U.S. Department of Labor

Office of Administrative Law Judges
2 Executive Campus, Suite 450
Cherry Hill, NJ 08002

(856) 486-3800
(856) 486-3806 (FAX)

Issue Date: 27 April 2006

Case No.: 2006-STA-00002

In the Matter of

LINDA G. BALAZS
Complainant

v.

DIMARE FRESH, INC.
Respondent

Appearances:

Paula L. Radick, Esq.
For Complainant

W. Stephen Cockerham, Esq.
For Respondent

Before: **RALPH A. ROMANO**
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under the employee protection provisions of the Surface Transportation Assistance Act ("the Act"), 49 U.S.C. § 31105. The Act prohibits covered employers from discharging or otherwise discriminating against an employee in retaliation for the employee's engagement in certain protected activities. The implementing regulations are set forth at 29 C.F.R. Part 1978.

Ms. Balazs ("Complainant") filed her complaint on May 4, 2005, and on September 22, 2005, the Occupational Safety and Health Administration ("OSHA"), acting on behalf of the Secretary of Labor, issued its decision in favor of DiMare Fresh, Inc. ("Respondent"). On October 11, 2005, Complainant appealed OSHA's decision and requested a formal hearing. This case was assigned to me on October 18, 2005, and the notice of hearing was issued the following day. The formal hearing in this matter was held before me on November 17 and 18, 2005 in Wilkes-Barre, Pennsylvania,[1] at which time both parties were given the opportunity to present

[1] The transcript of the hearing consists of 315 pages and will be cited as "Tr. at --."

testimony and other evidence.[2] At the close of the hearing, I instructed the parties to file post-hearing briefs within thirty days of receipt of the transcript, but upon a joint motion of the parties, the deadline for filing was extended to February 9, 2006. Complainant's brief was received on February 9, 2006, and Respondent's brief was received on February 14, 2006.[3]

SUMMARY OF THE EVIDENCE

Complainant testified on her own behalf at the formal hearing. Respondent offered the testimony of seven of its employees: Paul Holmes, James Wiernas, Carolyn Collins, James Hart, Alicia Wilcox, Kenneth Kazmarek and Alice Sheehan.

Complainant offered the help-wanted advertisement posted by Respondent (CX-1) and the resume she submitted in response thereto (CX-2) into evidence. In addition, Complainant submitted the following into evidence: Department of Transportation ("DOT") Regulation 395.3 (CX-3); several e-mails sent between herself and her superiors (CX-4, CX-5, CX-7 through CX-11, CX-19); a report she prepared regarding driver overtime and DOT compliance (CX-6); her phone records from January 24, 2005 (CX-12); and numerous Time Card Reports (CX-13 through CX-18, CX-20 through CX-63).

Respondent submitted the following into evidence: a letter welcoming Complainant to the company and outlining her job duties (RX-1); a corrective action form issued to Complainant on January 28, 2005 (RX-2); a letter from DOT, Federal Motor Carrier Safety Administration showing Respondent received a satisfactory safety rating (RX-3); Complainant's driver file (RX-4); the cover letter Complainant submitted with her resume (RX-5); and questions Ms. Collins used when interviewing Complainant and other applicants for the Traffic Manager position (RX-6).[4]

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[2] Complainant submitted 63 exhibits, which were accepted into evidence and will be cited as "CX-1" through "CX-63." Respondent submitted 6 exhibits, which were received into evidence and will be cited as "RX-1" through "RX-6."

[3] I note Respondent has objected to several portions of Complainant's brief based on the fact that Complainant did not purchase a copy of the hearing transcript and therefore the brief contains facts not in the record and misstatements of other facts that are in the record. Complainant has responded, "Your Honor was present for the hearing and also has access to the transcript in order to make an informed decision in this matter." It is clear to both parties then that I will not rely on Complainant's assertion of the facts, but will instead rely on the testimony of record. Complainant's brief will be cited herein as "CB at --." Respondent's brief will be cited as "RB at --."

