U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 14-0177

RAYMOND BABICK	)	
	)	
Claimant-Respondent	)	DATE ISSUED: Mar. 30, 2015
	)	
v.	)	
	)	
TODD PACIFIC SHIPYARDS CORPORATION	)	
	)	
	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

Matthew S. Sweeting, Tacoma, Washington, for claimant.

Russell A. Metz (Metz & Associates, P.S.), Seattle, Washington, for employer.

Before: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer[1] appeals the Decision and Order (2011-LHC-00287) of Administrative Law Judge Steven B. Berlin rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[1] The administrative law judge dismissed the insurance carrier from the proceedings because it is not a proper party in discrimination claims under the Act, 33 U.S.C. §948a. Decision and Order at 1.

Claimant has worked intermittently for employer as a carpenter and welder since 2005. He was injured for the seventh time on February 6, 2010. On that date, claimant took a misstep off a ladder onto a platform and injured his lower back. He reported the injury on February 11 and was off work until February 18. Trade Coordinator Matthew Seavey filled out an accident investigation report dated February 11, 2010. EX 3 at 15. This report states that the "housekeeping environment" was poor and that it was cold on the day of the accident. The report also states that claimant is highly skilled and has a good attitude. The report concludes that the ladder from which claimant slipped is built into the platform awkwardly and that the height of the platform should be adjusted to meet the ladder. It was recommended that all workers be informed of this height discrepancy in order to avoid injury. *Id.*

Employer voluntarily paid claimant benefits for this injury for three of the days he missed work. CX 1; EXs 1, 3-4. Claimant returned and continued to work for one or two weeks until he was laid off due to a seniority layoff that lasted approximately four or five weeks. In March 2010, claimant filed a claim for benefits, and employer filed a notice of controversion on the ground that claimant was not entitled to further benefits. Nevertheless, thereafter, employer paid claimant benefits for one additional day. CX 1; EX 1. Claimant returned to work after the layoff, and the Accident Review Committee met on May 5, 2010, to discuss claimant's February 2010 accident. The committee found that claimant's work was not performed in a safe manner, that he should understand his physical limitations due to his prior injuries, and that he should communicate with his supervisor and seek accommodations. EX 3. All members of the committee, including Mr. Seavey, agreed on this report. *Id.* On May 18, 2010, claimant received an "Unsatisfactory Performance Report." In it, Dale Samples, Director of Manufacturing, and Ron Olson, Production Supervisor, stated that claimant had violated safety rules and should be disciplined.[2] Claimant was suspended for three days, May 19-21, 2010, because he violated Rule III Safe Conduct.[3] Claimant returned to work thereafter. CX 2;

---

[2] The report stated that claimant:

> is being disciplined for engaging in behaviors that resulted in unsafe acts. Getting injured is not Grounds for discipline, however, [claimant's] seven injuries in 3 ½ years is more than any other employee and are being caused by employee behavior and choice, not conditions. Documented for unsatisfactory performance August 2009 and performance has not improved. [Claimant] must improve his choices.

EX 3 at 16.

[3] Section 10 of the Employee Handbook identifies "Plant Rules." EX 6. Rule III discusses "Safe Conduct." Pertinent to this case, it states:

EX 3. In his October 2010 pre-hearing statement, claimant raised the issue of employer's violating Section 49 of the Act, 33 U.S.C. §948a, claiming that employer discriminated against him because of his workers' compensation claim. Claimant sought payment of lost wages for the days on which he was suspended.[4]

The administrative law judge found that claimant established a prima facie case of discrimination pursuant to Section 49 and that employer failed to rebut it. Therefore, the administrative law judge awarded claimant back wages in the amount of $691.03, and he assessed a penalty of $4,000 against employer. Decision and Order at 9-10. Employer appeals the decision. Claimant responds, urging affirmance. Employer has filed a reply brief.

Employer contends the administrative law judge erred in analyzing the issue of whether it discriminated against claimant. Specifically, it asserts, the administrative law judge erred in finding that employer failed to rebut claimant's prima facie case of discrimination and to properly place the ultimate burden of proving discrimination on claimant. Employer also contends the administrative law judge exceeded his authority by expanding his inquiry to include the propriety of employer's business practices. We agree with employer that the administrative law judge's decision cannot be affirmed.

> As determined by the company, any employee committing one or more of the following violations will be disciplined up to and including termination of employment:
>
> 3.1 Employees must conduct themselves in a safe manner at all times while on company premises.
>
> ***
>
> 3.3 Causing accidents or injuries through negligence.
>
> ***
>
> 3.6 Working in an unsafe manner.
> 3.7 Engaging in unsafe conduct.

