

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

JAMES R. MURRAY,

Complainant,

and

SVC-HAWAII, LP (SHELL VACATION CLUB),

Respondent,

and

DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS,

Appellee.

CASE NO. OSH 2009-1

DECISION NO. 25

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 December 15, 2008 by Complainant JAMES R. MURRAY (Complainant or Murray), *pro se*. Complainant contests the decision issued on December 10, 2008, by Appellee DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (Director), via the Hawaii Division of Occupational Safety and Health (HIOSH), finding Complainant failed to carry his burden of establishing that he was terminated or discriminated against by SVC-HAWAII, LP (SHELL VACATION CLUB) (Respondent, Shell, or Company) for participating in a safety and health activity protected under Hawaii Revised Statutes (HRS) Chapter 396, in violation of HRS § 396-8(e).

On February 18, 2009, the Board conducted an initial conference by conference call in this matter and issued Pretrial Order No. 310, dated February 19, 2009, identifying the following issues for hearing as follows:

1. Whether Respondent discharged Complainant for discriminatory reasons in violation of HRS § 396-8(e)?

2. If so, what is the appropriate relief and penalty imposed?

On May 26, 2009, the Board¹ conducted a contested case hearing in the instant case. At the conclusion of the hearing, the Board requested the parties to submit written briefs by July 24, 2009. On July 23, 2009, the Director filed a Post-Hearing Position Statement taking no position on any issue listed in the Board's Pretrial Order. On July 24, 2009, Murray filed Closing Statements with the Board. On July 28, 2009, Shell submitted a Post Hearing-Closing Statement with the Board.

After careful consideration of the entire record, evidence, and arguments presented, on February 22, 2012, the Board² issued proposed findings of fact, conclusions of law and order in this matter. As no party submitted exceptions to the Board's proposed decision, the Board hereby makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

If it should be determined that any of these Findings of Fact should have been set forth as Conclusions of Law, then they shall be deemed as such.

1. Complainant Murray was, for all times relevant, a full-time Outside Public Contact (OPC) employed by Respondent. Murray was a sales person and sold tours and activities to customers and solicited people to attend timeshare presentations. Transcript (Tr.), pp. 17-18. Murray was hired by Respondent on or about November 19, 2004. Exhibit (Ex.) 12, p. 40.
2. Respondent Shell is a vacation club which sells tours and timeshares to visitors on the Big Island.
3. On November 1, 2007, Respondent imposed written Performance Expectations or minimum performance standards for qualified tour production for all OPCs. Ex. 12, p. 29.

Tour Production Requirements for Outside Public Contact's (sic)

¹The Board, consisting of Chair James B. Nicholson, Sarah R. Hirakami, and Emory J. Springer, conducted the hearing on the merits.

²Presently, the Board consists of Chair Nicholson and Board Members Sesnita A. D. Moepono and Rock B. Ley. The Board members have read the entire files of this proceeding and have reviewed the transcript of the May 26, 2009 hearing.

After (sic) 90 day probation period, all agents must meet a minimum monthly tour production. Outside Public Contract's (sic) must book an average of .5 tours per shift. All computations will be based on the calendar month. Example 20 shifts = 10 tours at the completion of the calendar month. All active OPC's (sic) not on probation will be held to minimum average tours starting November 1st (sic) 2007.

OPC's (sic) who are deficient will be placed on a calendar month Specific Performance in order to bring their production up to the minimum standard. All OPC's (sic) who are deficient at the end of the Specific Performance will be terminated due to lack of production.