[4] Certain evidence, including CX-13 through CX-18 and CX-20 through CX-63, in addition to RX-3, tends to prove whether or not Respondent violated the DOT regulations. It is uncontested that Complainant reasonably believed Respondent was in violation of the regulations and irrelevant whether Respondent was actually in violation. Therefore, this evidence warrants no further discussion.

FINDINGS OF FACT

Complainant was hired by Respondent in April of 2004 to serve as a Traffic Manager/Dispatcher. On February 16, 2005, Complainant's employment was terminated by Respondent. Complainant argues this termination was in retaliation for protected activity which she had engaged in, including "bringing her concerns to management and her refusal to violate federal law." (CB at 2). Respondent "denies these allegations, asserting that [Complainant] was discharged for poor performance." (RB at 1).

Respondent is a wholesale distributor of fruits and vegetables with several locations across the country, including a Wilkes-Barre/Scranton location. (Tr. at 146). The Wilkes-Barre/Scranton location is peculiar in that it is run from two separate facilities due to a fire that occurred in the original Scranton location. (Tr. at 147). Currently, the Scranton facility is used mostly to repackage tomatoes, which are then shuttled to the Wilkes-Barre facility, where various types of produce from around the country are shipped and stored. (Tr. at 148). Respondent then ships produce orders to its customers using its fleet of approximately twenty trucks, its company drivers and sometimes third party carriers. (Tr. at 149).

Previously, Respondent employed a Traffic Manger at its Wilkes-Barre/Scranton location. This individual was responsible for coordinating drivers' schedules while complying with DOT regulations. This responsibility included routing trips in an efficient manner and scheduling product pick-up. The Traffic Manager was also responsible for collecting drivers' log sheets and trip reports and entering data regarding mileage and the time it took a driver to complete a run into the computer. The Traffic Manager was also responsible for making occasional deliveries and pickups. (RX-1; Tr. at 92-95).[5]

Sometime prior to April 15, 2004, Respondent had terminated its Traffic Manager, because he failed to reduce the amount of overtime worked by drivers and was not "proactive in filling in on some runs…and [participating in] driver ride alongs." (Tr. at 150-51). Respondent therefore advertised that it was looking to hire a new Traffic Manger for its Wilkes-Barre/Scranton location in the newspaper. (Tr. at 11-12; CX-1). The advertisement stated that Respondent sought an individual capable of multi-tasking with professionalism and computer experience, who possesses a commercial driver's license ("CDL") and knowledge of the DOT regulations, and who possesses basic cost accounting skills. (CX-1).

Complainant responded to this advertisement by sending her resume, which shows that her most recent position was as a commercial truck driver, and that she had numerous years experience in the manufacturing/engineering fields, which included managing other employees and performing cost analyses. (CX-2). Complainant also sent a cover letter with that resume, which stated that she possessed a CDL and was familiar with DOT regulations. (RX-5). Complainant participated in several interviews before being hired by Respondent sometime in

[5] Complainant testified that she never received a copy of RX-1, which lists these responsibilities of the Traffic Manager position, but nonetheless classified this document as "a pretty accurate reflection" of her responsibilities. (Tr. at 92).

April of 2004. (Tr. at 90-91). Complainant served as Respondent's Traffic Manager until she was terminated, on February 16, 2005. (Tr. at 53).

There are several incidents that occurred on a date certain that are important in resolving this claim. First, shortly after beginning to work for Respondent, on May 5, 2004, Complainant sent an e-mail to Mr. Holmes, her supervisor, expressing concerns that Respondent's deliveries to Boston were violating DOT regulations. (CX-4). Mr. Holmes responded that he would talk to Mr. Hart, the Warehouse Manager/Shop Steward, to determine whether the driver could be paid by the run instead of by the hour, so that Respondent did not have to pay for overnight accommodations for the driver. (CX-4). Complainant again addressed the same issue in the Driver Overtime and Compliance Report that she sent to Mr. Holmes and Mr. Wiernas on May 20, 2004. (CX-6).