The collective bargaining agreement, EX 7, indicates there is a grievance process for complaints, disputes, or grievances. It is unknown whether claimant filed a grievance.

[4] There is no indication that claimant sought additional compensation for the work injury.

Section 49 of the Act prohibits an employer from discharging or discriminating against an employee because the employee has claimed compensation under the Act. If the employee can show he is the victim of such discrimination and if he is qualified to work, he is entitled to reinstatement and back wages. 33 U.S.C. §948a;[5] *G.M.* [*Meeker*] *v. P & O Ports Louisiana, Inc.*, 43 BRBS 68 (2009); 20 C.F.R. §702.271. The essence of discrimination is in treating like individuals differently. *See Mueller Brass Co. v. N.L.R.B.*, 544 F.2d 815 (5th Cir. 1977); *Jaros v. National Steel & Shipbuilding Co.*, 21 BRBS 26 (1988). Since the issuance of the decision in *Geddes v. Benefits Review Board* [*Geddes I*], 735 F.2d 1412, 16 BRBS 88(CRT) (D.C. Cir. 1984), the Board has applied a shifting-burden analysis to Section 49 claims.[6] That is, to establish a prima facie case of discrimination, a claimant must demonstrate that his employer committed a discriminatory act motivated by discriminatory animus or intent. *Id.*; *see also Dunn v. Lockheed Martin*, 33 BRBS 204 (1999); *Leon v. Todd Shipyards Corp.*, 21 BRBS 190 (1988). Once the claimant has met this burden, a rebuttable presumption arises that the employer was motivated at least in part by the claimant's involvement in a claim under

---

[5] Section 49 provides:

> It shall be unlawful for any employer or his duly authorized agent to discharge or in any other manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim compensation from such employer, or because he has testified or is about to testify in a proceeding under this chapter.

[6] The Board never "announced" it was following *Geddes I*. It first applied the *Geddes* analysis in *Tibbs v. Washington Metropolitan Area Transit Authority*, 17 BRBS 92 (1985), *aff'd mem.*, 784 F.2d 1132 (D.C. Cir. 1986), another case arising under the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501, 502 (1973), and has since cited it in virtually every Section 49 appeal. In cases decided prior to *Geddes I*, no shifting-burden scheme was applied, and the administrative law judge merely weighed all relevant evidence to determine if Section 49 was violated. *See, e.g.*, *Wallace v. C & P Telephone Co.*, 11 BRBS 826 (1980); *Martin v. General Dynamics Corp.*, 9 BRBS 836 (1978); *Winburn v. Jeffboat, Inc.*, 9 BRBS 363 (1978). Decisions by other courts of appeals have neither utilized nor criticized the *Geddes* approach. *See, e.g.*, *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1999); *Norfolk Shipbuilding & Drydock Corp. v. Nance*, 858 F.2d 182, 21 BRBS 166(CRT) (4th Cir. 1988), *cert. denied*, 492 U.S. 911 (1989). This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, and there are no reported Section 49 cases in this circuit.

the Act. The burden then shifts to the employer to prove that it was not motivated, even in part, by the claimant's exercise of his rights under the Act. *Geddes I*, 735 F.2d at 1418, 16 BRBS at 92-93(CRT); *see also Geddes v. Director, OWCP* [*Geddes II*], 851 F.2d 440, 21 BRBS 103(CRT) (D.C. Cir. 1988); *Rayner v. Maritime Terminals, Inc.*, 22 BRBS 5 (1988); *Jaros*, 21 BRBS 26.

Employer contends its burden on rebuttal is one of production only, much like an employer's burden to produce substantial evidence to rebut the Section 20(a), 33 U.S.C. §920(a), presumption that an injury is related to the employment. *See, e.g.*, *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010). Employer asserts it satisfied its burden of production and that the administrative law judge erred in finding otherwise. Employer also contends the administrative law judge erred in not placing the ultimate burden of persuasion on claimant. Employer's contention has merit in view of the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In *Geddes I*, the United States Court of Appeals for the District of Columbia Circuit explained the allocation of the burden of proof in a Section 49 claim, stating that the claimant bears an initially light burden of establishing a prima facie case of discrimination. When the claimant establishes that the employer committed a discriminatory act motivated by animus, a rebuttable presumption arises that the animus is due to the claimant's compensation claim. *Geddes I*, 735 F.2d at 1418, 16 BRBS at 93(CRT). The court stated that the burden then shifts to the employer "to prove" non-discrimination in order to promote the humanitarian purposes of the Act because, in all likelihood, the employer has greater access to the evidence particular to this issue than does the claimant.[7] *Id.*, 735 F.2d at 1417-18, 16 BRBS at 91-92(CRT). However, in setting forth the appropriate analysis, the court also explained that a claimant's "light burden" means that he "is not required to prove his case by a preponderance of the evidence; instead, a lesser standard of proof requires that inferences be made and doubtful questions of fact be resolved in favor of the employee seeking benefits under the Act." *Id.*, 735 F.2d at 1417, 16 BRBS at 91(CRT). While it may be legally sound to require a claimant to bear only a "light burden" to establish the elements of a prima facie case and then to shift the burden to the employer to rebut the prima facie case, to the extent that *Geddes I* stands for the proposition that a claimant need not establish the

