



In the Matter of:

RICHARD ASH,

ARB CASE NO. 97-080

COMPLAINANT,

ALJ CASE NO. 96-STA-21

v.

DATE: June 30, 1997

DSI TRANSPORT,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

Before us for review is the Recommended Decision and Order (R. D. and O.) issued on March 26, 1997, by the Administrative Law Judge (ALJ) in this case arising under the employee protection provision of the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C.A. § 31105. Complainant, Richard Ash (Ash), alleges that Respondent, DSI Transport (DSI), violated the STAA by terminating his employment for engaging in protected activity, *i.e.*, for complaining about the unsafe condition of the vehicle he was operating. DSI responds to this allegation by stating that Ash was discharged for legitimate, nondiscriminatory reasons, *i.e.*, for exhibiting a poor attitude and for violating Federal Motor Carrier Safety Regulations and company policy. The ALJ recommended that DSI be found to have violated the STAA and that it be ordered to pay back pay. The ALJ also found that Ash waived reinstatement. The findings of fact in the ALJ's R. D. and O. are supported by substantial evidence on the record as a whole and therefore are conclusive. 29 C.F.R. § 1978(c)(3) (1983).

In discussing the burden of proof to be met by the parties in STAA cases the ALJ found that "Respondent has failed to meet its burden to produce evidence that Ash's discharge was motivated by legitimate, nondiscriminatory reasons. R. D. and O. at 9. We find that DSI did meet its obligation to *produce* evidence of legal motivation in discharging Ash, but that Ash met his burden to *prove* that DSI's stated reasons were pretextual and that the true reason for his discharge was discriminatory. *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993).

We agree with the ALJ's conclusion that Ash waived reinstatement, R. D. and O. at 4, based upon Ash's stated preference and the record evidence that shows Ash is making approximately the same amount of money now, working for a competitor of DSI's, as he was when he was wrongfully terminated. *Id.* We caution litigants to thoroughly review the

applicable law regarding waiver of reinstatement, *e.g.*, *Cook v. Guardian Lubricants*, ARB Case No. 97-055, May 30, 1997, slip op. at 3-5, because it has been held that “statements made by an employee in the absence of an unconditional offer of reinstatement did not constitute a valid waiver of the right to seek reinstatement.” *Id.* at 4; *N.L.R.B. v. Seligman and Associates, Inc.*, 808 F.2d 1155 (6th Cir. 1986), *cert. denied* 484 U.S. 1026.

In all other respects the ALJ’s conclusions of law and fact are fully supported by the applicable law and the record evidence. Accordingly, the R. D. and O. is accepted (copy attached) and it is **ORDERED**¹ that:

- 1) Reinstatement has been waived;
- 2) DSI shall pay Ash the sum of \$1,000 per week as back pay, less required withholdings and less interim earnings, commencing from the date of his discharge;
- 3) The back pay award shall include all fringe benefits, if any, to which Ash was entitled at the time of his discharge; and
- 4) Interest shall be paid on the back pay award pursuant to 26 U.S.C. § 6621.

SO ORDERED.

DAVID A. O’BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member

¹ The order issued by the ALJ may not be sufficient for the parties to determine the exact amount of back pay owed. However, since neither party has requested a clarification of the ALJ’s order, we will enter a similar order. If either party believes that further clarification is necessary to effectuate enforcement of the order a motion seeking such clarification may be filed with the ALJ.