Eight months later, on January 24, 2005, a run that Complainant had assigned to Respondent's driver, Russ Balmer, failed to leave Respondent's facility. (Tr. at 47). Complainant was contacted at approximately 8:30 p.m. and notified that Mr. Balmer was unable to take this run due to a family emergency. According to Complainant's testimony, she was never advised of who was to handle such a situation and was not aware that it was ultimately her responsibility to make the delivery if she could not find another driver to do so. In addition, Complainant felt she was not a strong enough driver to take this trip, which covered a significant distance, and also was too fatigued to make the delivery. (Tr. at 47-48).

Nonetheless, Complainant received a Corrective Action Form (RX-2) in relation to this incident. In relevant part, the Corrective Action Form states:

> On Monday, January 24, 2005 Linda made a decision not to make a delivery to the Wal-Mart/Sam's division due to a driver call off. As dispatcher, it is her responsibility to see that all deliveries are made as scheduled. She failed to respond accordingly and react to the nights work load in order of importance.

(RX-2). In the "Expectation" section of the Corrective Action Form, it states, "You are expected to show immediate and continued improvement. If you continue to perform at an unacceptable level, you will subject yourself to further disciplinary action up to and including termination." (RX-2). Although Complainant exercised her right to supply a written comment on the Corrective Action Form, stating that she tried to call company drivers, casual drivers and other trucking companies to find coverage, her telephone bill from the evening of January 24th shows that she devoted less than fifteen minutes to finding a resolution, and called only three drivers.[6] (CX-12). In addition, the comment she supplied on the Corrective Action Form is consistent with Mr. Holmes' testimony indicating Complainant did not accept responsibility for the failed delivery.[7] (Tr. at 176).

[6] The telephone records show that Complainant called Respondent's facility twice, Mr. Hart twice, and three drivers each one time.

[7] The testimony clearly demonstrates that Complainant did not feel she bore the ultimate responsibility for whether a driver showed up for work and made his assigned delivery,

A few days after this delivery failed to leave Respondent's facility, on January 27, 2005, Complainant sent another e-mail to Mr. Holmes, which proposed that Respondent use a third-party driver to deliver the Boston run, which would eliminate the compliance issue with that run. (CX-7). By Complainant's own admission, when she brought compliance issues to Mr. Holmes' attention, he never became angry with her or told her not to raise the issue again. (Tr. at 127). Rather, Complainant testified, "while I was never yelled at or disciplined for bringing the problem area up, I was just dismissed, and I wasn't listened to. I wasn't allowed to implement. I had responsibility and no authority." (Tr. at 138-39). However, the evidence reveals that Complainant was given responsibilities but failed to execute them.[8]

On February 15, 2005, another issue arose as to a Wal-Mart delivery. (Tr. at 177). By Complainant's own admission, after receiving the corrective action form relating to the January 24, 2005 incident, she understood Wal-Mart was a priority customer and a national account and it was imperative that Wal-Mart deliveries were made on-time. (Tr. at 118-19). However, on February 15, 2005, Complainant left a message for Respondent's driver, Kenny Kazmarek, who Complainant previously labeled undependable (CX-11), that he was to take this run. (Tr. at 119). Mr. Kazmarek failed to report to work to make this delivery.

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evidenced by her statement that she was not on call twenty-four hours per day. (Tr. at 117). To the contrary, Respondent's other employees viewed this as Complainant's responsibility, as evidence by Mr. Holmes' testimony that he expected Complainant to reroute drivers in order to ensure every delivery was made even if she personally had to report in the early morning to take a delivery herself (Tr. at 174); Mr. Wiernas' testimony that the Traffic Manager was the "last line of defense…and [if] a load is not going to get out unless they do it, then they need to do it" (Tr. at 215; 236); and Ms. Sheehan's testimony indicating that when a driver did not show up for work she called Complainant, "Because she was the dispatcher and would have the knowledge of…who would be available…That was her decision to make." (Tr. at 301). However, whether or not it was actually Complainant's responsibility and whether or not she was aware of the responsibility are relevant inquiries only in so far as they may establish a non-discriminatory reason for Complainant's termination.

[8] For example, when asked about whether it was permissible for Complainant to dispatch a driver by use of an answering machine rather than personally speaking to the driver, Mr. Holmes replied, "That was [her] department. I had no formula for how she should contact drivers daily. I personally had no preference…as long as it was done correctly and that all of the drivers were aware each day of their workload." (Tr. at 204-05). According to Ms. Collins' testimony, Complainant "constantly needed direction, was constantly asking…what to do." (Tr. at 256). When asked for her opinion of Complainant's work, Ms. Sheehan stated that Complainant "tried very hard but there would always be loose ends, stuff not being done, that would be put off…which sometimes it caused a problem." (Tr. at 304-05). Ms. Sheehan explained that when she reported to work in the evening, she would often receive phone calls from the drivers because there was confusion as to whether they had been dispatched or as to the details of the trip they had been dispatched for. (Tr. at 305).

Mr. Kazmarek testified that he did not receive Complainant's message (Tr. at 290-91) and had spoken to Complainant personally before he left work for the day on February 15, and she told him there was no work for him the following day. (Tr. at 288-89). Complainant did not like that Mr. Kazmarek did not have his own telephone, and distributed a flyer regarding the necessity to be available to receive orders by telephone the day before she was terminated, while Mr. Kazmarek testified that he did not like that his parents had to take telephone messages for him. (Tr. at 76-77, 107, 288-90; CX-19). Regardless, Mr. Kazmarek could not have taken the Wal-Mart run that Complainant scheduled him for on February 15, 2005, regardless of whether he received Complainant's telephone message or not, since he lacked sufficient hours to make this run under the DOT regulations. (Tr. at 291).

On February 16, 2005, Respondent terminated Complainant's employment. According to her testimony, Complainant was told it was because business was slowing down and she was no longer needed. (Tr. at 54). However, Mr. Holmes made the decision to terminate Complainant, and according to his testimony, Complainant was terminated due to "her failure to reduce driver overtime," "[her] refusal to go on runs," and in part, due to the two Wal-Mart deliveries never reaching their intended destinations. (Tr. at 163-165).

Respondent has offered evidence tending to support Mr. Holmes' testimony and tending to prove that Complainant was altogether unsuccessful at performing her job responsibilities. For example, the weight of the evidence establishes that Complainant was expected to complete driving assignments and failed to meet this expectation.

First, Complainant was expected to shuttle trucks back and forth between the Wilkes-Barre and Scranton facilities. Complainant testified that this was not mentioned during the interview process (Tr. at 89), although it appears on the list of questions used by Ms. Collins, Respondent's Administrator, to interview Complainant and the other job applicants.[9] Regardless, Complainant admitted that she was made aware of this requirement on the day that she was hired (Tr. at 91), and it appears on the job description (RX-1), which Complainant testified was "a pretty accurate reflection" of her responsibilities as Traffic Manager (Tr. at 92). Complainant also unequivocally indicated she understood this responsibility when asked whether it was her understanding when she accepted the position that she would be required to drive a truck, to which she responded, "Occasionally shuttle runs were mentioned between the Wilkes-Barre facility and the Scranton warehouse." (Tr. at 16).

Secondly, Complainant was expected to make a couple of short runs per week in order to reduce driver overtime and to fill in when a driver was unable to take his scheduled run. Complainant initially testified that she was not told, either prior to being hired or during her tenure with Respondent, that she was expected to make two deliveries per week on her own. (Tr. at 81). However, on cross-examination, when Complainant was asked whether she was ever told that she was required to make occasional pickups, she responded, "It was mentioned after I was

[9] The list of questions generated and used by Ms. Collins includes the following, "As a traffic manager, you will be expected to help in all areas of the company if needed. This may include shuttling trucks, warehouse duties and administration duties. Are there any concerns regarding this?" (RX-6).

hired, yes." (Tr. at 95). In addition, this responsibility also appears on the list of Complainant's responsibilities as Traffic Manager. (RX-1).

Finally, Complainant was expected to occasionally ride with Respondent's drivers as they completed their driving assignments. Again, the list of Complainant's job responsibilities states, "drive along trips with our employees for efficiency inspections." (RX-1). In addition, in a "Driver Overtime and DOT Compliance Report" prepared by Complainant and attached to a May 20, 2004 e-mail sent to Complainant's supervisor, Mr. Holmes, among others, Complainant stated:

> My presence on a trip is meaningful in that I get to meet customers, spend some time with the individual drivers and see first hand the routes we travel but is not a deterrent to abuse. No driver will abuse the system with me on board. (I have started and will continue the practice of riding along on certain trips but for the reasons I listed.).

(CX-6).

By Complainant's own admission, she went on only two or three shuttle runs between the Wilkes-Barre and Scranton facilities, despite the fact that shuttles were run "every day, a couple times a day." (Tr. at 100). According to Complainant's testimony, she sometimes called a driver in, just to do shuttle runs because when she told Mr. Hart, Respondent's warehouse manager who trained her, that she would do the shuttle runs, he would tell her to call a driver instead. However, Mr. Hart testified that he only told Complainant not to make these runs when she offered to do them in the early afternoon, when they were not ready. (Tr. at 277). In any event, Complainant admitted she does not recall ever telling Mr. Holmes that her failure to shuttle the trucks between facilities was due to Mr. Hart instructing her not to. (Tr. at 100-01). Complainant also recalled participating in ride alongs only twice while employed by Respondent, but did have another one scheduled for the week following her termination. (Tr. at 43-44).

Other than failing to execute her driving responsibilities, Complainant failed to prepare reports properly. Complainant testified that when she traveled to Texas in May of 2004 for training, it was stressed that reports needed to be timely and accurate. However, she admitted that she made some errors inputting data and received "an occasional e-mail" from Mr. Holmes regarding errors and untimeliness of these reports. (Tr. at 97). Also, Complainant, by her own admission, became aware prior to working for Respondent that she would be responsible for reducing the amount of overtime that was being worked by Respondent's drivers. (Tr. at 49). However, Complainant admitted she was unsuccessful in reducing the overtime percentage. (Tr. at 97-98).

After Complainant was discharged from her employment, Respondent did not hire a new Traffic Manager. Instead, a few of Respondent's existing employees shared the responsibilities of the position. According to the testimony of Mr. Holmes, prior to the November 17, 2005 hearing, Respondent had reduced its driver overtime percentage by half and no delivery had failed to go out since Complainant's termination. (Tr. at 182-83). In addition, Respondent had

become a "preferred supplier" for Wal-Mart, allowing Respondent to receive additional contracts as new Wal-Marts open. (Tr. at 221).

ANALYSIS

To prevail under the Act, Complainant must prove by a preponderance of the evidence that she engaged in protected activity, that the employer was aware of the activity, that the employer took adverse employment action against her, and that there was a causal connection between the protected activity and the adverse employment action. *Schwartz v. Young's Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 01-STA-33, slip op. at 8-9 (ARB Oct. 1, 2003); *Assistant Sac's v. Minnesota Corn Processors, Inc.*, ARB No. 01-042, ALJ No. 2000-STA-0044, slip op. at 4 (ARB July 31, 2003). If the complainant is able to establish a *prima facie* case, she is entitled to a presumption that the protected activity was the reason for the adverse employment action. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Here, Complainant clearly engaged in protected activity, since she expressed on multiple occasions concerns about the Boston run violating the DOT regulations. In addition, Mr. Holmes, who made the decision to terminate Complainant's employment, was clearly aware that Complainant had engaged in this protected activity, since the concerns were addressed directly to him. Respondent undoubtedly took adverse employment action against Complainant, since Complainant's employment was terminated on February 16, 2005. Thus, the only element of the *prima facie* case that would even warrant discussion is whether there was a causal nexus between Complainant's engagement in protected activity and the adverse employment action taken.[10]

