SECTION 49

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The Board affirmed the administrative law judge's conclusion that employer's removal of claimant's name from the crane-rotation list constituted a Section 49 violation. The administrative law judge rationally determined that employer's alleged concerns with safety and health were pretextual. The Board also held that the administrative law judge properly credited GAI payments and holiday and vacation pay received by claimant against employer's back-pay liability under Section 49. These payments are not "collateral sources" of income for which employer does not receive credit toward its back-pay liability. Rayner v. Maritime Terminals, Inc., 22 BRBS 5 (1988).

The Board affirmed the administrative law judge's denial of a Section 49 claim, as administrative law judge rationally credited testimony that claimant would have been rehired had he demonstrated his medical fitness and completed a driving test. The Board reasoned that since the administrative law judge's implicit finding of no "discriminatory act" was proper, the administrative law judge did not err in failing to require employer to demonstrate that its actions toward claimant were unrelated to claimant's having filed a compensation claim. Geddes v. Washington Metropolitan Area Transit Authority, 19 BRBS 261 (1987), aff'd sub nom. Geddes v. Director, OWCP, 851 F.2d 440, 21 BRBS 103 (CRT)(D.C. Cir. 1988).

United States Court of Appeals affirms Board's decision to uphold denial of Section 49 claim, reasoning that the existence of a discriminatory act was not established by relevant evidence of record. Court notes that administrative law judge's finding of no discriminatory act is not inconsistent with administrative law judge's earlier finding that employer intended to induce claimant to not return to its employ, in that claimant never attempted to resume his job with employer, thus rendering employer's intentions irrelevant. Geddes v. Director, OWCP, 851 F.2d 440, 21 BRBS 103 (CRT) (D.C. Cir. 1988), aff'g Geddes v. Washington Metropolitan Area Transit Authority, 19 BRBS 261 (1987).

The Board reversed the administrative law judge's determination that employer's "five-day call-in" rule, under which certain absent employees could be terminated if they failed to "call in" to work every five days, discriminated against longshore claimants as a class, and that its application in this case thus constituted a Section 49 violation. The Board reasoned that, because employer's termination of claimant's job was based on the existence of this established rule than on "retaliation or punitive motive," no Section 49 violation had occurred, but indicated that employer's decision to implement the rule in the situation presented by this case was somewhat harsh. Holliman v. Newport News Shipbuilding and Dry Dock Co., 20 BRBS 114 (1987), aff'd, 852 F.2d 759, 21 BRBS 124 (CRT)(4th Cir. 1988).

The United States Court of Appeals affirms the Board's decision that employer did not violate Section 49 where the "five-day call-in" rule is inflexibly applied to all employees, and is enforced against persons absent due to personal or occupational injuries. Thus, there is no evidence of discriminatory animus or intent. Holliman v. Newport News Shipbuilding and Dry Dock Co., 852 F.2d 759, 21 BRBS 124 (CRT)(4th Cir. 1988), aff'g 20 BRBS 114 (1987).

The Board affirmed the administrative law judge's determination that employer's concededly standard practice of seeking "voluntary-quit" agreements from employees obtaining settlements of their longshore claims reflected the "discriminatory intent" necessary to establish a Section 49 violation. The Board noted that whether or not claimant had in fact orally consented to relinquish his job as a condition of his settlement, the very fact that employer attempted to procure such consent supported the administrative law judge's finding of discriminatory intent. Nance v. Norfolk Shipbuilding and Dry Dock Corp., 20 BRBS 109 (1987), aff'd, 858 F.2d 182, 21 BRBS 166 (CRT)(4th Cir. 1988), cert. denied, 492 U.S. 911 (1989).

United States Court of Appeals upholds Board's determination that administrative law judge, in deciding a Section 49 claim, properly excluded evidence showing that claimant had orally agreed to resign from his job as part of a Section 8(i) settlement, and properly found that employer's stated desire to induce claimant to resign established discriminatory intent within the meaning of Section 49. Norfolk Shipbuilding & Drydock Corp. v. Nance, 858 F.2d 182, 21 BRBS 166 (CRT) (4th Cir. 1988), aff'g 20 BRBS 109 (1987), cert. denied, 492 U.S. 911 (1989).

