



In the Matter of:

**THOMAS DUTKIEWICZ,**

**ARB CASE NO. 97-090**

**COMPLAINANT,**

**ALJ CASE NO. 95-STA-34**

**v.**

**DATE: September 23, 1997**

**CLEAN HARBORS ENVIRONMENTAL  
SERVICES, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

### **ORDER DENYING STAY**

In a Final Decision and Order (Final Decision) issued on August 8, 1997, the Board found that Respondent, Clean Harbors Environmental Services, Inc. (Clean Harbors), violated the employee protection provision of the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C.A. §31105 (West 1994) when it discharged Complainant, Thomas Dutkiewicz. Pursuant to an earlier order, Clean Harbors reinstated Dutkiewicz to his former position effective July 22, 1997. Final Decision at 8. As further remedies for the violation, the Board ordered Clean Harbors to pay back pay, interest, and compensatory damages and to expunge from its files any references to the adverse actions it took against Dutkiewicz.

Clean Harbors has moved for a stay of the “monetary portion” of the Board’s final decision pending judicial review and offers to provide a bond to secure payment of the award if the Court of Appeals affirms the decision. Motion at 2.

The factors for determining whether the Board’s final decision should be stayed pending judicial review are:

- (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal;
- (2) the likelihood that the moving party will be irreparably harmed absent a stay;
- (3) the prospect that others will be harmed if the court grants the stay; and
- (4) the public interest in granting a stay.

*Goldstein v. Ebasco*, Case No. 86-ERA-35, Sec. Order Denying Stay, Aug. 31, 1992, rev'd on other grounds *sub nom. Ebasco Constructors, Inc. v. Martin*, No. 92-4576 (5th Cir. Feb. 18, 1993); *OFCCP v. University of North Carolina*, Case NO. 84-OFC-20, Sec. Order Denying Stay, Apr. 25, 1989, slip op. at 7.

We must deny the request for stay because Clean Harbors has not established the second factor: that it will suffer irreparable harm unless the stay is granted. The company contends that, absent a stay, “it is substantially likely that Clean Harbors would be unable to retrieve the funds it pays to Mr. Dutkiewicz should it ultimately prevail on appeal.” Motion p. 7. In this regard, the courts have recognized that “economic loss does not, in and of itself, constitute irreparable harm . . . . Recoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the (movant’s) business.” *Packard Elevator, Farmers Cooperative Society, Inc. v. ICC*, 782 F.2d 112, 115 (8th Cir. 1986), quoting *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). Clean Harbors is a large company, June 11, 1997 Order Denying Stay at 3 n.1, and has not argued, let alone demonstrated, that the payment of back pay, interest, and compensatory damages to Dutkiewicz would threaten the company’s existence.

Nor has Clean Harbors demonstrated the first factor, that it likely will prevail on the merits. Contrary to the company’s contention, Motion at 2-3, the Board did not impermissibly shift the burden of proof to Clean Harbors. Rather, under settled law, where there are both legitimate and discriminatory reasons for an action taken against an employee, the respondent has the burden of establishing that it would have taken the same action solely for the legitimate reason. *Mt. Healthy City School District Board of Ed. v. Doyle*, 429 U.S. 274 (1977); *Terbovitz v. Fiscal Court of Adair County, Kentucky*, 825 F.2d 111, 115 (6th Cir. 1997) (under Title VII of Civil Rights Act of 1964).

Likewise, internal complaints to managers about violations of motor carrier safety regulations are protected under the STAA, *Reemsnyder v. Mayflower Transit, Inc.*, Case No. 93-STA-4, Sec’y. Dec. and Ord. on Reconsideration, May 19, 1994, slip op. at 6, *aff’d sub nom. Reemsnyder v. OSHA, U.S. Dept. of Labor*, 1995 U.S. App. LEXIS 13583, No. 94-4214 (6th Cir. May 30, 1995), contrary to Clean Harbors’ contention otherwise. See Motion at 4-6. We earlier explained, Final Decision at 4, that the ALJ’s ruling on the weight to be accorded testimony concerning customer complaints comported with the law concerning hearsay evidence. See Motion at 6-7.

Addressing the public interest factor, Clean Harbors argues that “no public interest is promoted by rendering a litigant’s legitimate right of appeal moot.” Motion at 8. We disagree that the absence of a stay renders Clean Harbor’s appeal “moot.” Rather, Clean

Harbors has a statutory right to seek reversal of the Board’s finding of liability and if it prevails, the company legitimately may discharge Dutkiewicz and seek repayment of any sums paid to him.

The motion for a stay pending judicial review is **DENIED**.

**SO ORDERED.**

**DAVID A. O'BRIEN**  
Chair

**KARL J. SANDSTROM**  
Member

**JOYCE D. MILLER**  
Alternate Member