4. Murray refused to sign or acknowledge receipt of the Performance Expectations sheet. Ex. 12; pp. 29, 40.
5. On or about December 3, 2007, Greg Farley (Farley), Respondent's General Manager, gave Murray a Written Warning for not booking any qualified tours from November 1, 2007 to November 30, 2007. Ex. 12, p. 30. Murray was advised that failure to improve his production would result in his termination from employment. Id.
6. Murray refused to sign the Written Warning. Id. Murray claimed that he was owed five training sessions. Ex. 12, p. 30. Respondent later rescinded the Written Warning because Murray claimed that he had not received training, and he was on vacation for 14 days in November. Id.
7. Murray received five one-hour training sessions with Farley or Marty Allen (Allen), Respondent's Marketing Manager, on February 9, 2008, February 13, 2008, February 18, 2008, February 19, 2008, and February 20, 2008. Ex. 12, p. 31.
8. On or about February 13, 2008, Murray's wife, Paulette (Mrs. Murray), who also worked as an OPC for Respondent, hit her head on a low clearance door of a kiosk at work and sustained a concussion and a neck injury. Ex. 12, p. 40. On or about February 17, 2008, Mrs. Murray's manager filed an incident report with the HR (human resources) department. Id.
9. On or about March 3, 2008, Murray filed a complaint with HIOSH at the Kona District Office resulting in a HIOSH inspection of the Company. Ex. 12, p. 40. During the investigation conducted by HIOSH on or around March 13-18, 2008, Murray took pictures of the worksite, made

measurements of the booth and door clearance, and talked to the HIOSH and building inspectors. Tr., p. 12.

10. On or about April 2, 2008, Farley gave Murray a Written Warning stating that from March 1, 2008 to March 31, 2008, Murray booked 7 qualified tours after working 21 shifts. Ex. 12, pp. 32, 103. Murray was required to book .5 qualified tours per shift, or 10.5 tours. Id. Murray signed the Written Warning. Ex. 12, pp. 40, 103.
11. On or about April 14, 2008, Murray emailed Respondent claiming that he was not offered proper training. Ex. 12, p. 55.
12. By email dated April 17, 2008, Hal Bonta (Bonta), Regional Director of Human Resources, thanked Murray for helping the OSHA representative with the booth. Ex. 12, p. 56. Bonta also stated he was impressed with the job the workers had done to correct the issues. Id.
13. On April 29, 2008, Sari Lassiter (Lassiter), Human Resources Manager, hand-delivered a letter to Murray advising him that the Company had received his recent complaint that he did not receive proper training, and the Company believed his complaint was unfounded. Ex. 12, pp. 84-85. Lassiter explained that in response to a previous complaint, Murray had received five hours of training in February. Id. In addition, the Company held training sessions on March 24-25, 2008, which Murray failed to attend.³ Lassiter also suggested that Murray could ask his wife for assistance as the Company considered her to be an excellent producer, but when asked about this, neither Murray nor his wife expressed an interest in working with one another regarding training. Id. Lassiter stated that despite 18 years of sales background and the additional training, Murray was not able to meet minimum production standards. Id. Lassiter reminded Murray that Respondent had established specific performance expectations for the OPC staff, and after the February training Murray was notified that he did not meet production standards in March and was given an additional 30 days to improve his performance and meet the minimum expectations for April. Id. Lassiter stated that as of April 29, 2008, Murray had produced zero (0)⁴ qualified tours for April and thus had failed to meet production standards justifying a negative employment action. Id. Lassiter stated that the Company considered his allegations that another individual

³Murray disputed the fact that he did not attend the group seminars. At the hearing, Allen admitted that Murray attended the group training but stated that Murray was terminated for lack of production. Tr., p. 46.

⁴At the hearing, Allen admitted that Murray had two or three tours but was still short of the ten-and-a-half tours required by the standard. Tr., pp. 43, 50.

was receiving favorable treatment, however, no exceptions were made and if production standards were not met, the employees were disciplined. Id.

