U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 03 October 2006

Case No.: **2006-STA-00003**

In the Matter of:

RICK JACKSON,
Complainant,

v.

EAGLE LOGISTICS, INC.,
Respondent.

Before: WILLIAM S. COLWELL
Administrative Law Judge

Appearances:

For the Complainant:
Rick Jackson, *Pro Se*.

For the Respondent:
Dean Raasch, President and Owner,
Eagle Logistics, Inc.

RECOMMENDED DECISION AND ORDER

Denying the Complainant's Claim

This case arises from a complaint filed under the employee protection provisions of Section 405 of the Surface Transportation Assistance Act of 1982 (the "Act" or "STAA"), 49 U.S.C § 31105, and the implementing regulations promulgated at 29 C.F.R. § 1978. Section 405 of the STAA protects a covered employee from discharge, discipline or discrimination because the employee has engaged in protected activity pertaining to commercial motor vehicle safety and health matters. This matter is before me on the Complainant's request for hearing and objection to findings issued on behalf of the Secretary of Labor by the Regional Administrator of the Department of Labor's Occupational Safety and Health Administration ("OSHA") after investigation of the complaint.

The Complainant in this case was hired by the Respondent as a driver of commercial motor vehicles on June 15, 2005. He was discharged by the Respondent on July 25, 2005. The Complainant alleged in his OSHA complaint that this discharge was in retaliation for an incident in which he claims to have refused to drive, because he

was too tired and required a ten-hour rest break, as well as a separate incident in which he claims to have made a late delivery, because he would have been unable to make the delivery on time without violating the rules governing hours of service.

The Complainant timely filed a complaint with OSHA setting out these alleged grievances on August 1, 2005. OSHA investigated, and in a September 22, 2005 opinion, OSHA dismissed the complaint. With regard to the incidents described by the Complainant, OSHA found that he could have made his delivery on time without violating the rules and that he had taken sufficient rest breaks that he did not need an additional ten-hour rest break. Moreover, OSHA found that the Complainant had been falsifying his driver's logs in violation of 49 C.F.R. § 395.8(e). OSHA concluded that the evidence supported the Respondent's contention that the Complainant had been terminated for his poor job performance, including: late deliveries, falsifying his logs, and insubordination.

On October 15, 2005, the Complainant appealed this finding by submitting a letter to the Chief Administrative Law Judge. The case was assigned to me, and on October 27, 2005, I issued a Notice of Hearing and Pre-hearing Order setting a hearing date of November 17, 2005. In response to a request from the Complainant, I postponed the start of the hearing until March 21, 2006. Due to a problem with the availability of the courtroom, I subsequently postponed the start of the hearing a second time to July 13, 2006.

A hearing was held in this matter in Madison, Wisconsin on July 13, 2006 at which both parties were afforded a full opportunity to present evidence and argument as provided by law and applicable regulation. The Complainant represented himself, and the Respondent was represented by Dean Raasch, its President and Owner. Testimony was received from the Complainant and from Dean Raasch. Nine (9) Complainant's Exhibits ("CX") were admitted into evidence as CX-1, CX-3, CX-4, CX-6 through CX-9, CX-11, and CX-14. Transcript ("Tr.") at 9 & 233-240. Ten (10) Respondent's Exhibits ("RX") were admitted into evidence as RX-1 through RX-10. Tr. at 10 & 233-240. At the close of the hearing, I reserved judgment on whether or not post-hearing briefs would be necessary, and I ultimately decided that they would not be and informed the parties by phone.

The findings and conclusions which follow are based on a complete review of the entire record, in light of the parties' arguments, applicable statutory provisions and regulations, and pertinent precedent.

SUMMARY OF THE EVIDENCE

The Complainant's Testimony

The Complainant's hearing testimony was composed almost entirely of explanations and excuses for the eight events listed in his termination letter, of

ruminations about the corrupt aspects of the trucking industry, and of hypothetical examples of how and why drivers falsify their logs. *See e.g.,* Tr. at 171-172. In testifying about these events, the Complainant conceded both that he was late for the various loadings and deliveries alleged by the Respondent and that he falsified his logs on June 20, 2005 as alleged by the Respondent. Tr. at 163-164, 166, & 200-201. Additionally, the Complainant testified that he falsified his logs on several other occasions as well. Tr. at 197.

The Complainant also testified that, during a heated phone call on June 23, 2005, he threatened to call the Department of Transportation and complain. Tr. at 175-178. The Complainant testified that this threat was made during an argument with his supervisor in response to his supervisor's desire to review his logs. Tr. at 175-178. The Complainant testified that in the same argument, he also respondent to his supervisor's inquiries by telling him to "go get fucked." Tr. at 175-178. The Complainant also testified that, immediately after he made the threat, he and his supervisor had another conversation after which the Complainant believed that "that whole incident…blew over." Tr. at 177. The Complainant also testified that he was not discharged until a month later after he had another argument with his supervisor and had made another late delivery. Tr. at 180.

Dean Raasch's Testimony

Dean Raasch testified that he terminated the Complainant for the eight reasons enumerated in the termination letter, and he explained what each of those reasons was, including various late pickups and deliveries, failure to perform a required inspection, falsification of logs, and insubordination. Tr. at 15-16. He testified that there were no other reasons beyond those enumerated in the letter for the Complainant's discharge. Tr. at 17.

Raasch also testified to the argument between him and the Complainant in which the Complainant told him to "fuck off" and threatened to call the DOT. Tr. at 104. He testified that this argument grew out of the Complainant's refusal to go over his driving logs with Raasch so that he could determine when the Complainant could make his next delivery. Tr. at 103-105. Raasch testified that after this blow-up he gave the Complainant some time to cool off before calling him again to finish resolving the matter. Tr. at 104 & 125.

Raasch explained that "[t]here was never any implicit or explicit demand on [the Complainant] to violate hours of service rules." Tr. at 122. Raasch emphasized that the Complainant was the first driver he had worked with in fourteen years that had refused to review his driving logs with his supervisor. Tr. at 106-108.

Raasch also testified that, when the Complainant started work with the Respondent, the Respondent was in a probationary period with the DOT in which it was subject to heightened scrutiny, because it was a new company. Tr. at 230-232. He testified further that the DOT actually did a "spot audit" of the Respondent's records

shortly after the Complainant began his employment there and found the Respondent to be compliant. Tr. at 231. He also explained that the DOT released the Respondent from this probationary period after only ten months, instead of the eighteen for which it could have gone on, because the Respondent was found to be a compliant company. Tr. at 231.

The Complainant's Exhibits

The Complainant's exhibits are a copy of the Respondent's answers to interrogatories (CX-1), a copy of consolidated notes related to the Complainant's employment with the Respondent (CX-3), copies of the Complainant's daily driver's logs (CX-4), a copy of the Respondent's responses to an inquiry letter from the Wisconsin Department of Workforce Development regarding the Complainant's discharge (CX-6), a copy of the letter terminating the Complainant (CX-7), copies of the documents related to the investigation (CX-8 & CX-9), a copy of the Respondent's pre-hearing issues statement (CX-11), and copies of the Complainant's phone bills (CX-14).

The Respondent's Exhibits

The Respondent's exhibits are a copy of the Eagle Logistics Employee Handbook (RX-1), copies of the hiring records from the beginning of the Complainant's employment (RX-2), a copy of the letter terminating the Complainant (RX-3), a copy of the Respondent's responses to an inquiry letter from the Wisconsin Department of Workforce Development regarding the Complainant's discharge (RX-4), copies of the Complainant's daily driver's logs (RX-5), a copy of a load/drop detail sheet (RX-6), copies of the documents related to the investigation (RX-7 & RX-8), annotated copies of some of the Complainant's daily driver's logs (RX-9), and a copy of consolidated notes related to the Complainant's employment with the Respondent (RX-10).

DISCUSSION

Applicable Law

The employee protection provisions of the Surface Transportation Assistance Act provide in relevant part:

> (a) Prohibitions:
>
> > (1) A person may not discharge an employee or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because:
> >
> > > (A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial vehicle safety regulation,

> standard, or order, or has testified or will testify in such a proceeding; ...
>
> (B) the employee refuses to operate a vehicle because:
>
> > (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or
> >
> > (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

49 U.S.C. § 31105(a).

Prima Facie Case

Claims under the STAA are adjudicated pursuant to the standard articulated in ***McDonnell Douglas Corp. v. Green***, 411 U.S. 792 (1973). Under that framework, the complainant must initially establish a *prima facie* case of retaliatory discharge, which raises an inference that the protected activity was likely the reason for the adverse action. ***Moon v. Transport Drivers, Inc.***, 836 F.2d 226, 229 (6th Cir. 1987); *see also* ***Texas Dep't of Community Affairs v. Burdine***, 450 U.S. 248, 253 (1981). To establish a *prima facie* case of retaliatory discharge under the Act, the complainant must prove: (1) that he engaged in protected activity under the STAA; (2) that he was the subject of an adverse employment action; and (3) that there was a causal link between his protected activity and the adverse action of the employer. ***Moon***, *supra*.

Protected Activity

Under 49 U.S.C. § 31105 (a)(1)(A), an employee has engaged in protected activity if he or she has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order. A complainant need not objectively prove an actual violation of a vehicle safety regulation to qualify for protection. ***Yellow Freight System, Inc. v. Martin***, 954. F.2d 353, 356-57 (6th Cir. 1992); *see also* ***Lajoie v. Environmental Management Systems, Inc.***, 1990-STA-00031 (Sec'y Oct. 27, 1992). A complainant also need not mention a specific commercial motor vehicle safety standard to be protected under the STAA. ***Nix v. Nehi-R.C. Bottling Co.***, 1984-STA-00001, slip op. at 8-9 (Sec'y July 4, 1984). An employee's threats to notify officials of agencies such as the Department of Transportation or the Federal Motor Carrier Safety Administration may also be protected under the STAA. ***William v. Carretta Trucking, Inc.***, 1994-STA-00007 (Sec'y Feb. 15, 1995).

Such complaints may be oral rather than written. ***Moon v. Transport Drivers, Inc.***, 836 F.2d 226, 227-29 (6th Cir. 1987) (finding that driver had engaged in protected activity under the STAA where driver had made only oral complaints to supervisors). If the internal communications are oral, however, they must be sufficient to give notice that a complaint is being filed. *See* ***Clean Harbors Environmental Services, Inc. v. Herman***, 146 F.3d 12, 22 (1st Cir. 1998) (holding that the complainant's oral complaints were adequate where they made the respondent aware that the complainant was concerned about maintaining regulatory compliance).

Under the STAA, an employee can also engage in protected activity by refusing to operate a vehicle because "the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health" or because "the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition." 49 U.S.C.A. §§ 31105(a)(1)(B)(i)-(ii). These two types of refusal to drive are commonly known as the "actual violation" and "reasonable apprehension" subsections. ***Eash v. Roadway Express, Inc.***, ARB No. 04-036, slip op. at 6 (Sept. 30, 2005), *citing* ***Leach v. Basin Western, Inc.***, ARB No. 02-089, slip op. at 3 (July 31, 2003). Since the Complainant has made no allegation that he ever refused to operate a vehicle, however, these two provisions are inapplicable in this case.

Adverse Employment Action

The employee protection provisions of the Surface Transportation Assistance Act provide that "[a] person may not discharge an employee" for engaging in protected activity under the Act. 49 U.S.C. § 31105(a). In this case, it is undisputed that the Complainant was terminated by the Respondent. Thus, it has been established that he suffered adverse employment action within the meaning of the Act in this case.

Causal Connection

A causal connection between the protected activity and the adverse employment action may be circumstantially established by showing that the employer was aware of the protected activity and that adverse action followed closely thereafter. *See* ***Couty v. Dole***, 886 F.2d 147, 148 (8th Cir. 1989). Thus, close proximity in time can be considered evidence of causation. ***White v. The Osage Tribal Council***, ARB No. 99-120, slip op. at 4 (Aug. 8, 1997). While temporal proximity may be used to establish the causal inference, it is not necessarily dispositive. ***Barber v. Planet Airways, Inc.***, ARB No. 04-056, slip op. at 6 (Apr. 28, 2006). When other, contradictory evidence is present, inferring a causal relationship solely from temporal proximity may be illogical. *Id*. Such contradictory evidence could include evidence of intervening events or of legitimate, nondiscriminatory reasons for the adverse action. *Id*.

Rebutting the Complainant's *Prima Facie* Case

If the Complainant can carry his burden of establishing a *prima facie* case, the burden shifts to the Respondent to rebut that *prima facie* case. The Respondent can do so by articulating, through the introduction of admissible evidence, a legitimate, nondiscriminatory reason for its employment decision. The employer "need not persuade the court that it was actually motivated by the proffered reasons," but the evidence must be sufficient to raise a genuine issue of fact as to whether the employer discriminated against the employee. ***Texas Dep't of Community Affairs v. Burdine***, 450 U.S. 248, 254-255 (1981). "The explanation provided must be legally sufficient to justify a judgment for the [employer]." *Id*. If the Respondent is successful, the *prima facie* case is rebutted, and the complainant must then prove, by a preponderance of the evidence, that the legitimate reason proffered by the respondent was a mere pretext for discrimination. *Id*. at 255-256.

Application to this Case

First, I should note that the Complainant is *pro se*, but he still must carry his burden of production. While a *pro se* party may be held to a lesser standard than legal counsel with regard to matters of procedure, the substantive burden of establishing a *prima facie* case and of rebutting a proffered nondiscriminatory reason can be no less. In this case, that is a burden that the Complainant has not carried.

Prima Facie Case

The Complainant in this matter has failed to establish a *prima facie* case. Although his firing establishes undisputed adverse employment action, the Complainant has failed to establish either that he engaged in protected activity or any causal link between such activity and the adverse employment action.

Protected Activity

Despite his extensive testimony, the Complainant never testified to anything that qualifies as protected activity. The Complainant instead focused exclusively on offering excuses and explanations for the eight events listed as the reasons for his termination in the termination letter sent to him by the Respondent on July 26, 2005. Those eight events are:

1. June 15, 2005 – Arrived late for a scheduled loading appointment for a customer.
2. June 15, 2005 – Failed to do a proper pre-trip on tractor resulting in dragging tires that brakes were locked up on. Left skid marks at Penske over entire yard.
3. June 16, 2005 – Arrived late for a scheduled delivery appointment to a customer
4. June 20, 2005 – Falsified driver's log.
5. June 23, 3005 – Arrived late for a scheduled appointment to deliver a load to a customer.

6. June 23, 2005 – Insubordinate behavior expressed towards [the Respondent] during a phone conversation related to the late arrival for [the Complainant's] scheduled delivery appointment.
7. July 22, 2005 – Failure to provide logs for each day during the month. At the writing of this letter we are still missing log pages for July 2, 3, 4, 9 and 10.
8. July 25, 2005 – Arrived late for a scheduled delivery appointment to a customer.

CX-7; RX-3. In testifying about these events, the Complainant conceded both that he was late for the various loadings and deliveries alleged by the Respondent and that he falsified his logs on June 20, 2005 as alleged by the Respondent. Tr. at 163-164, 166, & 200-201. Moreover, the Complainant admitted that he falsified his logs on several other occasions as well. Tr. at 197.

Despite my attempts to guide the Complainant away from excuses and explanations for these events and back onto relevant testimony about his alleged protected activity and resulting retaliation, he persisted in rehashing the details leading up to each of these eight events. *See e.g.,* Tr. at 171-172. None of these excuses or explanations, however, reveals any protected activity. Even if all of the Complainant's testimonial allegations about the Respondent's conduct related to these eight events were true – which I do not accept – they would still only establish that the Complainant willingly participated in regulatory violations regarding logging and hours of service throughout his employment, but an employer and an employee's collusion in violating regulations does not establish either protected activity or retaliation under the STAA' s employee protection provisions.

The only piece of testimony that could even arguably come close to revealing some protected activity is the Complainant's claim that, during a heated phone call on June 23, 2005, he threatened to call the Department of Transportation and complain. Tr. at 175-178. The Respondent acknowledges that this statement was made, but in the context of this discussion, I find that it does not rise to the level of "filing a complaint." Tr. at 104; ***Clean Harbors Environmental Services, Inc. v. Herman***, 146 F.3d 12, 22 (1st Cir. 1998).

First, this threat was made in the context of an argument in which the Complainant was refusing to discuss his logs with his supervisor, refusing to provide an estimate as to when he could make his next delivery, and in which the Complainant also responded to his supervisor's inquiries by telling him to "fuck off" or to "go get fucked." Tr. at 103-105 & 175-178. Given this context, along with the fact that the Complainant was employed for another month without ever elaborating on or acting on this threat and the fact that even at the hearing the Complainant could not articulate specifically what it was that he was going to report the Respondent for, I find that this statement was merely an empty attempt to rebuff his supervisor's legitimate inquiries into his poor performance and was not adequate to put the Respondent on notice that the Complainant was actually engaging in protected activity.

Causal Connection

Even if that threat did qualify as protected activity, the Complainant still would not have established a *prima facie* case, because he has offered no direct or circumstantial evidence of any causal link between that threat and his termination one month later except for their temporal proximity. The Complainant's allegedly protected activity and termination were separated by only about a month, so there is arguably temporal proximity, and as discussed *supra*, close proximity in time between protected activity and adverse employment action can be used to infer a causal connection between the two in some cases. In this case, however, mere temporal proximity is inadequate to establish a causal inference, because there is also evidence of both intervening events and legitimate, nondiscriminatory reasons for the discharge. *See* ***Barber***, *supra*.

The intervening events that occurred in this case were the subsequent conversation between the Complainant and his supervisor settling the issue and his subsequent late delivery. The Complainant made his alleged threat on June 22, 2005, but he was not terminated until July 25, 2005. Immediately after he made the threat, he and his supervisor had another conversation after which the Complainant believed that "that whole incident…blew over." Tr. at 177. Moreover, the Complainant failed once again to make a delivery on time one month later, and immediately afterwards, he was discharged. This late delivery was one of the eight events listed in the termination later as cause for the discharge. CX-7; RX-3; Tr. at 15-17. Since these two events occurred between the alleged protected activity and the termination decision, their intervention undermines any inference based merely on temporal proximity.

In addition to the intervening events, the establishment of legitimate, nondiscriminatory reasons for the adverse activity also undermines any inference based merely on temporal proximity. In this case, the Respondent identified eight different events as justification for the Complainant's discharge. CX-7; RX-3; Tr. at 15-17. Each of these items is legitimate and nondiscriminatory, and most of them are completely undisputed by the Complainant. Tr. at 163-164, 166, & 200-201.

In light of both the intervening events and evidence of legitimate, nondiscriminatory reasons for the Complainant's discharge, I find that mere temporal proximity is inadequate to create an inference of causation. Thus, even if the Complainant had established that he engaged in protected activity, he still would not have established a *prima facie* case.

Rebutting the Complainant's *Prima Facie* Case

Even if the Complainant had established a *prima facie* case, the Respondent introduced adequate evidence to establish legitimate, nondiscriminatory reasons for the discharge, as discussed *supra*. CX-7; RX-3; Tr. at 15-17. These nondiscriminatory reasons would effectively rebut a *prima facie* case and shift the burden back to the Complainant to establish by a preponderance of the evidence that those reasons were mere pretexts for discrimination. The Complainant, however, has offered absolutely no

evidence demonstrating that these legitimate, nondiscriminatory reasons were mere pretexts for discrimination, and in fact, admitted that most of them occurred as alleged by the Respondent. Tr. at 163-164, 166, & 200-201.

Conclusion

Although it is undisputed that the Complainant suffered adverse employment action when he was terminated on July 25, 2005, the Complainant has failed to establish that he engaged in any protected activity, that such activity had any causal connection to his termination, or that the nondiscriminatory reasons offered by the Respondent were mere pretexts. Because he has failed to carry his burdens of proof under the STAA, his claim for relief must be denied.

RECOMMENDED ORDER

The claim of the Complainant, Rick Jackson, against the Respondent, Eagle Logistics, Inc., is hereby denied.

A

WILLIAM S. COLWELL
Administrative Law Judge

Washington, D.C.
WSC:MAWV

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.