[7] In this regard, the D.C. Circuit stated, "it is reasonable to presume that the acts complained of, if not otherwise explained, are likely to have been caused by improper conduct on the part of the defendant. . . . [the employer] typically has greater access to the evidence on the particular issue than does the [claimant]." *Geddes I*, 735 F.2d at 1418, 16 BRBS at 92(CRT).

elements of his claim by a preponderance of the evidence, it is not in accordance with subsequent case precedent. *Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT). Indeed, the *Geddes* decision did not address what happens after an employer rebuts the presumption.[8]

In *Greenwich Collieries*, the Supreme Court addressed Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. §556(d), which is incorporated into the Longshore Act by 33 U.S.C. §919(d).[9] Section 7(c) states in pertinent part: "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. §556(d). The Court held that the "burden of proof" means that the proponent bears the burden of persuasion by a preponderance of the evidence. In view of this holding, the Supreme Court held that the "true doubt" rule violates Section 7(c) of the APA because it improperly shifts the burden to the party opposing the claim.[10] The Court, therefore, held that, if the evidence is in equipoise, in accordance with Section 7(c), the claimant's claim fails. *Greenwich Collieries*, 512 U.S. at 276, 281, 28 BRBS 46, 48(CRT); *see Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996).

---

[8] Because the analysis set forth was not undertaken, the *Geddes I* court remanded the case for proper consideration. After remand, the court affirmed the Board's decision denying the claimant relief under Section 49. Although the Board and the court determined that the administrative law judge improperly shifted the burden to the employer because the claimant had not established the discriminatory act element of his prima facie case, they agreed the administrative law judge correctly found there was no credible evidence upon which to conclude the employer had discriminated against the claimant in violation of Section 49. *Geddes II*, 851 F.2d 440, 21 BRBS 103(CRT).

[9] Section 19(d) of the Act states in pertinent part: "Notwithstanding any other provisions of this chapter, any hearing held under this chapter shall be conducted in accordance with the provisions of section 554 of title 5."

[10] Under the "true doubt" rule, where doubt existed in an administrative law judge's mind about the proper resolution of evidentiary conflicts such that the evidence was found to be in equipoise, that doubt had to be resolved in favor of the claimant. *See Heckstall v. General Port Service Corp.*, 12 BRBS 298, 303 (1980); *Melendez v. Bethlehem Steel Corp.*, 2 BRBS 395 (1975). This statutory policy was viewed as placing a less stringent burden of proof on the claimant than the preponderance of the evidence standard which is applicable in a civil suit. *Strachan Shipping Co. v. Shea*, 406 F.2d 521 (5th Cir.), *cert. denied*, 395 U.S. 921 (1969). Thus, if the evidence were evenly balanced, the claimant would prevail.

Although *Geddes* did not involve the true doubt rule, it is apparent that the shifting-burden analysis of *Geddes I* is not in compliance with *Greenwich Collieries* and Section 7(c) of the APA unless it is interpreted as meaning that the employer's rebuttal burden is one of production only with the ultimate burden shifting back to the claimant to prove his discrimination claim. Therefore, in order to be in compliance with *Greenwich Collieries*, we overrule the prior standard utilized for Section 49 cases in all cases except those arising under the 1973 D.C. Act. We hold that, henceforth, the proper standard for analyzing claims under Section 49 of the Act is as follows:

1. A claimant's initial burden is to make out a prima facie case of discrimination under Section 49. That is, he must "produce enough evidence to permit the trier of fact to infer" that employer committed a discriminatory act motivated by discriminatory animus. *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1420 (9th Cir. 1990) (internal quotes omitted). If the claimant makes out a prima facie case, he is entitled to a rebuttable presumption that his employer violated Section 49 of the Act. *See American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000).

