

## TOPIC 48a DISCRIMINATION AGAINST EMPLOYEES WHO BRING PROCEEDINGS

*[ED. NOTE: Prior to the 1984 amendments, this section of the LHWCA was numbered "49." Occasionally, it is still, though incorrectly, referred to as "Section 49." As late as July 9, 2001, the Board has referred to "retaliatory discharge under Section 49 of the Act, 33 U.S.C. §948a." Jones v. Cardinal Services, Inc., (BRB No. 00-1032)(July 9, 2001)(Unpublished). Although the text of Topic 48a reflects the new, post-1984 amendment, numbering, quotations, and parentheticals have been left undisturbed and still refer to "Section 49" which was in effect at the time of the issuance of the individual decisions.]*

### 48a.1 GENERALLY

Section 48a of the LHWCA reads as follows:

**It shall be unlawful for any employer or his duly authorized agent to discharge or in any other manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim compensation from such employer, or because he has testified or is about to testify in a proceeding under this chapter. The discharge or refusal to employ a person who has been adjudicated to have filed a fraudulent claim for compensation is not a violation of this section. Any employer who violates this section shall be liable to a penalty of not less than \$1,000 or more than \$5,000, as may be determined by the deputy commissioner. All such penalties shall be paid to the deputy commissioner for deposit in the special fund as described in section 944 of this title, and if not paid may be recovered in a civil action brought in the appropriate United States district court. Any employee so discriminated against shall be restored to his employment and shall be compensated by his employer for any loss of wages arising out of such discrimination: Provided, That if such employee shall cease to be qualified to perform the duties of his employment, he shall not be entitled to such restoration and compensation. The employer alone and not his carrier shall be liable for such penalties and payments. Any provision in an insurance policy undertaking to relieve the employer from the liability for such penalties and payments shall be void.**

33 U.S.C. § 948a.

## **48a.2 DETERMINING IF EMPLOYER HAS DISCRIMINATED**

Section 48a, 33 U.S.C. § 948a, prohibits discrimination by an employer (or his agent) against a claimant in retaliation for that claimant filing, or attempting to file, a compensation claim, or for testifying in a proceeding under the LHWCA. Discharging, or refusing to hire, a person who has filed a fraudulent compensation claim is exempt from this prohibition.

Under the 1984 Amendments to the LHWCA, a penalty may be assessed against the employer in the amount of at least \$1,000, but no more than \$5,000, for violations of Section 48a. These penalties are to be paid to the Special Fund, through the district director. Only an employer may pay the penalty--the carrier shall not be held liable for any penalties. Additionally, Section 48a holds that any claimant who has been discriminated against shall be reinstated with back pay. This provision is contingent upon the claimant's qualifications to perform the duties of the job. See also 20 C.F.R. §§ 702.271-702.274.

### **48a.2.1 Commission of a Discriminatory Act**

The essence of a discrimination claim is that the person who filed the compensation claim (or testified) is treated differently than other similarly-situated individuals. Holliman v. Newport News Shipbuilding & Dry Dock Co., 852 F.2d 759, 761, 21 BRBS 124 (CRT) (4<sup>th</sup> Cir. 1988) (all employees were required to call employer if absent for 5 workdays, regardless of the nature of the absence); Dickens v. Tidewater Stevedoring Corp., 656 F.2d 74, 76, 13 BRBS 629 (4<sup>th</sup> Cir. 1981) (employees guaranteed annual income was reduced by 8 hours for every day absent, even it for a compensable injury under the LHWCA).

