

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of)
 ROBERT'S HAWAII TOURS, INC.,)
 Respondent,)
 vs.)
))
 DIRECTOR, DEPARTMENT OF LABOR)
 AND INDUSTRIAL RELATIONS,)
 Complainant.)

CASE NO. OSAB 94-051

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 LABOR RELATIONS BOARD

DECISION AND ORDER

This Occupational Safety and Health case is before the Board on appeal by Employer-Respondent, ROBERT'S HAWAII TOURS, INC., from the decision of the Director of the Department of Labor and Industrial Relations, Hawaii Occupational Safety and Health Division (hereinafter "HIOSH"), dated August 12, 1994. In that decision, HIOSH determined that Employer-Respondent violated Hawaii Revised Statutes (HRS) §396-8(e) and proposed that Employer-Respondent settle the matter by making restitution for back pay owed to three employees.

HIOSH's August 12, 1994 decision arose out of a discrimination complaint filed on June 7, 1994, by Employer-Respondent's employee, Patrick Oguma, Sr. ("Oguma"), pursuant to HRS §396-8(e)(3). By a separate decision dated August 12, 1994, HIOSH found no merit to Oguma's discrimination complaint. Notwithstanding its determination of no discrimination, HIOSH determined in a second decision on the same date that Employer-Respondent had violated HRS §396-8(e). Oguma appealed HIOSH's



decision of no discrimination, but subsequently withdrew his appeal on October 10, 1994. Oguma's appeal was dismissed by the Board's Order of Dismissal dated October 27, 1994.

On December 8, 1994, Employer-Respondent filed a motion for a dismissal of HIOSH's August 12, 1994 determination that it had violated HRS §396-8(e), or, in the alternative, for summary judgment.

Having heard Employer-Respondent's motion, and there being no genuine issue of material fact, we hereby grant Employer-Respondent's motion and order that HIOSH's August 12, 1994 decision of a violation of HRS §396-8(e) and proposal for restitution be vacated in its entirety.

FINDINGS OF FACT

1. HIOSH conducted an inspection of Employer-Respondent's body shop establishment on April 22, 1994 and April 25, 1994.
2. On April 22, 1994, Employer-Respondent suspended its operations and sent several employees, one of whom was Oguma, home without pay for the afternoon. As a result of the establishment's closure, Oguma did not participate in the HIOSH inspection for that day.
3. On June 7, 1994, Oguma filed a discrimination complaint pursuant to HRS §396-8(e)(3) against Employer-Respondent, alleging that Employer-Respondent had denied him the right to participate in the HIOSH inspection when it suspended

operations on April 22, 1994. Oguma contended that the closure was part of a pattern of harassment and/or discrimination engaged by Employer-Respondent in retaliation for his complaints of alleged unsafe work conditions.

4. After an investigation of the complaint, HIOSH, on August 12, 1994, issued a decision to Oguma, finding no evidence to support his complaint of discrimination and/or harassment under HRS §396-8(e).

5. In a separate letter addressed to Employer-Respondent dated August 12, 1994, HIOSH determined that, in its opinion and based on its investigation, Employer-Respondent's closure of the establishment on April 22, 1994, was improper and violative of HRS §396-8(e). In that same letter, HIOSH proposed that Employer-Respondent settle the matter by making restitution for wages that were not paid the employees during the closure.

6. Oguma appealed HIOSH's August 12, 1994 decision of no discrimination, but subsequently withdrew his appeal on October 10, 1994.

7. On September 6, 1994, Employer-Respondent appealed HIOSH's August 12, 1994 determination that it had violated HRS §396-8(e).

8. By the Board's Order of Dismissal of Appeal dated October 27, 1994, Oguma's appeal was dismissed.

CONCLUSIONS OF LAW

We conclude that HIOSH's determination that Employer-Respondent had violated HRS §396-8(e) and its proposal for restitution for back wages is without legal basis and shall be vacated in its entirety.

Under HRS §396-8(e), employers are prohibited from discharging, suspending, or otherwise discriminating against employees for exercising their rights under chapter 396. An employee who perceives discrimination that is violative of HRS §396-8(e), may file a discrimination complaint with the Department of Labor and Industrial Relations pursuant to HRS §396-8(e)(3) within thirty days from the alleged act of discrimination. Thereafter, pursuant to HRS §396-8(e)(4), HIOSH, on behalf of the Director, must investigate the complaint and if it finds discrimination in violation of HRS §396-8(e), must order the employer to provide necessary relief. The relief may include rehiring, reinstatement to former job with back pay, and restoration of seniority.

In this case, HIOSH determined that there was no merit to Oguma's discrimination complaint. HIOSH's decision of no discrimination stands, since Oguma withdrew his appeal of that decision. HIOSH's concurrent determination that Employer-Respondent violated HRS §396-8(e) and should pay Oguma back pay is at odds with its decision that Employer-Respondent did not discriminate against Oguma and is without legal basis. Because

Oguma's complaint of discrimination was not sustained, Employer-Respondent could not have violated HRS §396-8(e). Furthermore, under HRS §396-8(e)(4), the remedy of back pay is available to an employee only upon a finding of employer discrimination that is violative of HRS §396-8(e). Since HIOSH found no evidence of discrimination, Employer-Respondent is under no legal obligation to make restitution for back pay. Accordingly, we conclude that HIOSH wrongly determined that Employer-Respondent violated HRS §396-8(e) and that it should pay back wages for the duration of the establishment's closure.

ORDER

The decision of the Director of Labor and Industrial Relations, Hawaii Occupational Safety and Health Division, against Employer-Respondent, dated August 12, 1994, is hereby vacated in its entirety.

Dated: Honolulu, Hawaii, DEC 19 1994.

EXCUSED
FRANK YAP, JR., Chairman

Carol K. Yamamoto
CAROL K. YAMAMOTO, Member

Charles T. Akama
CHARLES T. AKAMA, Member

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


NOTICE TO EMPLOYER:

You are required to post a copy of this Decision and Order at or near where citations under the Hawaii Occupational Safety and Health Law are posted.

Further, you are required to furnish a copy of this Decision and Order to a duly recognized representative of the employees.