

CCASE:

E.R. CRUZ v. PUERTO RICAN CEMENT

DDATE:

19850805

TTEXT:

~1161

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

EMILIANO ROSA CRUZ,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. SE 83-62-DM

v.

PUERTO RICAN CEMENT COMPANY,
INC.,
RESPONDENT

DECISION ON REMAND

Before: Judge Broderick

The Commission remanded this case to me by order issued April 12, 1985 for reconsideration and further findings on the alleged threat complainant made on the life of Respondent's assistant personnel manager. The matter was also remanded to give Respondent the opportunity to depose complainant concerning his attempts to obtain interim employment and the extent of his interim earnings. I interpret this direction to mean that I should make further findings on the relief to which Complainant is entitled, by bringing the relief order up to date.

On April 25, 1985, I ordered that deposition testimony be taken from complainant and from Respondent's assistant personnel manager regarding the alleged threat on the latter's life. I also directed that Complainant make himself available for deposition concerning his efforts to obtain interim employment and the extent of his interim earnings.

The depositions were taken on May 10, 1985. Complainant has filed an objection to certain documents submitted at the depositions. Complainant has also filed a statement of additional attorney's fees and legal expenses to which Respondent objects. Transcripts of the depositions were filed with me on July 2, 1985, by Respondent. Complainant has not filed any objections or corrections. Therefore, I accept the transcripts as part of the record in this case. On July 8, 1985, Respondent filed a memorandum discussing the post-remand deposition evidence. On July 8, 1985, complainant's attorney filed a motion to withdraw as counsel for complainant on the ground that he has been appointed Judge of the Superior Court of Puerto Rico. I called counsel on July 9 and was assured

~1162

that he would arrange for a substitute attorney who would file an appearance. No such appearance has been filed. However, Judge Alvarado's motion to withdraw as counsel for complainant is GRANTED. Because the case was remanded to me for expedited proceedings, and because no further evidentiary matters are involved, I believe that withholding my decision further is not justified.

I. THE POST DISCHARGE ALLEGED THREAT

The depositions of Pedro Rene Vargas (identified at the hearing as Rene Vargas) and Emiliano Rosa taken pursuant to my order and as a consequence of the Commission remand have substantially added to the record on the alleged threats made by Complainant on Vargas' life. The only evidence of such threats in the transcript of the original hearing was the testimony of Vargas that Complainant threatened Vargas in the unemployment office: "He said that he had not been able to get this benefit because of a declaration that I did and he was going to take action over me . . . He said that he was going to kill me." (Tr. 63)

In his deposition, Vargas elaborated on this testimony. He stated that at the Puerto Rico Department of Labor Building on September 21, 1983, complainant told Vargas "with the statements you gave I am not going to get my benefits." (D.7) Vargas and Complainant were alone at the time, and were about 10 feet apart. Complainant told Vargas "I am armed and I'm going to kill you." (D. 25) Vargas told Mr. Rosich of the Labor Relations Department of the threat and was told to call a judge. He called Judge Febus Bernardini, a Superior Court Judge or District Judge in Ponce. He also told Mr. Marcucci, the Union President. A few days later Vargas met with the Judge who told him that he had already talked to complainant and that Vargas should call the Judge "if anything happens." (D. 20)

Complainant testified that he saw the Judge the day following his unemployment hearing concerning the alleged threat to Vargas. He also testified that he had a permit to carry a weapon in September 1983, and that everyone in the company knew that he carried a weapon. Complainant denied that he threatened to kill Vargas. He admitted that he told Vargas that he was going to take action against him, but stated that he was referring to "judicial action." (D. 109)

On the basis of the evidence taken subsequent to the Commission remand, I find that Complainant did in fact threaten Vargas' life. The threat was taken seriously and was not an off-hand or jocular remark. I am accepting the

~1163

testimony of Vargas over that of Complainant on this issue because (1) the record does not disclose any motive for Vargas to fabricate the testimony; (2) he immediately reported the threat to local authority; (3) he told others, including the President of the local union who testified at the hearing and was present at the depositions. Respondent has objected to the taking of Vargas' deposition and to that part of the deposition of Complainant which dealt with the alleged threat to Vargas. I am overruling the objections. I should note that without the above testimony, the record would not support a finding that complainant made a serious threat to kill Vargas. Vargas' testimony at the original hearing (Tr. 63) that complainant "said he was going to kill me" in my judgment is not sufficient for me to make a finding that Complainant committed an act constituting a serious criminal offense. However, the additional evidence in the depositions: that Rosa carried a weapon; that Vargas made an official complaint to a local judge who called Rosa to court; that Vargas notified others including the union president of the threat--persuades me that Rosa made a serious threat on Vargas' life.

