

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of)	CASE NO. OSAB 97-032
SAMUEL M. CRUZ, JR.,)	
Complainant,)	(Discrim. Complaint)
vs.)	
)	
FAST SIGNS,)	
Respondent,)	
and)	
)	
DIRECTOR, DEPARTMENT OF LABOR)	
AND INDUSTRIAL RELATIONS,)	
Appellee.)	

DECISION AND ORDER

This Occupational Safety and Health case is before the Board on a Notice of Contest filed by FAST SIGNS ("Respondent") from the decision of the DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, via the State Occupational Safety and Health Division ("Director"), filed on July 16, 1997.

In that decision, the Director determined that Respondent violated Hawaii Revised Statutes ("HRS") §396-8(e). The Director awarded Claimant back wages in the amount of \$2,655.73 and assessed Respondent a penalty of \$1,000.00, payable to the Director of Budget and Finance.

The sole issue to be determined is whether Respondent discriminated against SAMUEL M. CRUZ, JR. ("Complainant"), in violation of HRS §396-8(e); and if so, what is the appropriate remedy for the violation.

For the reasons stated below, we affirm the Director.

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FINDINGS OF FACT

1. Respondent is registered at the Department of Commerce and Consumer Affairs as "Sign Centers of Hawaii, Inc., dba FastSigns." Respondent is in the business of fabricating signs and banners.

2. On April 14, 1997, Complainant was hired by Respondent to work as a sign and banner maker. Complainant was scheduled to work five days a week, from 8:00 am to 5:00 pm. Complainant's monthly salary was \$1,300.00.

3. To make banners, Complainant used a glue called "HH-66 vinyl cement" to glue down the edges of the vinyl banners. Complainant used the glue on a daily basis since the first or second day on the job. Complainant breathed in the fumes that were emitted from the glue, and as a result, experienced headaches and sore eyes and throat while using the glue.

4. Respondent did not provide Complainant with any personal protective equipment, such as respirator or glasses, for protection while using the glue.

5. Prior to April 22, 1997, Complainant had requested to be provided with a mask or respirator to protect himself from the glue's fumes. Respondent's owner and manager, Earl Simao, pointed Complainant to a soiled paper dust mask that Respondent had on hand, but refused to provide him with any other protective equipment. Complainant declined to use the dust mask because it was used and dirty, and would not have provided him with sufficient protection from the fumes.

6. On April 22, 1997, at approximately 3:00 p.m., Complainant was making banners with co-workers in the store's production area. Complainant happened to read the label on the glue container. The label cautioned that use of the product may cause headaches, sore eyes, and sore throat.

7. Complainant became concerned and immediately brought this to the attention of Mr. Simao, who was standing at the customer service counter. Complainant told Mr. Simao that he was experiencing the same symptoms that were described on the label of the glue can. Complainant again asked for protective equipment.

8. Employer, through Mr. Simao, responded in a loud and angry tone, telling Complainant that if you can't do the job, then you don't work here anymore. Mr. Simao told Complainant to "go home" and "clock out". As Complainant gathered his belongings, he was told by Mr. Simao that he was fired.

9. Claimant's testimony that he was fired by Mr. Simao after voicing his concerns about the safety of the glue was corroborated by the trial testimony of his coworker, Jennifer Lamkin, and by the deposition testimony of coworker, Kendi Ho.

10. Complainant did not quit his job on his own accord and wanted to continue his employment had Mr. Simao not fired him.

11. Based on the testimony provided by Complainant, the evidence from Employer, and the testimonies of Complainant's

coworkers, we find that Complainant was terminated for voicing occupational safety and health complaints to his employer.

12. We do not credit Employer's testimony or evidence that Claimant was fired for his poor job performance or was to be fired anyway because of his job performance.

13. On July 8, 1997, shortly prior to the issuance of the Director's decision, Respondent offered to reinstate Complainant to his previous position with a salary increase of \$2.00 per hour. The offer was open until 7:30 a.m., July 10, 1997.

14. Complainant declined the offer of reinstatement. Instead, Complainant sought the remedy of back wages to the extent allowed by law.

15. The Director determined that Complainant was entitled to back pay from April 22, 1997, the date of termination, to July 8, 1997, the date of the offer of reinstatement, which Complainant refused. Complainant's back pay was calculated at \$2,655.73 for this period, based on Complainant's hourly wage rate, the number of hours he would have worked but for the termination, and the amount of income he received from employment he secured following the termination. We find the Director's calculation of back wages to be reasonable under the circumstances of this case.

16. There being no contrary evidence, we find the Director's assessment of a \$1,000.00 civil penalty against Respondent to be reasonable.

CONCLUSIONS OF LAW

Section §396-8(e) of the HRS provides, in part:

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.

We conclude that Employer discriminated against Complainant, in violation HRS §396-8(e), when it discharged Complainant for making complaints about occupational safety. Although Complainant's complaints were made to Mr. Simao, his employer, and not to the Director, given the remedial purpose of the anti-discrimination provision of §396-8(e) and our belief that it is reasonable to expect employees to bring their safety concerns or complaints to their employers first before making any formal complaints to the appropriate state authorities, we conclude that complaints to employers constitute protected activity under our Occupational Safety and Health law and is subject to protection under HRS §396-8(e), regardless of whether a complaint was filed with the Director or the State Occupational Safety and Health division. Our interpretation of HRS §396-8(e) is consistent with federal law, since the federal counterpart to HRS §396-8(e) has consistently been interpreted to include complaints to the employer, as well as to occupational safety and health authorities. See Marshall v. Springville Poultry Farm, Inc. 445 F. Supp. 2 (Penn. D.C. 1977); Reich v. Cambridgeport Air

Systems, 26 F. 3d 1187 (1st Cir. 1994). See also, Rothstein, Occupational Safety and Health Law § 207, at 264 (4th ed. 1998).

We further conclude that the award of back wages in the amount of \$2,655.73 and the penalty of \$1,000.00 payable to the Director of Budget and Finance were appropriate remedies for Respondent's violation of HRS §396-8(e).

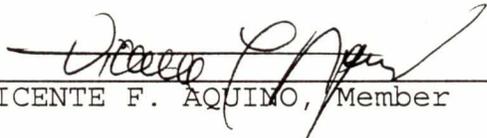
ORDER

The Director's July 16, 1997 decision is affirmed, in accordance with the foregoing.

Dated: Honolulu, Hawaii, JUN 10 1999.


FRANK YAP, JR., Chairman

EXCUSED
CAROL K. YAMAMOTO, Member


VICENTE F. AQUINO, Member

Jerry P. S. Chang, Esq.
Attorney for Complainant

Earl W. Simao
Representing Respondent

Herbert B. K. Lau, Esq.
Attorney for Appellee

I do hereby certify that the foregoing
is a full, true and correct copy of
the original on file in this office.