14. On April 30, 2008, Allen, Farley and Lassiter arrived at the booth at 2:30 p.m. and told Murray to turn in his gifting vouchers. Ex. 12, p. 71. Murray received a paycheck and was also handed an envelope containing papers to sign him up on his wife's health insurance as his insurance coverage had expired at 12:00 a.m. Id. Murray stated that they also said that the OSHA inspector never came down and that they were not getting fined. Id.
15. On May 6, 2008, Murray submitted a letter of complaint to HIOSH claiming that Respondent retaliated against him and terminated him on April 30, 2008 because he helped the OSHA officer and building inspector during their site visit after his wife's injury, showing them where his wife was injured, measuring the door entrance and taking photos of the accident site. Ex. 12, pp. 121-22. Murray alleged that he was named as the one who measured the door clearance on February 17, 2008 in an incident investigation report that his wife submitted and turned in to Farley. Id. On April 17, 2008, Murray received an email from Bonta thanking him for helping the OSHA officer around the booth, and indicating he had never told Bonta that he helped the inspector. Id. On April 29, 2008, Lassiter said he produced zero (0) qualified tours in April and did not attend seminars whereas he actually booked two (2) qualified tours and attended the seminars. Id.
16. Regarding the safety complaint involving Mrs. Murray, on July 25, 2008, the Director through HIOSH issued a Citation and Notification of Penalty to Respondent based on inspections conducted March 13-18, 2008 of Respondent's sales booth where the alleged safety violations arose for inadequate lighting in the drop box closet; insufficient clearance in the drop box closet; no first aid supplies; no readily accessible fire extinguisher and no annual maintenance check; clutter in the drop box closet; an unmarked circuit panel; and misuse of flexible extension cords. Ex. 12, pp. 191-99. The area in question had a small storage area where a safe was kept and where the employees would drop off proceeds during shifts. Id. The door above the safe was 59 inches high and did not meet the requirements of the standards. Id. In addition no lighting existed. Id. The inspector also noted there were wooden 2x4's protruding above the safe which created a hazard which an employee banged her head on while proceeding to stand up after placing money into the safe. Id. The Director imposed fines of \$1,225.00 on the Company. Id.
17. Regarding Murray's retaliation complaint, Murray stated in a Witness Statement dated August 18, 2008, that the following is true and accurate to the best of his knowledge:

I filed a safety complaint w/ HIOSH and they got inspected by HIOSH on 3/13/08. I met all the tour requirements prior to March of 2008. In March 08 I received a letter from HR stating that I did not meet the required tours booking. I booked nine tours and was one short. In April I booked nine tours and was one short. Ex. 12, p. 49.

18. By letter dated December 10, 2008, the Director, through HIOSH, advised Murray that HIOSH received his letter dated May 6, 2008, regarding the discrimination complaint he filed alleging that Respondent violated HRS Chapter 396-8(e) by terminating him. The letter stated:

In determining whether or not a prima facie case exists, four elements must be considered: 1) protected activity; 2) employer knowledge, 3) adverse action, and 4) a causal link between all the elements. All of the elements must be met to constitute a violation of Section 396-8(e), HRS.

Based on our investigation by the HIOSH, it has been determined that your complaint does not meet the requirements of a prima facie case. The investigation found that your claim that you were singled out for disciplinary action because of your safety complaint was not supported by facts. Investigation found other employees who did not meet performance standards were also written up and/or terminated. The minimum expectation policy was established prior to you filing your safety complaint. Records showed and by your own admission that you did not meet the performance expectation in March and you continued to perform below expectation after the write up in April. The investigation concluded that continued to perform below expectation was the reason for your dismissal. The SVC-Hawaii, LP (Shell Vacation Club) demonstrated legitimate business reasons to support its decision resulting in your termination.

Based (sic) the above reasons, the burden of establishing that you were discriminated against in violation of Section 396-8(e), HRS, cannot be sustained. Accordingly, we are closing your complaint.

Ex. 12, pp. 7-8.