2. An employer's burden on rebuttal is one of production only, that is, it must produce substantial evidence that it acted for non-discriminatory reasons. If the employer produces such substantial evidence, the presumption falls from the case.[11] *American Grain Trimmers*, 181 F.3d at 816-818, 33 BRBS at 74-78(CRT); *Rose*, 902 F.2d at 1420.

3. The claimant, who bears the ultimate burden of persuasion, then must prove by a preponderance of the evidence that his employer committed a discriminatory act against him motivated by his claim for compensation under the Act, i.e., that the action was taken because of the claimant's protected activity. *See, e.g., Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT); *Machado v. National Steel & Shipbuilding Co.*, 9 BRBS 803 (1978); *see generally Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009).[12]

---

[11] Substantial evidence has been defined as "more than a mere scintilla," or "such relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *Schwirse v. Director, OWCP*, 736 F.3d 1165, 47 BRBS 31(CRT) (9th Cir. 2013).

[12] In *Gross*, a case arising under the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.* (ADEA), the Supreme Court addressed whether the burden of

In the case before us, the administrative law judge found that claimant established a prima facie case of discrimination. He found that the "suspension came directly on the heels" of claimant's injury report and claim, and he found that the "evidence demonstrates" that employer treated claimant differently from other employees because it disciplined him for a safety violation that had not occurred. Decision and Order at 8. The administrative law judge found that it was not proven that claimant had violated a safety rule in either 2009[13] or 2010 and that employer's "practice" of blaming employees for accidents that cannot be attributed to environmental factors is faulty. The administrative law judge also found signs of pretext in employer's decision to disregard the initial findings of Mr. Seavey, who investigated the accident; to fail to offer evidence on how many accidents had occurred on the platform; to indicate earlier to claimant that his prior injuries were his fault; or to fully specify which rule claimant had violated. Decision and Order at 8-9.

Employer does not challenge the administrative law judge's determination that claimant established a prima facie case. We affirm the administrative law judge's finding that claimant established a prima facie case; however, we do so solely on the grounds that claimant established he was suspended (the act), and that the suspension occurred after he filed a claim for benefits for his seventh work-related injury.[14] From this evidence, the administrative law judge could infer that the suspension was motivated by discriminatory animus. *See Rose*, 902 F.2d at 1420. Thus, the burden shifted to employer to produce

---

persuasion ever shifts to the party defending an allegation of mixed-motives discrimination. Based on the language of the ADEA which establishes that the plaintiff must prove his age was the reason his employer took an action, that is, the employer acted "because of" his age, the Court held that the burden of persuasion in a mixed-motives claim is the same as in any other disparate treatment action under that statute: the burden of persuasion remains with the plaintiff.

[13] In July 2009, claimant suffered his sixth injury while working for employer when he twisted to pick up a grinder and hurt his back. Following the investigation of the situation, employer issued an "Unsatisfactory Performance Report" stating that claimant violated Rule III (safe conduct) and he was given a written warning about being safer, making better choices, and warming up before work. The notice informed claimant that if he had additional violations, he could receive additional discipline up to and including termination. CX 3; EX 2.

[14] We will address *infra* the other factual bases for the administrative law judge's finding that claimant made out a prima facie case.

substantial evidence that its action was not due to the filing of claimant's claim. Using the standard set forth herein, we hold that employer has produced substantial evidence that its action was not due to claimant's filing a claim for compensation and, therefore, we reverse the administrative law judge's finding that employer did not rebut claimant's prima facie case.

In this regard, we note that employer voluntarily paid claimant some benefits for the February 2010 injury before the claim was filed and paid claimant an additional day of compensation shortly after the claim was filed.[15] The administrative law judge found Mr. Samples's lack of awareness at the time of the suspension that claimant had filed a claim, *see* Tr. at 69-70, is insufficient to rebut claimant's prima facie case because Mr. Olson, who also participated in the decision to suspend claimant, testified "yet never denied knowing about Claimant's claim. . . ." Decision and Order at 9. The administrative law judge stated that Mr. Olson's "knowledge that Claimant had filed a claim forecloses" employer's contention that claimant's claim was not the basis for the suspension. *Id.* The finding that Mr. Olson knew claimant had filed a compensation claim is not supported by any evidence of record. *See* Tr. at 55-62. Because Mr. Samples stated he was unaware that claimant had filed a compensation claim, employer has produced substantial evidence rebutting claimant's prima facie case of discrimination. *See generally Hawaii Stevedores*, 608 F.3d at 651-652, 44 BRBS at 50-51(CRT). Thus, the burden shifts back to claimant to persuade the administrative law judge by a preponderance of the evidence that employer discriminated against him due to his filing a compensation claim. *Id.*