However, when a case is tried fully on the merits, the proper inquiry is whether the adverse action was motivated by a discriminatory or a legitimate, non-discriminatory purpose, and there is no need to determine whether the employee has established a *prima facie* case. *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714-16; *Pike v. Public Storage Companies, Inc.*, 98-STA-35 (ARB Aug. 10, 1999); *Ass't Sec'y & Ciotti v. Sysco Foods Co. of Philadelphia*, 97-STA-30 (ARB July 8, 1998).

Here, Respondent has shown by clear and convincing evidence that it had a legitimate, non-discriminatory purpose for discharging Complainant. Complainant knew she was expected

[10]Complainant has offered no evidence that there was a relationship between the protected activity and the adverse employment action. While it is settled that the proximity in time between the two can raise an inference of causation, *see Woodson v. Scott Paper Co.*, 109 F.3d 913, 920 (3d Cir. 1997), no such inference arises here. First, I note Complainant had raised the non-compliance issue within a month of being hired and again shortly thereafter. By her own admission, she did not feel anyone was angered by the fact that she raised the issue and there were no negative consequences for her action during the next eight months. She again raised the issue on January 27, 2005, but suffered no adverse employment action until after the second Wal-Mart issue arose, on February 15, 2005. Complainant was fired upon reporting to work the following morning, raising an inference that this instead was the factor which triggered her termination.

to reduce driver overtime, and admitted that she did not do so. In addition, she failed to perform the driving functions of her position, which were specifically assigned to her in order to reduce the overtime. These are the precise reasons why Complainant's predecessor was fired.

Complainant also failed to file accurate and timely reports, and she admittedly understood the importance of this aspect of her job. In addition, in January of 2005, Complainant was reprimanded because a Wal-Mart delivery failed to leave Respondent's facility. After this incident, Complainant knew that Wal-Mart was a very important account and understood that Wal-Mart was to receive priority. She was notified via a Corrective Action Form that similar incidents would lead to further adverse action, up to and including termination. Still, less than a month later, Complainant dispatched a driver who she previously referred to as undependable, and who lacked sufficient hours, to take a Wal-Mart run. That driver failed to take the load, leading to Complainant's termination.

After Complainant was terminated, Respondent decided not to hire another Traffic Manager, and instead divided the responsibilities of that position among a few individuals already employed by Respondent. These individuals seem to have excelled in the areas where Complainant and her predecessor failed.

Based on the fact that Complainant's predecessor was terminated for unsatisfactory performance, and the evidence introduced by Respondent of Complainant's failure to execute many responsibilities of her job, and because those who took over Complainant's job duties have succeeded, I find that Respondent has proven by clear and convincing evidence that Complainant was terminated for a legitimate, non-discriminatory reason.

RECOMMENDED ORDER

It is ORDERED that the complaint of Linda G. Balazs is dismissed.

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RALPH A. ROMANO
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF REVIEW: The administrative law judge's Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. *See* 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002).

Within thirty (30) days of the date of issuance of the administrative law judge's Recommended Decision and Order, the parties may file briefs with the Board in support of, or in opposition to, the administrative law judge's decision unless the Board, upon notice to the parties, establishes a different briefing schedule. *See* 29 C.F.R. § 1978.109(c)(2). All further inquiries and correspondence in this matter should be directed to the Board.