

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD
STATE OF HAWAII

In the Matter of,)	CASE NO. OSAB 94-046
MICHAEL BRANDON,)	
Complainant,)	
)	
vs.)	
)	
THE SPORTS AUTHORITY,)	
Respondent,)	
)	
and)	
)	
DIRECTOR, DEPARTMENT OF LABOR)	
AND INDUSTRIAL RELATIONS,)	
Appellee.)	
_____)	

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US APPEALS BOARD
COURT OF HAWAII

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DECISION AND ORDER

This Occupational Safety and Health case is before the Board on appeal by MICHAEL BRANDON ("Complainant") from the decision of the DIRECTOR OF LABOR AND INDUSTRIAL RELATIONS, dated August 3, 1994, dismissing his complaint for discrimination filed pursuant to Hawaii Revised Statutes ("HRS") §396-8(e).

Pursuant to a pre-trial order dated November 21, 1994, the issues to be determined were (1) whether Complainant filed a timely appeal and if so, whether the appeal should be dismissed; and (2) if the appeal was timely appealed, whether THE SPORTS AUTHORITY ("Respondent") discriminated against Complainant pursuant to HRS §396-8(e).

On November 28, 1994, Respondent filed a motion to dismiss appeal for untimeliness.



By order dated December 1, 1994, the Board determined that Complainant's appeal was timely filed and denied Respondent's motion.

The only issue left for the Board's determination is whether Respondent discriminated against Complainant pursuant to HRS §396-8(e).

For the reasons stated below, we affirm the Director's dismissal of Complainant's discrimination complaint.

FINDINGS OF FACT

1. Respondent is a sporting goods store which was scheduled for a grand opening in Waikele on July 20, 1993. In April of 1993, Respondent hired Complainant as an area manager for the Hunting, Fishing and Marine department of the Waikele store.

2. Complainant's immediate supervisor was Laura Hahn, assistant manager of merchandising. Hahn's supervisor was Respondent's Waikele store manager, Sue Jaminet.

3. Employees at Respondent's Waikele store began work on June 7, 1993, to prepare for the store's grand opening.

4. On June 29, 1993, at a managers' meeting, all area managers, including Complainant, were asked to adhere to Respondent's policy of being on time for work. At the meeting, Complainant advised Hahn that he would be late for work the following morning because he had to have his picture taken for the store's newspaper advertisement.

5. Complainant, who was scheduled to begin work about 7:00 a.m. on June 30, 1993, was given permission to do the errand, but was expected back at the store around 11:00 a.m. Complainant did not return to the store until after 1:00 p.m. and did not call to inform anyone that he would be late.

6. Upon Complainant's return on the afternoon of June 30, 1993, Hahn counseled him and gave him a verbal warning for unexcused tardiness.

7. On July 1, 1993, Complainant complained to Hahn at work that he was being affected by the smell of the adhesives that were used to lay the store's carpet. He suggested that the doors of the building be opened for ventilation. Also on July 1, 1993, Complainant asked and received permission to leave work early on July 2, 1993, between 11:00 and 11:30 a.m. Complainant advised store manager Jaminet that he would be back some time between 1:30 and 2:00 p.m.

8. On the morning of July 2, 1993, Complainant attended an area managers' meeting. At the meeting, Complainant, complained to Jaminet about the problem with vapors emitting from the carpet adhesives. He produced a can of the adhesives that was allegedly used on the store's carpet and recited the contents from the label on the can. He warned Jaminet that if nothing is done about the fumes, he would call the Hawaii Occupational Safety and Health Division of the Department of Labor and Industrial Relations ("DLIR").

9. In response to Complainant's complaints, Jaminet called Joe Castigleone at Respondent's Florida corporate office, Bill Michel, Respondent's risk manager, and Alii Flooring, the company that installed the carpet, about the concerns raised by Complainant. She was assured by all that the materials used to install the carpet were safe. Notwithstanding their assurances, Jaminet agreed to open all of the doors of the store to allow for increased ventilation.