19. By letter dated December 15, 2008 and received by HIOSH on December 18, 2008, Murray timely filed the instant contest of the Director's decision to close his case with the Board. Ex. 12, p. 6.
20. Based on a review of work records provided by the Respondent to HIOSH, the Board finds that contrary to his Witness Statement, dated August 18, 2008, Murray consistently fell short of expectations every month since November 2007. Ex. 12, p. 42. In November 2007, Murray worked five (5) shifts and booked zero (0) tours. Id. In December 2007, Murray worked twenty (20) shifts and booked six (6) tours. Id. In January, Murray worked twelve (12) shifts and booked two (2) tours. Id. In February 2008, Murray worked twenty (20) shifts and booked nine (9) tours. Id. More importantly, in March 2008, Murray worked twenty-one (21) shifts and booked seven (7) tours. Id. In April 2008, Murray worked twenty (20) shifts and according to the Respondent's records, booked zero (0) tours. Id. However, Allen, admitted in his testimony that Murray actually sold two (2) tours in April 2008. Tr., p. 43. Mrs. Murray stated that Murray sold three (3) tours. Id. Allen stated that Murray would still have been seven (7) tours short even if he sold three (3) tours. Tr., p. 50.
21. Allen also admitted that Murray attended the second training but stated that Murray was fired for lack of production. Tr., p. 46.
22. Mrs. Murray testified that David Pickering (Pickering), Allen's brother-in-law should have been fired because of low production. Tr., p. 14. Allen testified that Pickering had been written up but that his production was higher than Murray's. Tr., p. 44. According to records considered by HIOSH, Pickering worked eleven (11) shifts and sold eight (8) tours for November 2007; in December 2007, Pickering worked eleven (11) shifts and sold eight (8) tours; in January 2008, Pickering worked thirteen (13) shifts and sold six (6) tours and was .5 short; in February 2008, Pickering worked 13 shifts and sold 7 tours; in March 2008 Pickering worked twelve (12) shifts and sold three (3) tours and was three (3) tours short; and in April 2008, Pickering worked thirteen (13) shifts and sold eight (8) tours. Ex. 12, p. 42. Based on the foregoing, contrary to Complainant's allegations, the Board finds that Pickering's sales production was higher than Murray's and Pickering did not fail to sell the minimum number tours for two consecutive months.
23. Based on the record, the Board finds that Respondent was incorrect in stating in Murray's termination letter that Murray had produced zero (0) tours in April 2008 and failed to attend training, when the preponderance of evidence indicates that Murray produced three (3) tours in April 2008 and did attend the training. Nevertheless, even if Murray produced three (3) tours in April 2008 as corrected, this number is far less than the ten (10)

tours he was expected to produce to meet the minimum production requirements based on the twenty (20) shifts Murray worked.

24. Based on the record, the Board also finds that Murray's Written Statement to HIOSH, dated August 18, 2008, is false or incorrect as Murray claimed to have met all the tour requirements prior to March of 2008. The record clearly indicates that Murray consistently performed below expectations in his tour sales since November 2007. In addition, Murray's statement that he booked nine (9) tours in March and was one (1) short is also false or incorrect since Respondent's records indicate that Murray worked twenty-one (21) shifts and sold seven (7) tours, or 3.5 tours short of the 10.5 tours expected in March 2008. Also, Murray's statement that he booked nine (9) tours in April 2008 and was one (1) short is also false or incorrect as the record indicates that Murray sold three (3) tours, which was seven (7) short of the ten (10) tours expected. Thus, given these false or incorrect statements from Complainant regarding material issues in this case, the Board does not credit Murray's testimony that he was discriminated or retaliated against by Respondent for assisting the HIOSH inspector investigate his wife's safety complaint.
25. Mrs. Murray was considered by Respondent as an excellent producer and was the subject of the safety complaint filed with HIOSH. Ex. 12, pp. 45, 55. There is no evidence in the record that the Respondent retaliated against Mrs. Murray for filing her safety complaint with HIOSH.
26. The Board finds that the facts in the record establish that Murray was terminated for failing to meet Respondent's minimum production standards for two consecutive months.

CONCLUSIONS OF LAW

If it should be determined that any of these Conclusions of Law should have been set forth as Findings of Fact, then they shall be deemed as such.

1. The Board has jurisdiction over this case pursuant to HRS § 396-11.
2. 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:

* * *

- (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;
3. The burden of proof is on the Complainant to establish by a preponderance of evidence⁵ a prima facie case of discrimination.
 4. “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 [or him] 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 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 [or he] 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.)
 5. Complainant failed to prove by a preponderance of evidence that Respondent terminated Complainant after he engaged in protected activity under HRS Chapter 396.
 6. Complainant failed to prove by a preponderance of evidence that Complainant’s exercise of protected activity, i.e., assisting HIOSH in the investigation of Mrs. Murray’s safety complaint, was a substantial factor in Respondent’s decision to terminate Complainant.
 7. The Board concludes that Complainant was not terminated for exercising a protected right under HRS § 396-8(e).

⁵The Complainant has 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).

8. The Board concludes that Respondent did not terminate Complainant in violation of HRS § 396-8(e).

ORDER

This contest filed by Complainant on December 15, 2008 is dismissed.

DATED: Honolulu, Hawaii _____ March 12, 2012 _____.

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



SESNITA A. D. MOEPONO, Member



ROCK B. LEY, Member

Copies sent to:

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