

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of )  
 DAVID ESGUERA, )  
                   Complainant, )  
                   ) )  
 vs. ) )  
                   ) )  
 PATISSERIE BY THE SEA, )  
                   Respondent, )  
                   ) )  
 and ) )  
                   ) )  
 DIRECTOR, DEPARTMENT OF LABOR )  
 AND INDUSTRIAL RELATIONS. )

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CASE NO. OSAB 88-8  
(OSHCO ID C0308)

FILED  
 LIR APPEALS DIV.  
 90 JUL 17 A7:55

DECISION AND ORDER

This occupational safety and health case is before the Board on written notice of contest of a decision of the Administrator of the Occupational Safety and Health Division of the Department of Labor and Industrial Relations dated July 12, 1988, denying a complaint of discrimination filed by Complainant, DAVID ESGUERA, against Respondent, PATISSERIE BY THE SEA, under Section 396-8(e), H.R.S.

The parties agreed to strike Exhibit "A", filed by Complainant's attorney with his letter dated May 25, 1989. The remainder of the file was stipulated into evidence.

The sole issue before the Board is whether Complainant was unlawfully discharged by Respondent, pursuant to Section 396-8(e), H.R.S.

## FINDINGS OF FACT

1. Complainant, DAVID ESGUERA, was hired by Respondent, HEINO VOSSLER dba PATISSERIE BY THE SEA, on a part-time basis in November 1987, and continued in part-time employment with Respondent until discharged on March 30, 1988. Claimant was working three hours a day and three days a week when he was discharged.

2. On March 29, 1988, Complainant and Respondent got into a heated discussion concerning ventilation at the workplace.

3. On March 30, 1988, Complainant was scheduled to begin work at 9:00 a.m. Instead of going to work, however, Complainant went to the Maui office of the Occupational Safety and Health Division of the Department of Labor and Industrial Relations ("DOSH") to complain about inadequate ventilation at Respondent's workplace.

4. Complainant met with a DOSH compliance officer and about 9:00 a.m., the compliance officer telephoned Respondent to inform him of the complaint against his company. The officer did not say who initiated the complaint.

5. Complainant's wife, also employed by Respondent, stated that when she reported to work about 9:30 a.m. on March 30, 1988, Respondent did not allow her to enter the workplace and told her he did not want Complainant to return to

work either, because he had filed a complaint with DOSH. We credit the statement by Complainant's wife.

6. When Complainant returned to work about 11:00 a.m. on March 30, 1988, he saw his wife outside the workplace and she was upset. Complainant stated his wife stated that she was suspended by Respondent due to the DOSH complaint and that he (Complainant) was not to return to work, either. Complainant then spoke with Respondent, who told Complainant in an angry tone that he was terminated because "you're a troublemaker". We credit Complainant's statement.

7. Complainant's complaint regarding inadequate ventilation at Respondent's workplace was dated March 30, 1988, and was stamped received by the DOSH office on March 31, 1988.

8. The parties agreed that Complainant was terminated on the same day he visited the DOSH office to complain.

#### CONCLUSIONS OF LAW

We conclude that Complainant was unlawfully terminated in violation of Section 396-8(e), H.R.S. That section provides, in pertinent part:

\* \* \*

(e) Discharge or discrimination against employee for exercising rights prohibited.

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

\* \* \*

(D) The employee's filing a complaint, having instituted or causing to be instituted any proceeding under or related to this chapter, or the employee's intent to testify in any such proceedings, or otherwise acting to exercise rights under this chapter for oneself or others.

We find that Complainant was discharged for filing a complaint against Respondent with DOSH. On the morning of March 30, 1988, Complainant went to the DOSH office to complain about Respondent's workplace; about 9:00 a.m., the DOSH compliance officer called Respondent to inform him of the complaint; about 9:30 a.m., when Complainant's spouse arrived at Respondent's workplace, she was suspended due to Complainant's action with DOSH, and was also told to tell Complainant not to return to work. About 11:00 a.m., Complainant found his spouse outside the workplace, and she told Complainant about her suspension and his termination due to the DOSH complaint. When Complainant spoke with Respondent about this, Complainant said Respondent spoke in an angry tone and told Complainant he was terminated because he was a "troublemaker".

Although Respondent argues that Complainant was terminated for reporting to work more than two hours late, we find otherwise and conclude that Complainant was terminated for complaining to DOSH. Accordingly, we hold that Complainant was unlawfully terminated under Section 396-8(e), H.R.S.

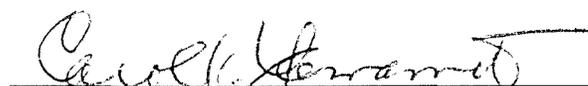
ORDER

The decision of the Administrator of the Occupational Safety and Health Division of the Department of Labor and Industrial Relations dated July 12, 1988, is hereby reversed, and this case is remanded to the Director for further proceedings consistent with the decision of this Board and §396-8(e)(4), H.R.S.

JUL 17 1990

Dated: Honolulu, Hawaii, \_\_\_\_\_.

  
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.

  
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