Although employer allegedly discharged claimant for falsifying information on his pre-employment application, the administrative law judge's failure to consider the fact that employer discharged claimant only a few weeks after he filed his workers' compensation claim, possibly in violation of Section 49, violates the APA, and required remand. Jaros v. National Steel & Shipbuilding Co., 21 BRBS 26 (1988).

The administrative law judge properly found that employer's policy of discharging employees for material falsifications on their employment applications did not violate Section 49 and that the evidence failed to establish that the termination claimant's employment was motivated by the requisite animus or ill will to constitute a violation of Section 49. Leon v. Todd Shipyards Corp., 21 BRBS 190 (1988).

The Board affirms the administrative law judge's finding that Section 49 was not violated where claimant was discharged for intentionally falsifying company documents. The administrative law judge found that the company policy was invariable, claimant failed to establish that he was treated differently than other employees who failed to disclose prior injuries on employment applications. Brooks v. Newport News Shipbuilding & Dry Dock Co., 26 BRBS 1 (1992), aff'd sub nom. Brooks v. Director, OWCP, 2 F.3d 64, 27 BRBS 100 (CRT) (4th Cir. 1993).

The Board reversed the administrative law judge's finding that employer violated Section 49. It held that where all employees who falsify company records are terminated and where claimant's termination for falsifying company records followed the routine procedure for such a violation, employer has not discriminated against claimant. Additionally, the Board concluded that employer has not discriminated against claimants as a class merely because claimants are the only employees subjected to the subpoena power of the Act, as employer has a legitimate need to investigate issues affecting the applicability of Section 8(f). Therefore, the Board held that the administrative law judge erred in inferring discriminatory animus from employer's investigation of claimant's medical history in this case. *Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd mem.*, 61 F.3d 900 (4th Cir. 1995).

Although the administrative law judge found that employer's disciplinary hearing was not impartial, the Board affirmed the administrative law judge's finding that employer did not violate Section 49 when it terminated claimant since claimant was treated no differently than other employees subject to disciplinary hearings. *Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175, 178 (1996).

The Fifth Circuit held that employer did not discriminate against claimant under Section 49 of the Act by terminating claimant after his industrial injury. The court noted that the record supported the administrative law judge’s finding that claimant was terminated because he failed to medically document his absences from work. *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1999)

The Board holds that the administrative law judge erred in dismissing the issue of Section 49 discrimination from the case in a summary decision where he did not address the contested issues of fact relevant to employer’s motivation for terminating claimant and where the administrative law judge did not go through the prescribed analysis and apply the proper legal standards involved in consideration of the Section 49 issue. Moreover, the administrative law judge erred in finding the Section 49 claim barred by giving collateral estoppel effect to the district court’s judgment in claimant’s ADA suit. *Dunn v. Lockheed Martin Corp., 33* BRBS 204 (1999).

The Board affirmed the administrative law judge's finding that claimant was discharged due to her claim for compensation in violation of Section 49 of the Act as the administrative law judge properly examined the totality of the circumstances regarding the discharge. The administrative law judge found that employer discharged claimant for "pretextual reasons," and that employer had not established that it was not motivated, even in part, by claimant's exercise of her rights under the Act. Claimant was fired for receiving an authorized employee discount. *Monta v. Navy Exchange Service Command*, 39 BRBS 104 (2005).

The Board affirmed the administrative law judge's finding that claimant should be reinstated to her former position in view of employer's violation of Section 49, until claimant's ability to work can be assessed after she reached maximum medical improvement following her surgery. The Board agrees with the Director's interpretation that, in view of the silence of the Act and regulations, this method insures the availability of reinstatement as a remedy, which otherwise would be unavailable to disabled claimants who are not immediately able to return to work. *Monta v. Navy Exchange Service Command*, 39 BRBS 104 (2005).

As the Board affirmed the administrative law judge's finding that claimant was discharged in violation of Section 49, the Board remanded the case to the administrative law judge, rather than the district director as urged by the Director, for assessment of a monetary penalty pursuant to Section 49 of the Act and its implementing regulation, 20 C.F.R. §702.273. *Monta v. Navy Exchange Service Command*, 39 BRBS 104 (2005).