In this regard, we also cannot affirm the administrative law judge's treatment of other evidence of record, largely discussed in conjunction with the administrative law judge's finding that claimant established a prima facie case. The circumstances of the action taken against the employee may be examined to determine whether the employer's reason for the action is the actual motive or is a mere pretext, and the administrative law judge may infer animus from the circumstances. *See Monta v. Navy Exch. Serv. Command*, 39 BRBS 104 (2005); *Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996); *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd on other grounds sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993). The manner in which the claimant is treated in relation to the employer's

[15] The payment to claimant for one additional day of compensation occurred shortly after the claim was filed in March 2010 – two months before claimant was suspended. Thus, contrary to the administrative law judge's statement, the suspension was not "on the heels" of the claim.

customary employment practices may support an inference that the employer's true motive was retaliation for the filing of the compensation claim. *Manship,* 30 BRBS 175.

Employer correctly alleges that the administrative law judge drew improper inferences in this case, leading him to conclude that employer's suspension of claimant was pretextual. Specifically, the administrative law judge's findings are based upon a fundamental misunderstanding of the scope of the Section 49 inquiry. The administrative law judge's finding that employer's motive for disciplining claimant was due to his filing a claim is premised on the "facts" that employer did not establish that claimant had violated any specific safety rule, either in 2009 or in 2010, and should not have been disciplined, and that employer cannot "blame" its employees for injuries that occur without an obvious environmental cause.[16] Decision and Order at 8-9. Contrary to the administrative law judge's conclusions, the issue under Section 49 is not whether an employer may discipline its employee for the occurrence of work accidents or whether such discipline is objectively reasonable; the issue is whether the discipline imposed was due to the employee's filing of a compensation claim. The United States Court of Appeals for the Fourth Circuit has stated that "[o]ur task is not to pass judgment on the wisdom of rules established by competing parties in the marketplace. Our task is to determine if the rules are designed to or do in practice discriminate." *Holliman v. Newport News Shipbuilding & Dry Dock Co.*, 852 F.2d 759, 762, 21 BRBS 124, 129(CRT) (4th Cir. 1988);[17] *Winburn v. Jeffboat, Inc.*, 9 BRBS 363 (1978); *see also Mueller Brass Co.*, 544 F.2d 815.[18] As the administrative law judge's error in assessing

[16] The administrative law judge's error in this regard is further demonstrated by the penalty he imposed on employer. The administrative law judge stated that an "enhanced" penalty ($4,000) is warranted: "Of particular concern is Employer's practice of turning every injury into a potential disciplinary event unless Employer determines that there was an environmental cause for the injury. . . Employer's disregard for its own policies established in Rule III . . . exacerbates the circumstances." Decision and Order at 10. This "practice" of employer's does not establish it has violated Section 49 of the Act.

[17] In *Holliman*, the administrative law judge found that the claimant was fired for violating the employer's five-day rule and not because he sought compensation. Nevertheless, the administrative law judge concluded the termination was discriminatory because the rule "served no legitimate business purpose." The court determined this was an inappropriate finding, and it affirmed the Board's holding that there was no discriminatory animus.

[18] In holding that the NLRB erred in reversing the administrative law judge's determination that the employee's termination was not related to anti-union sentiment in

the "reasonableness" of employer's discipline permeates the decision, we vacate his finding that employer suspended claimant in violation of Section 49, as well as his award of back pay and the assessment of a penalty against employer. We remand this case for the administrative law judge to reconsider the evidence as a whole, in accordance with the standard stated herein. Claimant bears the burden of proving that employer suspended him because he filed a compensation claim.

---

violation of Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. §158(a)(3), the United States Court of Appeals for the Fifth Circuit stated:

> The [NLRB's] error is the frequent one in which the existence of the reasons stated by the employer as the basis for the discharge is evaluated in terms of its reasonableness. If the discharge was excessively harsh, if lesser forms of discipline would have been adequate, . . . the argument runs, the employer must not actually have been motivated by managerial considerations, and . . . nought remains but anti-union purpose as the explanation. But as we have so often said: management is for management. Neither [the NLRB] nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision. Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which Section 8(a)(3) forbids.

Mueller Brass, 544 F.2d at 819 (quoting *NLRB v. McGahey*, 233 F.2d 406, 412-413 (5th Cir. 1956)).

Accordingly, the administrative law judge's Decision and Order finding that employer violated Section 49 of the Act is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

_____
BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge