Dec

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of DARREN GONSALVES, Complainant, vs. CASCADE INDUSTRIES, INC., Respondent, and DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Appellee.	CASE NO. OSH 2005-6 DISCRIMINATION COMPLAINT DECISION NO. 15 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This Occupational Safety and Health case comes before the Hawaii Labor Relations Board (Board) pursuant to a written notice of contest filed May 12, 2005 by Respondent CASCADE INDUSTRIES, INC. (Respondent or CASCADE) by and through its owner, Jerry Johnson (Johnson), proceeding pro se. Respondent contests the decision issued on May 2, 2005 by Appellee DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (DIRECTOR), via the Hawaii Division of Occupational Safety and Health (HIOSH), finding Respondent terminated DARREN GONSALVES (Complainant or GONSALVES) for participating in a safety and health activity protected under Hawaii Revised Statutes (HRS) Chapter 396, in violation of HRS § 396-8(e).

On June 9, 2005, after conducting an initial conference in conjunction with OSH Case No. 2005-7, In the Matter of Timothy Santos v. Cascade Industries Inc. and the Director, Department of Labor and Industrial Relations, the Board issued Pretrial Order No. 143 to identify the following issues for hearing as follows:

1. Whether Respondent CASCADE INDUSTRIES, INC. violated HRS § 396-8(e) by discriminating against the Complainant for engaging in protected activity?

2. If so, whether the penalties and restitution imposed are appropriate?

On September 12 , 13, and 14, 2005, the Board conducted a consolidated case hearing for the taking of evidence in the instant case and Case No. OSH 2005-7. The parties stipulated that separate decisions would be issued. At the conclusion of the hearing, the parties agreed to make oral closing arguments in lieu of any written submissions. On November 8, 2005, the DIRECTOR filed the Director's Points and Authorities covering circumstances when an employee refuses to work because of an alleged safety or health hazard.

After careful consideration of the entire record, evidence, and arguments presented, the Board makes the following findings of fact by the preponderance of evidence, conclusions of law and order.

FINDINGS OF FACT

1. Respondent CASCADE is an industrial painting company that specializes in the application of polyurea paint. CASCADE was established over 25 years ago on the island of Kauai and is owned and operated by Johnson.

2. In 2004, Johnson hired GONSALVES and Timothy Santos (Santos) as general painters. GONSALVES had been employed by CASCADE for four months prior to his termination on January 27, 2005.

3. During a two-week period prior to January 26, 2005, Santos would first check on a painting job at Kauai Beach Villas, before joining GONSALVES and their lead man Terry Noice (Noice) at a jobsite in Kapahi, Kauai where they were learning how to apply polyurea paint for the first time to a wooden residential structure. Johnson was the foreman on the job and directed his employees on the application of polyurea; Noice made sure Santos and GONSALVES followed his lead since Noice had more experience than them in applying polyurea paint.

4. On January 26, 2005, after checking the jobsite in Kapahi where it was raining, Johnson directed Santos to report to work at a condomium project in Poipu, Kauai. Johnson had a complaint from the owner of the residence in Kapahi about the paint job which he discussed with Santos. Based on information from Noice, Johnson believed that GONSALVES was a bad influence on Santos, and therefore, wanted to separate them by giving them separate work assignments. Before Santos left the Poipu project in the early afternoon, he was not informed by Johnson or the foreman to return to Poipu the next day.