10. Later that morning, Complainant left work around 11:00 a.m. Although he had told Jaminet that he would be back by 2:00 p.m., he did not return until 4:15 p.m. He did not call to notify management that he would be late and did not offer any explanation for his tardiness.

11. On the evening of July 2, 1993, Jaminet counseled Complainant and issued a written warning for his tardiness and unprofessional attitude.

12. On July 12, 1993, Complainant filed a complaint with DLIR against Respondent for alleged unsafe working conditions. However, Complainant indicated on the complaint that the unsafe conditions created by Respondent have already been abated.

13. In response to the complaint, DLIR advised Complainant by letter dated July 14, 1993, that it has decided not to inspect Respondent's premises, since the hazards or conditions that he complained about have already been abated.

DLIR informed Complainant that he may seek informal review of its decision with the department's administrator if he disagreed with DLIR's decision not to take compliance action against Respondent.

14. On July 20, 1993, Complainant was scheduled to begin work at 7:00 a.m. Complainant overslept and did not call the store until 12:00 p.m. to notify them that he would not be coming in. Respondent was upset with Complainant not calling in until five hours after the start of his scheduled shift.

15. Complainant went to see his chiropractor on the afternoon of July 20, 1993, and obtained a note from the doctor to excuse him from work for that day.

16. The next day, on July 21, 1993, Complainant reported for work at 10:00 a.m. He went straight to his department and did not seek out Hahn or Jaminet to inform them that he was sick the day before and had a doctor's excuse slip. At 10:45 a.m., Complainant was called into Jaminet's office to discuss his problem with tardiness. At that time, Complainant produced his note from the chiropractor to excuse his absence the day before. Complainant asked Jaminet to sign the note, but she refused. She could not understand why he waited until he was counseled to produce the doctor's note. Complainant was terminated on this date for chronic tardiness.

17. On July 22, 1993, Complainant filed a discrimination complaint with DLIR.

CONCLUSIONS OF LAW

Under HRS §396-8(b), an employee has the right to file a complaint against the employer for its failure to provide a safe workplace, and where reasonable grounds exist, DLIR shall conduct an inspection in response to the complaint.

Section 396-8(e) prohibits employers from discharging or discriminating against employees for exercising any right under this chapter.

If, however, DLIR decides not to take any compliance action as a result of the violations alleged by any employee, it shall notify the employee of its decision, the reasons therefor, and the procedures for informal review of such decision. HRS §396-8(d).

Complainant contends that he was discharged or discriminated against for raising safety and health concerns with management and for filing a complaint with DLIR for unsafe working conditions pursuant to HRS §396-8(b). We disagree.

When Complainant first raised his safety concerns, Respondent promptly investigated them and even acquiesced to his suggestion of opening the building's doors for ventilation. As evidenced by DLIR's letter of July 14, 1993, the carpet problem was resolved prior to Complainant's termination and Complainant was informed that no compliance action would be taken. According to the record, Complainant had a problem with tardiness for which he received an oral warning prior to the time he first raised the safety concerns with Respondent. Complainant also received both

oral and written warnings for tardiness prior to the filing of the complaint with DLIR for unsafe working conditions. Not coincidentally, Complainant's termination occurred on July 21, 1993, the day after he overslept and failed to call in to work until five hours after the beginning of his shift. The July 20, 1993 incident was the third of a series of incidents involving Complainant's tardiness. On these facts, we conclude that Complainant was not discharged or discriminated against for exercising his rights under chapter 396.

CONCLUSIONS OF LAW

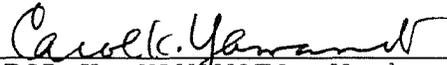
The Director's dismissal of Complainant's discrimination complaint is affirmed, in accordance with the foregoing.

MAR 25 1996

Dated: Honolulu, Hawaii, _____.

EXCUSED

FRANK YAP, JR., Chairman



CAROL K. YAMAMOTO, Member



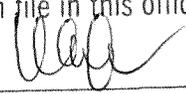
CHARLES T. AKAMA, Member

Michael Brandon
Complainant

Michael Ramos
for Respondent

Herbert Lau
for the Department of
Labor and Industrial Relations

I do hereby certify that the foregoing
is a full, 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.