See also Brooks v. Newport News Shipbuilding & Dry Dock Co., 26 BRBS 1 (1992), aff'd at 27 BRBS 100(CRT) (4<sup>th</sup> Cir. 1993) (no evidence indicating that claimant was treated any differently from any other employee who failed to disclose prior injuries on his employment application); Jaros v. National Steel & Shipbuilding Co., 21 BRBS 26, 29-30 (1988) (claimant was terminated for allegedly falsifying a pre-employment medical form); Leon v. Todd Shipyards Corp., 21 BRBS 190, 192 (1988) (claimant was terminated for falsifying his employment application); Hunt v. Newport News Shipbuilding & Dry Dock Company, 29 BRBS 105 (CRT) (4<sup>th</sup> Cir. 1995) (Unpublished), aff'g 28 BRBS 364, ( Employer investigating claimant's medical records because of the filed claim found that claimant omitted info on pre-employment physical and was therefore, rightfully terminated.). Although the discrimination most often takes the form of termination, the employer's actions may result in other discriminatory treatment, such as discriminatory pay practices. See Dickens, 656 F.2d 74, 13 BRBS 629.

The Board has explained that the manner in which the claimant is treated in relation to the employer's employment practices is a factor to be considered in a Section 48a case. Williams v.

Newport News Shipbuilding & Dry Dock Co., 14 BRBS 300, 303 (1981) (claimant was terminated for allegedly violating employer's policy against falsifying company records); Wallace v. C & P Tel. Co., 11 BRBS 826, 829 (1980). In Powell v Nacirema Operating Co., Inc., 19 BRBS 124 (1986) (Employer's alleged motive for discharging was pretextual, and its true motivation was its chagrin at having paid claimant to settle his compensation claim, only to have him return full-time to his usual employment shortly thereafter.), the ALJ noted that work gang members ordinarily were discharged only for such contractual violations as drunkenness, stealing, incompetence, or carrying a weapon. However, in Powell, according to the employer, the claimant had been discharged "because of his permanently and totally disabling ailments, which put him at risk of being reinjured or injuring others at work." The ALJ noted that the claimant performed his duties satisfactorily after his return to work, and that the employer ignored his treating physicians' opinions that he was able to return to work.

Another factor that is relevant to the consideration of a retaliatory discharge is witness credibility. Williams, 14 BRBS 300; Dill v. Sun Shipbuilding & Dry Dock Co., 6 BRBS 738, 743 (1978) (employer's stated reasons for termination were mere pretext for its actual reason of termination, which was to avoid future compensation liability).

For liability to attach under Section 48a, the employer must discriminate against the claimant because of the filing of a claim under the LHWCA, or testifying in a proceeding under the LHWCA. Buchanan v. Boh Bros. Constr. Co., Inc., 741 F.2d 750 (5th Cir. 1984) (claimant had no cause of action under Section 49 where his current employer discharged him due to a claim brought under the Jones Act against a former employer even though claimant was currently engaged in work under the LHWCA); Gondolfi v. Mid-Gulf Stevedores, 621 F.2d 695, 697, 12 BRBS 394 (5th Cir. 1980) (claimant was discharged for reporting late to work without a proper excuse); Nooner v. National Steel & Shipbuilding Co., 19 BRBS 43 (1986) (No discrimination took place; by claimant's own testimony, employer rejected him for medical reasons.).

Such discrimination must be committed by the employer after the filing of a claim (or testifying) to properly trigger Section 48a protection. Geddes v. Director, OWCP, 851 F.2d 440, 443, 21 BRBS 103 (CRT) (D.C. Cir. 1988) (claimant was discharged after criticizing his employer at a public hearing).

An employer's business judgment, and whether an employer's policies violate any statutes other than the LHWCA are not matters subject to review under Section 48a. Holliman, 852 F.2d at 761; Leon, 21 BRBS at 192-93. The judge does not have the authority to adjudicate whether or not an employee who brings a claim under Section 48a was terminated for justifiable cause according to the terms of an employment contract or collective bargaining agreement. Winburn v. Jeffboat, Inc., 9 BRBS 363, 367 (1978); Dill, 6 BRBS at 743.

The judge is only interested in whether the employer's policies are designed to, or have the effect of, discriminating against claimants under the LHWCA. Holliman, 852 F.2d at 761 ("Proper matters for inquiry in a [Section 48a] claim are whether compensation claimants, individually or as

a class, are treated differently from like groups or individuals, and whether the treatment is motivated, in whole or in part, by animus against the employee(s) because of compensation claims.").

The Board will not consider the issue of Section 48a unless it was initially raised before the judge. Swain v. Bath Iron Works Corp., 14 BRBS 657, 660 ("Since the issue was not raised before the ALJ, the Board will not consider whether the threat to fire did, indeed, constitute discriminatory conduct prohibited by Section 49."). Similarly, the judge may not, *sua sponte*, raise Section 48a in his Decision and Order. Rather, the judge must give the parties an opportunity to respond prior to the issuance of the Decision and Order. Once the Decision and Order is issued, the record is closed. Bukovac v. Vince Steel Erection Co., 17 BRBS 122 (1985); see also 20 C.F.R. § 702.336(b).

#### **48a.2.2 Applicable Statute of Limitations**

The limitations period applicable to Section 48a claims does not appear in the LHWCA. The limitations in Section 13 are expressly restricted to claims for compensation for disability or death, and there appears to be no other federal limitation statute which applies. In the case of such a "void which is commonplace in federal statutory law," the **Supreme Court** has held that a limitation period for an analogous state cause of action is borrowed. Board of Regents v. Tomanio, 446 U.S. 478 (1980). See also Owens v. Okure, 488 U.S. 235 (1989); Wilson v. Garcia, 471 U.S. 261 (1985); Practice Commentary following 28 U.S.C.A. § 1658 in the U.S. Code Annotated.

This rationale was recently used and developed in Davis v. Todd Shipyards Corp., 27 BRBS 335 (ALJ) (1993) (ALJ applies analogous California statute of limitations).

***[ED. NOTE: The 1990 enactment of a Uniform Statute of Limitations on Federal Claims, 28 U.S.C. § 1658, enacted as part of the Judiciary Improvements Act of 1990 adopts a uniform and general statute of limitations, settling on a period of four years, but applies only to causes of action or claims created by Congress after December 1, 1990, the effective date of the Act. Thus, applying Tomanio, 446 U.S. 478, the state law of limitations governing an analogous cause of action should be applied. See Practice Commentary following 28 U.S.C.A. § 1658 in the U.S. Code Annotated. However, as noted in the Practice Commentary, in reaching for an analogous statute in state law, one must bear in mind the policies underlying the federal claim being sued on so as "to assure that the importation of state law will not frustrate or interfere with the implementation of national policies." Occidental Life Ins. Co. of California v. EEOC, 432 U.S. 355, 367 (1977). As the Practice Commentary also stated, it may even be more appropriate in some cases to borrow time periods "drawn from federal law--either express limitations periods from related federal statutes, or such alternatives as laches." Del Costello v. International Brotherhood of Teamsters, 462 U.S. 151, 162 (1983).]***

#### **48a.2.3 Procedure and Burden of Proof**

After the district director receives a complaint from an employee alleging discrimination under Section 48a, the district director shall notify the employer. The District director shall also

initiate an investigation within five working days to determine all of the facts and circumstances pertaining to the alleged discrimination. 20 C.F.R. § 702.271(b). The District director may also conduct an informal conference on the issue. 20 C.F.R. § 702.271(c).

The **ultimate burden of persuasion lies with the claimant** in a Section 48a case. Manship v. Norfolk & Western Ry. Co., 30 BRBS 175 (1996); Martin v. General Dynamics Corp., Elec. Boat Div., 9 BRBS 836, 838 (1978). The Claimant's burden of proof is less than that required in a normal civil action, i.e., less than a preponderance of the evidence. Doubtful questions of fact must be resolved in favor of the claimant. A claimant bringing a claim under Section 48a bears the same light burden of proof that an injured claimant bears when he seeks compensation under the LHWCA. Geddes v. Benefits Review Bd., 735 F.2d 1412, 1417, 16 BRBS 88 (CRT) (**D.C. Cir.** 1984).

In establishing a *prima facie* case under Section 48a, the claimant must prove that:

- (1) the employer committed a discriminatory act, and
- (2) the discriminatory act was motivated by *animus* against the claimant because of the claimant's pursuit of his rights under the LHWCA.

Holliman, 852 F.2d at 761; Geddes, 735 F.2d at 1415; Rayner v. Maritime Terminals, Inc., 22 BRBS 5, 7 (1988) (claimant's name was removed from the list of rotating crane operators, thus resulting in an economic disability); Jaros, 21 BRBS at 29-30; Leon, 21 BRBS at 192; Rayner v. Maritime Terminals, Inc., 19 BRBS 213, 214 (1987); Tibbs v. Washington Metro. Area Transit Auth., 17 BRBS 92, 93 (1985), aff'd mem., 784 F.2d 1132 (**D.C. Cir.** 1986) (claimant filed a Section 49 claim when employer refused to rehire him after he was released to return to work); Brooks v. Newport News Shipbuilding & Dry dock Co., 26 BRBS 1 (1992), aff'd sub nom. Brooks v. Director, OWCP, 2 F.3d 64, 27 BRBS 100 (CRT)(**4th Cir.** 1993). Upon satisfaction of these two elements, a rebuttable presumption that the employer's act was at least partially motivated by the claimant's claim for compensation is created in favor of the claimant. Geddes, 735 F.2d at 1418.

The second prong of the test may be satisfied in a mixed motive situation, i.e., where the discriminatory *animus* played some part in the discriminatory act. Norfolk Shipbuilding & Drydock Corp. v. Nance, 858 F.2d 182, 187, 21 BRBS 166 (CRT) (**4th Cir.** 1988), cert. denied, 492 U.S. 911 (1989) (employer demonstrated general animus against longshore claimants by requiring them to resign in consideration of reaching a Section 8(i) settlement); Geddes, 735 F.2d at 1415 ("[A]n employer who discriminates against an employee both because the employee filed a compensation claim and because of other, independent reasons nonetheless violates [S]ection 49."); Rayner, 19 BRBS at 214; Miller v. Prolerized New England Co., 14 BRBS 811, 819 (1981), aff'd on other grounds, 691 F.2d 45, 15 BRBS 23 (CRT) (**1st Cir.** 1982) (claimant was terminated due to his union activity and not because of his compensation claim); Williams, 14 BRBS at 303 ("Although 'customary' harsh discharge policies are not alone a sufficient basis upon which to find a violation of Section 48a, the provision has been violated when termination was **in part** motivated by an

employee's pursuit of compensation."); Curling v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 770, 772 (1978) (claimant was discharged after he failed to appear for a scheduled appointment at employer's infirmary); Dill, 6 BRBS at 743 ("[S]upervisor relied at least in part on an impermissible discriminatory reason for dismissing the claimant.").

It is the employer's burden to establish that its animus was not motivated, even in part, by the claimant's exercise of his rights under the LHWCA. Powell v. Nacirema Operating Co., Inc., 19 BRBS 124 (1986); Geddes; Tibbs.

The ALJ may infer animus from circumstances demonstrated by the record. See Brooks, 26 BRBS at 3. The essence of discrimination is in treating the claimant differently from other employees. Jaros v. National Steel & Shipbuilding Co., 21 BRBS 26 (1988).

The employer may not offer the defense that its actions were based on other grounds as well as anti-compensation discrimination. Machado v. National Steel & Shipbuilding Co., 9 BRBS 803, 806 (1978) (claimant was terminated under a provision of a union agreement which held that employees who were absent for three consecutive days without notification and justifiable reason would be considered voluntarily terminated); Curling, 8 BRBS at 772.

In deciding a Section 48a case, the judge must examine the circumstances surrounding the alleged discrimination. *Animus* may be inferred from the surrounding circumstances when determining whether the employer's reasons for taking the discriminatory action are credible or merely pretext. Rayner, 22 BRBS at 7; Jaros, 21 BRBS at 29-30; Leon, 21 BRBS at 772; Miller, 14 BRBS 811; Ledet v. Phillips Petroleum Co., 163 F. 3d 901, 32 BRBS 212 (CRT)(5<sup>th</sup> Cir. 1998)(No evidence of a discriminatory motive.).

Once the claimant has established his *prima facie* case of discrimination, the burden shifts to the employer to prove that its *animus* was not even partially motivated by the claimant's exercise of his rights under the LHWCA. Geddes, 735 F.2d at 1417 (the employer is more likely than not to have greater access to the evidence on the particular issue than would the claimant); Rayner, 22 BRBS at 7; Jaros, 21 BRBS at 29-30; Leon, 21 BRBS at 192; Hunt, 29 BRBS 105 (CRT) (4<sup>th</sup> Cir. 1995); Brooks v Newport News Shipbuilding & Dry Dock Co., 26 BRBS 1 (1992); Manship v. Norfolk & Western Railway Co., 30 BRBS 175 (1996).

#### **48a.2.4 Penalty for Violation of Section 48a**

Section 48a provides for reinstatement and back pay only if the claimant remains qualified to return to his former employment. Rayner, 22 BRBS at 8.

The Board has determined that the judge must make all determinations regarding penalties under Section 48a. The Board believes that remanding the case to the district director for this determination would be unnecessarily time consuming. Winburn, 9 BRBS at 369-70; Curling, 8 BRBS at 774 ("The amount of the penalty to be assessed is properly an adjudicatory function, a discretionary matter to be based on evidence developed at a hearing."). See also 20 C.F.R. § 702.273 ("The Office of Administrative Law Judges is responsible for final determinations of all disputed issues connected with the discrimination complaint, including the amount of penalty to be assessed..."). The Board has, however, allowed the district director to determine the amount of back pay owed to the claimant. Dill, 6 BRBS at 744.

Finally, although the claimant may not prevail on a Section 48a claim, attorney's fees may be awarded for work performed on the Section 48a issue if the claimant was successful in obtaining a compensation award. Battle v. A.J. Ellis Constr. Co., 16 BRBS 329 (1984).

#### **48a.3 ADA**

In Dunn v. Lockheed Martin Corp., 33 BRBS 204 (1999), the Board found that an ALJ erred in finding that a claimant was collaterally estopped from raising a Section 48(a) discrimination claim because of a district court's judgment in the claimant's ADA lawsuit. The ADA claim and the LHWCA discrimination claim are two distinct causes of action involving different standards, and the issues presented by the LHWCA discrimination claim could not have been litigated in the ADA action.

The basis of the district court's dismissal of his ADA claim was its determination that the claimant's jaw deformity, skin condition and emotional condition do not constitute a disability protected by the ADA. This determination by the court did not involve an examination of any of the issues relevant to the inquiry under the LHWCA discrimination section. The Board stated: "In finding collateral estoppel applicable, the [ALJ] apparently relied on the court's brief discussion of the reasons why the claimant's claims of unlawful inquiry and retaliation under the ADA are groundless. This discussion is at most, peripheral to the court's judgment and, thus, fails to satisfy the requirement that, to be given collateral estoppel effect, the determination of the issue must have been a critical and necessary part of the court's judgment. Moreover, the court's discussion of unlawful inquiry and retaliation is confined to whether employer's actions were prohibited by the ADA, and the court applied standards specific to that statute. Thus, even if these findings could be considered essential to the court's judgment, they are not dispositive of the issues presented by the claimant's [LHWCA discrimination claim] arising under the LHWCA".