section supercede those included in the ROD and are now the recommendations presented to the Commission for final action in this matter. In its order of May 6, 2005, the Commission again affirmed the default entered against Respondent on June 2, 1999. Therefore, Respondent is found liable for a violation of the Human Rights Act as alleged in Charge No. 1998CF2406 and it is recommended that Complainant be awarded the following relief:

- A. That Respondent pay Complainant back pay in the amount of \$225,333.41;
- B. That Respondent pay Complainant interest on all elements of this award contemplated by Section 8A-104(J) of the Human Rights Act (735 ILCS 5/8A-104(J)) and calculated as provided in Section 5300.1145 of the Commission's Procedural Rules, to accrue until payment in full is made by Respondent;
- C. That the recommended award in Paragraph C of the ROD of December 29, 2004 at pages 20-21 that Complainant be reinstated to employment with Respondent be rescinded in its entirety (to include the award of \$950.00 per week from and after January 1, 2005) for the reasons set forth in this SROD;
- D. That any public contract currently held by Respondent be terminated forthwith and that Respondent be barred from participating in any public contract for three years in accord with Sections 8-109(A)(1) and (2) of the Human Rights Act. 775 ILCS 5/8-109(A)(1) and (2).
- E. That Respondent cease and desist from any discriminatory actions with regard to any of its employees and that Respondent, its managers, supervisors and employees be referred to the Department of Human Rights Training Institute (or any similar program specified by the Department) to receive such training as is

necessary to prevent future civil rights violations, with all expenses for such training to be borne by Respondent; and,

- F. That Complainant's personnel file or any other file kept by Respondent concerning Complainant be purged of any reference to this discrimination charge and litigation.

HUMAN RIGHTS COMMISSION

ENTERED:

August 22, 2005

BY: _____
DAVID J. BRENT
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

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