5. On January 26, 2005, GONSALVES was assigned by Johnson to work with Noice at CASCADE's warehouse located in Hanamaulu, Kauai. Noice's job was to sandblast an iron gate outdoors to prepare it for painting. While sandblasting, Noice wore a spray sock, leather gloves, and a fresh air hood with a mask protecting his eyes. The fresh air hood was attached to an oil water separator to provide clean air. The Board finds that Noice wore appropriate protective safety equipment while sandblasting on January 26, 2005. The Board does not credit GONSALVES' claim that the only protective equipment Noice wore consisted of a towel around his head with safety goggles and a painting respirator.[1]

6. GONSALVES did not sandblast for CASCADE even though he had the skill and experience, as well as the protective equipment (sandblasting hood), which he had offered to transport from Honolulu. GONSALVES' work assignment on January 26, and 27, 2005, was to stand watch as Noice sandblasted. GONSALVES' safety was not at risk as the second man watching Noice sandblast.[2]

7. Johnson had suspended GONSALVES from work two weeks prior to January 27, 2005.

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[1]See, Transcript of Proceedings (Tr.) dated Sept. 12-13, 2005, pp. 413-16.

[2]GONSALVES testified as follows:

Q: Was your safety at risk without a hood when you were just the second man?
A: No, sir.
Q. And would your safety – would your safety have been at risk without a hood if you were just the second man on the 27th?
A: No, sir.
Q: And on the 27th, then you didn't anticipate being the leadman?
A. No, sir.

* * *

Q: So your safety would not be at risk?
A. Not my safety, but the person that would be sandblasting would be at risk.

* * *

Q. So neither on the 26th or on the 27th, as anticipated, would your safety have been at risk?
A: No sir.

See, Tr. dated Sept. 14, 2005, Vol. III, pp. 619-20.

8. On January 27, 2005, Johnson expected Santos to return to the Poipu job site and GONSALVES was to again stand watch while Noice finished sandblasting the iron gate at CASCADE's warehouse in Hanamaulu. Johnson had asked Noice to call Santos and GONSALVES to make sure that Santos reported to Poipu, and that GONSALVES was on his way to the shop in Hanamaulu. Santos did not hear from Noice that he was supposed to report to work at the Poipu project. Instead, both Santos and GONSALVES reported to work at the residence jobsite in Kapahi. After he arrived, Santos talked to the owner of the Kapahi residence regarding his complaints about the paint job.

9. On or about 8:32 a.m. on January 27, 2005, after speaking with Noice, Johnson called GONSALVES. Johnson told GONSALVES that he was to supposed to be at the warehouse to finish the sandblasting job with Noice, and Santos was to report to the Poipu project. The Board credits Johnson's testimony about his phone conversation with GONSALVES.

10. Contrary to Johnson's work assignment, GONSALVES told Santos that Johnson instructed them to report to the shop in Hanamaulu to sandblast. The Board finds that GONSALVES refused to report to work at the shop to join Noice to finish the sandblasting work after being instructed by Johnson to do so, and instead mislead Santos to believe that Johnson was instructing him to sandblast.[3]

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[3]In testimony before the Board, GONSALVES could not explain why he lead Santos to believe that Johnson wanted him to sandblast on January 27, 2005:

> Q. One last question, Mr. Gonsalves. If your testimony is it wasn't your job to tell Tim Santos to go to Poipu, why did you tell him to go to . . . Hanamaulu to sandblast?
>
> A. Because that was what was told to me. I didn't say it wasn't my job to tell Tim. I said – what I meant was according to Mr. Johnson, he delegates his – his orders, and being that I wasn't a foreman at the time, he delegated me to tell him to come to the shop to do sandblasting. He did not delegate me to tell him to come to – to go to Poipu. He told me, tell Tim to come to the shop and you for sandblasting. . . .
>
> Q. And when Mr. Santos said he didn't want to do sandblasting, why didn't you explain to him that he was supposed to just watch?
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> A. I can't answer that. I don't know why I didn't explain to him why he was supposed to watch or who was to sandblast. I wasn't going to sandblast. I didn't sandblast the day before, and I wasn't about to sandblast that day.
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> Q: So you made him believe that he would be sandblasting?
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> A. Not made him believe. I just told him where we were

11. At no time, did Santos himself, or through his co-worker GONSALVES, ask Johnson to provide sandblasting safety equipment in order to perform sandblasting work. Santos refused to perform sandblasting work because he had no training or experience in sandblasting.[4]

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supposed to report to for the job that we're supposed to do.

Q. So you just failed to tell him that according to the instructions that you believed you received from Mr. Johnson, you failed to tell Mr. Santos that he was just being assigned to watch the sandblasting?

A. No, I just – like I said, I told him we were to go to the shop for sandblasting. In my mind, I wasn't going be the guy under the gun. I wasn't under the gun the day before because of this reasons, okay. Now, I just came out and told him where we were supposed to go, and his answer was no, I'm not. I did not explain to him what we had to do or who was going to sandblast, but I knew I wasn't going to be sandblasting.

See, Tr. dated Sept 14, 2005, pp. 617-18.

[4]Santos admitted that his lack of experience in sandblasting was the sole motivating factor in refusing to work, and any concern about safety was an afterthought:

Q. Okay. Prior to January 26th, did you ever discuss the subject of proper safety equipment to be used while sandblasting?

A. No.

Q. You never did?

A. No.

Q. You never talk about it with Mr. Gonsalves?

A. Oh, safety equipment?

Q. Yes.

A. Yeah, because my knowledge – my knowledge of sandblasting is nothing. I never did sandblasting in my life, don't know nothing about the product, what was supposed to be happening, what is expected. Don't even know how to turn the machine on.

Q. Okay, so you did have a – So you did discuss safety equipment for sandblasting with Mr. Gonsalves prior to January 26th?

A. Prior to January 26th?

Q. Yes.

A. No.

Q. When did you have a discussion with him?

A. The morning of the 27th.

See Tr. Sept. 12-13, 2005, pp. 302-03.

Q. But when he (Gonsalves) told you that you guys were supposed to go to the Hanamaulu shop to do sandblasting –

A. Yeah.

Q. – what was your response, tell us to the best of your recollection what your words were?

A. I not gonna do sandblasting and then – and – you know what I mean? If the conversation went more, it would have come out that I don't know nothing about sandblasting. The conversation never continued after that. I not going sandblast, you can tell him that, you know what I mean?

See, Tr. Sept. 12-13, 2005, p. 312.

Q. When you decided that you weren't going to do sandblasting, why didn't you call Jerry and tell him?

A. How come I didn't tell him? Because I was preoccupied talking to the home owner. What was going on there didn't – to me wasn't very important, you know what I mean? I was trying to get to why that home owner never like us on the job and this and that according to him.

Q. But you testified that you refused to do sandblasting because of safety concerns, yeah?

A. Yeah. I mean because I was told there wasn't a hood, you know what I mean? He said there wasn't safety –

Q. You testified that you overheard discussions about safety?

A. Yeah.

Q. And overhearing discussions about safety led you to have enough concerns to refuse to do the job?

A. Because, yeah, I refused. I refused to do the job, yeah, just plain out because I never like admit to Darren that I never did do sandblasting jobs, but I told Darren for tell him I'm not going to do the stuff and continued my conversation.

Q. Did you refuse to do the job because you didn't have training and experience, or were you genuinely concerned about safety?

A. Both.

* * *

Q. The safety equipment had nothing to do with you refusal?

A. Safety equipment?

Q. Yes,

A. Really, no.

* * *

A. For real, no. It was added after.

Q. Okay. How was it added after?

A. When I stop and think about it more, that my health was at risk, you know what I mean? He never mentioned that.

12. Johnson received a call back from GONSALVES informing him that Santos did not want to sandblast. As a result of the misinformation that Santos received from GONSALVES, Johnson terminated Santos because he reasonably believed that Santos refused a direct order to work at the Poipu project. At the same time, Johnson terminated GONSALVES for refusing to report to work to stand watch as Noice finished the sandblasting job at the Hanamaulu shop. When GONSALVES asked Johnson about a sandblasting hood for protection, Johnson informed him that a hood was not necessary since he was only to stand watch.[5]

> Q. When was that added after?
> A. Between being fired and driving to my sister's office to make this statement.
>
> * * *
>
> Q. Because you refused to work with the equipment having not been trained and having no experience?
> A. Yeah.
> Q. That was why you refused?
> A. That is why I refused, that is the bottom line, yes.

See, Tr. Sept. 12-13, 2005, pp. 357-60.

[5]See, Tr. Vol. III, dated Sept. 14, 2005, pp. 587-88, wherein Johnson clarified for the Board that when he told GONSALVES to go home, he meant to terminate GONSALVES. The Board credits Johnson's testimony as follows:

> So I ended up calling him (GONSALVES) I think at 8:32. I'm not saying this because I remember the exact times or anything. That's what it says on the thing. I called him about 8:30 and asked what was going on, where he was. And he said, I'm up at the Kapahi project. I said, where's Tim? He said, he's up here too. I go, tell Tim he needs to be getting to Poipu. And he says like, well, Tim doesn't want to sandblast. No, tell Tim to go to Poipu. And I'm going like, what? You know, tell Time to get to Poipu. And he says, like, Tim don't want to go so something. Now, in my head I'm thinking he doesn't want to go to Poipu, he doesn't want to go with Dennis, and I couldn't quite figure out what the sandblast remark was about. And so then I said, put Tim on the phone, whatever, and he said, he don't want to, or something to that remark. It's like you know what, tell Tim to go to Poipu or he's fired. Because I had kind of had it at this point with what was going on. And he said like – he either said, he's fired, or he said, you're sure, or something like that. And I said, yes. So again, my belief being that Tim was just saying, hey, heck with you. I'm not going to that job, you know. Even though it's a very good job. But maybe that wasn't what actually happened.

13. On January 27, 2005, GONSALVES filed a complaint identical to Santos' with the HIOSH alleging that he was discriminated against when he was terminated for refusing to sandblast without safety protection equipment. (Director's Ex. 1)

14. On or about January 28, 2005, Johnson was visited by a HIOSH inspector relating to the sandblasting work at Hanamaulu following the discrimination complaints filed by Santos and GONSALVES. Johnson was not cited for any safety violation arising from the safety inspection conducted by HIOSH relating to the sandblasting work at CASCADE's Hanamaulu workshop.[6]

15. On May 2, 2003, CASCADE was cited for violating HRS § 396-8(e), based on a discrimination investigation conducted by HIOSH finding as follows:

    a. Mr. Gonsalves engaged in a protected activity when he expressed the safety concerns of his co-worker and of himself to the employer that his co-worker and he would need proper safety equipment for the sandblasting work.

    b. Employer was fully aware of the situation because Mr. Darren Gonsalves, talked with the respondent directly about a request for the safety equipment for sandblasting work.

    c. Adverse action occurred when Mr. GONSALVES was terminated immediately by the employer during the talk over the phone.

    d. There was a clear animus shown, as the complainant was terminated immediately by the respondent during the phone call asking for safety equipment.

    e. The respondent stated that the complainant was terminated because he failed to call back on the second day after he was told to go home. The complainant stated that during the call the respondent told him that he was fired. The statements made by both the respondent

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Then Darren made some comment to me about, well, I don't have a blast hood. I said, you don't need a blast hood, Darren. You're going to be watching Terry, just like yesterday. . . . See Tr. Vol. III, dated September 14, 2005, pp. 495-96.

See Tr. Vol. III, dated Sept. 14, 2005, pp. 588-91.

and the complainant regarding the call conversation on January 27, 2005 show that the respondent did not ask the complainant to call back on the second day. (Director's Ex. 3)

16. HIOSH ordered CASCADE to pay a penalty of $1,000.00, back pay of $8,358.00 (less regular payroll deductions)to GONSALVES, reinstatement with full seniority, pay and benefits, posting a Notice to Employees, and clearing the personnel and other company records of any unfavorable references related to the citation. (Director's Ex. 4)

17. On May 9, 2005, CASCADE timely appealed the DIRECTOR's discrimination findings and order.

18. The Board finds that at no time prior to his termination did Santos engage in protected activity by raising safety and health issues relating to sandblasting and asking Johnson to provide proper sandblasting protective equipment.[7]

19. At no time did GONSALVES engage in protected activity by raising safety concerns for himself or Santos for proper safety equipment to perform sandblasting work, since Johnson never assigned GONSALVES or Santos to perform sandblasting work, prior to their termination.

20. The DIRECTOR and GONSALVES failed to show that he was confronted with a choice between not performing sandblasting work or subjecting himself or Santos to serious injury or death arising out of a hazardous condition, to justify his refusal to work as protected activity.

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[7]Regarding his knowledge about sandblasting, Santos testified as follow:

Q: Okay. Did you ever discuss with anybody, whether it be Mr. Jerry Johnson or Mr. Darren Gonsalves or anybody else with Cascade or anybody or any other third party, did you ever discuss – -
A. Safety.
Q. – proper safety equipment for sandblasting with anybody prior to January 27th?
A. No.
Q. Okay. The first time you talked about it with anybody was on January 27th?
A. Yes.

Tr. Sept. 12 - 13, 2005, pp. 303-04.

DISCUSSION

The issue in the instant appeal filed by Respondent is whether Complainant was terminated in violation of HRS § 396-8(e), allegedly for refusing to perform sandblasting work after raising safety and health issues by asking the Respondent to provide protective safety equipment.

The purpose of the Hawaii Occupational Safety and Health Law, Chapter 396, HRS, is to encourage employee efforts at reducing injury and disease arising out of the workplace and to prevent retaliatory measures taken against those employees who exercise these rights.

HRS § 396-8 provides, in part:

> (e) Discharge or discrimination against employees for exercising any right under this chapter is prohibited. In consideration of this prohibition:
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> * * *
>
> (3) No person shall discharge or in any manner discriminate against any employee because the employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or intends to testify in any such proceeding, or acting to exercise or exercised on behalf of the employee or others any right afforded by this chapter; . . . .

The burden of proof is the Director's and/or Complainant's to establish by a preponderance of evidence[8] a prima facie case of discrimination.

> "Proof of a prima facie case of retaliatory discharge requires a showing that (1) plaintiff engaged in a protected activity, (2) the employer subjected her to an adverse employment action, and (3) a causal link exists between the protected activity and the adverse employment action. (Citation omitted.) Like disparate treatment claims, the evidence

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[8]The DIRECTOR/Complainant have the burden of proof as well as the burden of persuasion. The degree or quantum of proof is by a preponderance of evidence. HRS § 91-10(5). The preponderance of the evidence has been defined as "that quantum of evidence which is sufficient to convince the trier-of-fact that the facts asserted by a proponent are more probably true than false." Ultimate Distribution Systems, Inc., 1982 OSHD § 26.011 (1982).

> necessary to establish a prima facie case of retaliatory discharge is minimal. (Citation omitted.) A plaintiff may satisfy the first two elements by demonstrating that she was fired, demoted, transferred or subjected to some other adverse action after engaging in protected activity. The causal link may be inferred from circumstantial evidence such as the employer's knowledge that the plaintiff engaged in protected activity and the proximity in time between the protected action and the allegedly retaliatory employment decision." Marcia Linville v. State of Hawaii, et al., 874 F.Supp 1095, 1110 (D. Haw. 1994). (Emphasis added.)

In the instant complaint, the DIRECTOR and/or GONSALVES failed to prove a prima facie case of discrimination by a preponderance of evidence, i.e., that GONSALVES was terminated because he refused to perform sandblasting work after asking for protective equipment for himself and Santos. Johnson never asked GONSALVES to perform sandblasting work. GONSALVES did not sandblast for CASCADE even though he had the skill and experience, as well as the protective equipment (sandblasting hood), which he had offered to transport from Honolulu. GONSALVES' work assignment on January 26 and 27, 2005, was to stand watch as Noice sandblasted. By his own admission, GONSALVES' safety was not at risk as the second man watching Noice sandblast.

