



In the Matter of:

KEVIN L. ISHMAEL,

ARB CASE NO. 97-118

COMPLAINANT,

ALJ CASE NO. 96-SWD-2

v.

DATE: October 17, 1997

CALIBUR SYSTEMS, INC.

and

**UNITED PETROLEUM
CORPORATION,**

RESPONDENTS.

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 June 23, 1997, and the Supplemental Decision and Order Awarding Attorney Fees (S. D. and O.) issued on September 24, 1997, by the Administrative Law Judge (ALJ) in this case arising under the Solid Waste Disposal Act (SWDA), 42 U.S.C. §6971 (1988). Complainant Kevin L. Ishmael (Ishmael) alleges that Respondents Calibur Systems, Inc. and United Petroleum Corporation violated the SWDA by terminating his employment for engaging in protected activity. The ALJ held that Respondents violated the SWDA and that Ishmael is therefore entitled to reinstatement, back pay, compensatory damages and attorney's fees.

The record in this case has been thoroughly reviewed, and we find that it fully supports the ALJ's findings of fact and conclusions of law.^{1/} *Remusat v. Bartlett Nuclear, Inc.*, Case

^{1/} The ALJ's analysis discusses at length Ishmael's establishment of a *prima facie* case. R. D. and O. at 19-22. Since this case was fully tried on the merits, the ALJ's task was to weigh all the evidence and testimony and decide whether the Ishmael had proven by a preponderance of the evidence that Respondents intentionally discriminated against him because of his protected activity. Once Respondents presented their rebuttal, the answer to the question whether Ishmael had presented a *prima facie* case was no longer particularly useful. *James v. Ketchikan Pulp Co.*, Case No. 94-WPC-4, (continued...)

No. 94-ERA-36, Sec. Fin. Dec. and Ord., Feb. 26, 1996, slip op. at 2; *Stockdill v. Catalytic Industrial Maintenance Co., Inc.*, Case No. 90-ERA-43, Sec. Fin. Dec. and Ord., Jan. 24, 1996, slip op. at 2; *Miller v. Thermalkem, Inc.*, Case No. 94-SWD-1, Sec. Fin. Dec. and Ord., Nov. 9, 1995, slip op. at 1; *Minard v. Nerco Delamar Co.*, Case No. 92-SWD-1, Sec. Fin. Dec. and Ord., July 25, 1995, slip op. at 1-2; *Daugherty v. General Physics Corp.*, Apr. 19, 1995, slip op. at 2. We adopt the ALJ's R. D. and O. (copy attached).

On July 15, 1997, Ishmael submitted a fee petition requesting that Respondents pay \$27,129.68 for approximately 263.15 hours of work performed by various individuals at various rates. The ALJ concluded that the fees and rates indicated in the petition were reasonable but, since the case was docketed with the Office of Administrative Law Judges on June 17, 1996, any work performed before that date was "performed for another forum and [was] not compensable." S. D. and O. at 1. We disagree. A complainant who prevails in a whistleblower action is entitled to "a sum equal to the aggregate amount of all costs and expenses (including attorney and expert witness fees) reasonably incurred by the complainant, as determined by the Secretary, for, or in connection with, the bringing of the complaint upon which the final order was issued." 29 C.F.R. §24.6(b)(4). Costs and expenses incurred in connection with the bringing of a complaint include work performed prior to the hearing phase of a whistleblower action. There is no allegation in this case that a separate claim was being pursued by Ishmael in a different forum. Ishmael was terminated on February 21, 1996 and the first entry for attorney costs is dated February 23, 1996. We therefore amend the S. D.

^{1/}(...continued)

Sec. Fin. Dec. and Ord., Mar. 15, 1996, slip op. at 3; *Cook v. Kidimula International, Inc.*, Case No. 95-STA-44, Sec. Fin. Dec. and Ord. of Dism., Mar. 12, 1996, slip op. at 2, n.3; *Creekmore v. ABB Power Systems Energy Services, Inc.*, Case No. 93-ERA-24, Dep. Sec. Dec. and Rem. Ord., Feb. 14, 1996, slip op. at 7-8.

and O. by ordering Respondents to pay a sum of \$27,129.68, which represents the amount recommended by the ALJ plus fees and costs incurred between February 23, 1997 and June 14, 1997.^{2/}

SO ORDERED.

DAVID A. O'BRIEN

Chair

KARL J. SANDSTROM

Member

JOYCE D. MILLER

Alternate Member

^{2/} The ALJ improperly deducted the \$24.50 in Federal Express charges as being included in overhead expenses. Specific delivery charges incurred in the case are recoverable as costs.