II. INTERIM EMPLOYMENT AND EARNINGS

In my order issued March 7, 1985, I noted that complainant had supplied a copy of his 1983 income tax return (He was discharged effective April 25, 1983). He also authorized the Social Security Administration to give Respondent a copy of his earning record for the year 1983.

In the course of Mr. Vargas' deposition, Respondent submitted certain documents showing the employment in industries promoted by the Economic Development Administration for the Ponce municipality in 1983 and 1984; a statement from the Commonwealth Department of Labor and Human Resources to the effect that 3200 persons were employed (hired ? "se han colocaco alrrededor") in Ponce from April 1983 to March 4, 1985. Also submitted was the decision of the Commonwealth. Employment Security Referee denying unemployment benefits to complainant on the ground that he was discharged for chronic absenteeism. In his deposition, Vargas admitted that unemployment in Ponce was high.

At his deposition, complainant testified that he had sought work between April and September, 1983. He named various employers to whom he applied for work. He stated that all his applications for employment were oral; he had not made any written applications. Complainant's testimony as to whether he registered at the Department of Labor as seeking employment is confusing. On the basis of his testimony, I am not able to determine whether he did or not. The Social

~1164

Security records for 1983 and 1984 have been requested but as of the time of the deposition had not been received. The record as augmented does not change my finding (order of March 7, 1985), that complainant had no interim earnings other than those testified to at the hearing (he worked from January 1, 1984 to February 18, 1984 and earned \$3.35 per hour). On the basis of the augmented record, I find also that complainant made reasonable efforts to secure interim employment during the relevant period.

III. ADDITIONAL ATTORNEY'S FEES

On June 17, 1985, Counsel for complainant submitted a statement claiming additional attorney's fees and legal expenses. He showed a total of 30.75 hours expended from September 20, 1984 to June 7, 1985 at \$60.00 per hour and requests approval of \$1845.00 in addition to the \$2,340.00 previously approved. Respondent objects to the claim on the grounds (1) that it is not sufficiently descriptive of the services performed and (2) the services performed referred to the Respondent's Petition for Review and the back pay computation, "issues on which Respondent has prevailed."

Section 105(c)(3) of the Act provides that "whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) . . . reasonably incurred . . . for or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation."

I find that the legal services of attorney Alvarado in connection with the Petition for Review and the proceedings on remand were reasonably incurred in connection with the prosecution of this proceeding. The statement is not as detailed as it might be, but the number of hours and the description of the services appear reasonable.

ORDER

I have reviewed the entire record including the evidence submitted pursuant to the Commission remand, and have considered the contentions of the parties. Based on that record and in the light of the Commission remand, my decision issued July 19, 1984, and order issued March 7, 1985 are modified as follows:

(1) Reinstatement of complainant as ordered on July 19, 1984 is "inappropriate" because of the threat complainant made on the life of Vargas. NLRB v. R.C. Can Company, 340 F.2d

~1165

433 (5th Cir.1965). Therefore, the order to reinstate complainant to the position from which he was discharged is RESCINDED. Respondent is not ordered to reinstate him.

(2) Respondent's liability for back wages is suspended as of September 21, 1983, the date of the threat above referred to. See *Alumbaugh Coal Corp. v. NLRB*, 635 F.2d 1380 (8th Cir.1980): "thus, . . . (the employee discharged for union activity) should be granted reinstatement with full backpay for only that period preceding his unlawful post discharge conduct." Therefore, my order of March 7, 1985 is AMENDED to require Respondent to pay back wages only from April 25, 1983 to September 21, 1983 with interest thereon at the rate of 16 percent for the back wages payable from April 25, 1982 to June 30, 1983 and at the rate of 11 percent for the back wages payable from July 1, 1983 to September 21, 1983.

(3) Respondent IS ORDERED to pay to Complainant's attorney the further amount of \$1845.00 for legal services from September 20, 1984 to June 7, 1985, making a total amount for legal fees and expenses of \$4185.00.

James A. Broderick
Administrative Law Judge