

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of)	CASE NO. OSAB 88-5
)	(OSHCO ID R2831)
DIRECTOR, DEPARTMENT OF)	(Report No. 951510)
LABOR AND INDUSTRIAL RELATIONS,)	
and)	
DUKE JOHN PERRY,)	
)	
Complainants,)	
)	
vs.)	
)	
DIVERSIFIED DISTRIBUTORS, INC.,)	
)	
Respondent.)	

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DECISION AND ORDER

This occupational safety and health case is before the Board on written notice of contest and petition for review of an Order of the Administrator of the Occupational Safety and Health Division of the Department of Labor and Industrial Relations, dated March 3, 1988, finding a complaint of unlawful discrimination, filed by Complainant, DUKE JOHN PERRY, to be valid. Respondent, DIVERSIFIED DISTRIBUTORS, INC., was ordered to reinstate Complainant PERRY and to compensate him in full for all back wages and benefits that would otherwise have accrued to him, less any amounts received for unemployment benefits or other employment from the date of dismissal through the date of reinstatement.

The issue before the Board is whether Complainant, DUKE JOHN PERRY, was unlawfully discharged by Respondent, DIVERSIFIED DISTRIBUTORS, INC. ("DIVERSIFIED"), pursuant to §396-8, H.R.S.

A motion to join DUKE JOHN PERRY and to amend caption to include DUKE JOHN PERRY as a Complainant was granted by the Board on October 3, 1988. A bifurcated hearing was held at the Board on November 25, 1988, and December 2, 1988.

The file and certain stipulated facts were accepted into evidence by the Board.

FINDINGS OF FACT

The Board incorporates into its findings of fact those facts stipulated to by the parties, filed with the Board on November 25, 1988.

1. Complainant, DUKE JOHN PERRY ("PERRY") was hired by DIVERSIFIED on August 13, 1987, as a warehouseman. His rate of pay was \$5.50 per hour for a 40-hour work week. PERRY understood that he would be on probation for six months.

2. As a warehouseman, PERRY worked with other employees or alone in picking orders, palletizing loads, repairing pallets, and sweeping the warehouse.

3. On August 26, 1987, PERRY was assigned to the warehouse freezer section under the supervision of Michael Salsedo. Ten minutes after beginning work there, PERRY sustained a work injury to the fingers of both hands when he

grabbed the frame of the forklift to steady himself as he was being lifted on an unguarded pallet.

4. As a result of the injury, PERRY did not work again until November 16, 1987. Upon PERRY's return to work, he was placed on light-duty status on the advice of his physician.

5. PERRY was assigned to pulling small solo orders, cleaning the warehouse, lifting of five to ten pounds, repairing pallets, and off-loading containers with other warehousemen.

6. PERRY, however, was unable to perform satisfactorily. His performance, even before his injury, was slow. His foreman received verbal complaints from co-employees about his slowness. Claimant was unable to palletize loads properly, and the majority of his orders were filled incorrectly. Naomi Lee, who checked PERRY's loads before and after his injury, noted no improvement. The loads were a "hodge podge." We credit Ms. Lee's testimony. PERRY did not have the comprehension for warehousing.

7. A performance evaluation of PERRY covering the periods from August 16, 1987 through August 26, 1987, and November 16, 1987 through December 11, 1987, showed that PERRY's job performance was unsatisfactory, because of his difficulty in filling orders properly, in comprehending what was expected of him, and in working at an acceptable pace. We credit the report prepared by Darryl Andaya and Naomi Lee.

8. On December 11, 1987, PERRY was called into Darryl Andaya's office to review the evaluation report with Andaya and Richard Morikawa, Director of Operations. PERRY was then terminated because of unsatisfactory work performance during the probationary period.

9. On December 15, 1987, PERRY lodged a complaint with the Division of Occupational Safety and Health, Department of Labor and Industrial Relations ("DOSH"), alleging that he was unlawfully discharged for refusing to ride on and work from an unguarded pallet.

10. Prior to his injury, PERRY had ridden the unguarded pallets on a number of occasions, never indicating that he did not want to ride the pallets.

11. After his return to work to light duty, PERRY was not ordered to ride the pallets, and no reports were received by his foreman or management of any refusal by PERRY to ride the pallets.

12. Rodney Masumoto, compliance officer for DOSH, inspected the jobsite on January 7, 1988, to obtain information related to the allegation of unlawful discharge. At the time of the investigation, PERRY was unable to specify incidents in which he had refused to get on the pallets after his injury, except for one, which he was not able to give a date for or any details on. The officer was unable to obtain any corroborating

testimony of such an incident or any write-up for such an incident.

13. In investigating PERRY's complaint, DOSH cited DIVERSIFIED for unsafe conditions related to the unguarded pallets. DIVERSIFIED has paid the fines imposed and has taken corrective action.

CONCLUSIONS OF LAW

Complainants, DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS ("DIRECTOR"), and DUKE JOHN PERRY, allege that PERRY was terminated for refusing to work from an unguarded and unsafe raised pallet, in violation of Section 396-8(e)(1)(B), H.R.S. That section provides, in pertinent part:

(1) No person shall discharge, suspend or otherwise discriminate in terms and conditions of employment against any employee by reason of:

(B) The employee's failure or refusal to engage in unsafe practices in violation of this chapter or of any standard, rule, regulation, citation or order issued under the authority of this chapter;

In support of their contention, Complainants rely on the testimony of DUKE JOHN PERRY. We find, however, that PERRY was not ordered to ride a pallet after his work injury, and that his foreman and management were unaware of any alleged refusals

until after the unlawful discharge complaint was filed. Even if PERRY had been asked to get on the pallet after the work injury and had refused, we are unable to find on this record that such was the basis for his termination.

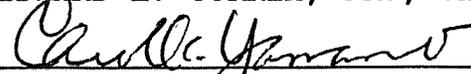
We find that PERRY was terminated for the reasons given in his December 11, 1987 performance evaluation. PERRY had difficulty in filling orders properly, in comprehending what was expected of him, and in working at an acceptable pace. We credit the evaluation prepared by Darryl Andaya and Naomi Lee. We also credit the testimony of Albert Pacanas, Michael Salsedo, Richard Morikawa, and Allen Reeves, who testified that PERRY lacked the comprehension for warehousing and was unable to perform satisfactorily. Accordingly, we conclude that Respondent, DIVERSIFIED DISTRIBUTORS, INC., did not terminate PERRY's employment, in violation of §396-8, H.R.S..

ORDER

The March 3, 1988 determination of the Administrator of the Occupational Safety and Health Division of the Department of Labor and Industrial Relations finding a violation of §396-8, H.R.S., and ordering DIVERSIFIED DISTRIBUTORS, INC., to reinstate DUKE JOHN PERRY with back pay, is hereby reversed.

Dated: Honolulu, Hawaii, FEB 16 1990.


EDWARD L. CORREA, JR., Chairman


CAROL K. YAMAMOTO, Member

Excused
RONALD Y. KONDO, Member

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