Furthermore, the Board finds that Noice wore appropriate protective safety equipment while sandblasting on January 26, 2005. The Board does not credit GONSALVES' claim that the only protective equipment Noice wore consisted of a towel around his head with safety goggles and a painting respirator.

In addition, on or about January 28, 2005, Johnson was visited by a HIOSH inspector relating to the sandblasting work at Hanamaulu following the discrimination complaints filed by GONSALVES and Santos. Johnson was not cited for any safety violation arising from the safety inspection conducted by HIOSH relating to the sandblasting work at CASCADE's Hanamaulu workshop.

At no time did GONSALVES engage in protected activity by raising safety concerns for himself or Santos for proper safety equipment to perform sandblasting work, since Johnson never assigned GONSALVES or Santos to perform sandblasting work, prior to their termination. Having failed to show that GONSALVES engaged in protected activity that resulted in his termination, there are no facts from which the Board can reasonably infer a causal link to establish a prima facie case of discrimination.

Based on the record and evidence presented, the Board finds that Johnson terminated GONSALVES for refusing to report to work to stand watch as Noice finished the sandblasting job at the Hanamaulu shop. When GONSALVES asked Johnson about a sandblasting hood for protection, Johnson informed him that a hood was not necessary since he was only to stand watch.

Nevertheless, the DIRECTOR and GONSALVES urge this Board to conclude that GONSALVES' termination was the result of a "valid" refusal to perform sandblasting work without protective safety equipment, thereby constituting protected activity covered under HAR § 12-57-7(b)(2).

Under HIOSH's anti-discrimination provisions, HAR § 12-57-7(b)(2), when a hazardous condition cannot be "cured," employees have a right to leave a job under a constructive discharge claim."[9] This issue was first addressed by the Board in Decision No. 12, In the Matter of Sheldon Keliinoi, et al., v. SI-NOR, Inc. and Director of Labor and Industrial Relations.

HIOSH's anti-discrimination provisions were adopted as a rule in substantial part from the Occupational Safety and Health Act (Act) of 1970, 29 U.S.C. § 651, et seq. As a general rule, "there is no right afforded by the Act which would entitle employees to walk off the job, because of the potential unsafe conditions at the workplace." Hence, the refusal to perform an assigned task, does not include the act of walking off the job. If, however, an employee's valid refusal to perform the assigned work results in a suspension or discharge, then the employee's job refusal may be protected activity covered under HAR § 12-57-7(b)(2).[10]

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[9]HAR §12-57-7(b)(2) provides that:

> However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting themselves to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to be exposed to the dangerous condition, that employee would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through the resort to regular statutory enforcement channels. In addition, under such circumstances, the employee, where possible, must also have sought from the employer, and had been unable to obtain, a correction of the dangerous condition.

[10]According to Rabinowitz, "Employee Work Refusals Under Section 11(c)," Occupational Safety and Health Law, 2nd Ed. (BNA Books 2002), pp. 592-95:

> In 1973 the Secretary [of Labor] promulgated a regulation providing that an employee has a right to refuse to work in certain situations. Noting that the Act does not specifically provide employees with the right to refuse to perform hazardous work, the regulation observes

Under certain circumstances, protection may be afforded an employee who engages in a form of "self-help." Under HAR § 12-57-7(b)(2), such protection is afforded in very limited situations when an employee is confronted with a choice between not performing assigned tasks or being subjected to serious injury or death arising from a hazardous condition at the workplace, and left with no reasonable alternative, refuses in good faith to be exposed to the dangerous condition.

In Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980), the Supreme Court found valid and consistent with the Act, the federal rule permitting an employee's "self-help" by two employees, who refused to perform work on an elevated wire mesh screen two weeks after another employee had fallen through the screen to his death. In that case, the refusal to work occurred two weeks after the employees filed an Occupational Safety and Health Administration (OSHA) complaint and unsuccessfully voiced concerns to management over the safety of the elevated wire mesh screen. The District Court found that the two employees had refused to perform the cleaning operation because of a genuine fear of death or serious bodily harm, that the danger presented had been real and not something which had existed only in the minds of the employees, that the employees had acted in good faith, and that no reasonable alternative had realistically been open to them other than to refuse to work. The Sixth Circuit Court of Appeals upheld the factual determinations of the District Court, but disagreed with the conclusion that the regulation authorized an employee's refusal to work in certain situations. The Supreme Court held the federal regulation authorized the employees' preemptive refusal to work.

Like its federal counterpart, we interpret HIOSH's anti-discrimination rules to protect employees who refuse to perform hazardous work that the employees reasonably believe to be hazardous when "confronted with a choice between not performing assigned tasks or subjecting themselves to serious injury or death arising from a hazardous condition at work." An employee's preemptive refusal to work is protected if the employee chooses not to perform an assigned task over subjecting themselves to serious injury or death arising from a hazardous condition. Cases involving employee work refusal typically require

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that in most situations, employees will be able to correct hazardous conditions by bringing them to the attention of their employers or, if this fails, by requesting an inspection by OSHA pursuant to Section 8(f) of the Act. While an employer generally will not violate Section 11(c) if it disciplines an employee who refuses to perform normal job assignments because of alleged safety or health hazards, the regulation provides that an employee occasionally may be "confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from the hazardous condition at the work place. According to the regulation, Section 11(c) protects an employee in this situation who refuses to perform work that the employee reasonably believes to be hazardous."

objective evidence that the employee would have been in danger of death or serious injury, if the employee had performed the assigned tasks.[11]

In the instant case, the facts do not support any finding that the sandblasting work performed on January 26, 2005, by Noice, while GONSALVES stood watch, posed a potentially hazardous condition that could result in serious injury or death. GONSALVES was unequivocal in his testimony that standing watch posed no hazard or risk. Furthermore, while sandblasting on January 26, 2005 Noice wore appropriate protective safety equipment. Johnson testified that an inspection of the sandblasting operation by a HIOSH inspector after his termination of Santos did not result in a safety citation.

Assuming arguendo, GONSALVES proved his termination resulted from a valid refusal to perform sandblasting work, the DIRECTOR and GONSALVES failed to present any objective evidence that GONSALVES was confronted with a choice between not performing the sandblasting or being subjected to serious injury or death arising from a hazardous condition at the workplace. Nor, was there a showing that, left with no reasonable alternative, GONSALVES refused in good faith to be exposed to a hazardous condition.

Based on the foregoing, the Board concludes that Respondent did not unlawfully terminate Complainant in violation of HRS § 396-8(e).

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant contest pursuant to HRS § 396-11.

2. The Board concludes that GONSALVES failed to show he engaged in protected activity that resulted in his termination and there are no facts from which the Board can reasonably infer a causal link to establish a prima facie case of discrimination.

3. The Board concludes that Respondent did not violate HRS § 396-8(e), by terminating GONSALVES when he refused to report to work assigned to him on January 27, 2005, i.e. to stand watch as Noice finished the sandblasting job at the Hanamaulu shop.

ORDER

It is hereby ordered that in accordance with the foregoing, the DIRECTOR's decision, corresponding back pay away and penalty assessed against CASCADE are vacated.

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[11]Rabinowitz, Occupational Safety and Health Law, 2nd Ed. (BNA Books 2002) p. 595.

DARREN GONSALVES v. CASCADE INDUSTRIES, INC., et al.
CASE NO. OSH 2005-6
DECISION NO. 15
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

DATED: Honolulu, Hawaii, June 29, 2006.

HAWAII LABOR RELATIONS BOARD

BRIAN K. NAKAMURA, Chair

EMORY J. SPRINGER, Member

KATHLEEN RACUYA-MARKRICH, Member

Copies sent to:

Herbert B.K. Lau, Deputy Attorney General
Darren Gonsalves
Jerry Johnson