U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 08 September 2008

CASE NO.: 2008-NTS-00002

In the Matter of:

DARIUS MOTARJEMI,
Complainant

v.

METROPOLITIAN COUNCIL METRO TRANSIT DIVISION,
Respondent

RECOMMENDED DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

The Background

Procedural Background

A hearing is scheduled to begin on September 16, 2008, in Minneapolis, Minnesota, in the above-captioned matter arising under the employee protection provisions of the National Transit Systems Security Act ("NTSSA"), Pub. L. No. 110-53 (August 3, 2007)(to be codified at 6 U.S.C. § 1142 *et seq.*)("Act"). On August 25, 2008, Respondents submitted a Motion for Summary Decision pursuant to 20 C.F.R. § 18.40. Complainant submitted no response to the Respondents' Motion for Summary Decision.

On February 22, 2008, the Complainant filed a complaint, under the NTSSA, with the Occupational Safety and Health Administration ("OSHA") against the Metro Transit Division of the Metropolitan Council. (Hereinafter "Metro" or "Metro Transit"). On April 4, 2008, the complaint was dismissed by OSHA which found no "protected activity." By letter, dated May 22, 2008, Complainant, through his former counsel, objected to that determination, and requested a hearing before an Administrative Law Judge. I issued a Notice of Hearing on June 13, 2008.

The Respondent is a public transportation agency subject to the Act. The Complainant was an employee of Metro Transit. Given the complaint was filed within 180 days of the termination, it is timely filed. Moreover, the alleged protected activity giving rise to the complaint and the employment termination occurred on or after the effective date of the Act. Those actions complained of prior to the effective date of the Act do not form appropriate bases for action.

The Parties' Contentions

Respondent first argues that its Motion for Summary Decision should be granted because the record reflects a "complete absence" of evidence to support the claims and provides a "clear and legitimate basis" for the Complainant's removal. Respondents assert that Complainant cannot show that he engaged in protected activity. Respondents further assert that even if Complainant can establish protected activity, he cannot establish a causal connection between said activity and his discharge. Secondly, Respondents argue, assuming that Complainant can establish a prima facie case, that their Motion for Summary Decision should be granted because Complainant was terminated for a legitimate, non-discriminatory reason.

In his earlier pleadings, Complainant argued that he had been placed on administrative leave, on August 30, 2007, and later terminated, on September 2, 2007, because, on August 30, 2007, he had refused to drive a bus with passengers standing in the aisle. He had been assigned to transport passengers from the Mall of America, in Bloomington, MN, to a State Fair, in St. Paul, MN, in a 60-foot articulated bus. He believed the bus was overcrowded and that passengers had encroached on the driver's area which might have restricted his field of vision. He claimed that with mostly elderly passengers and a freeway route, he allegedly believed in the risk of serious injury in the event of an accident. The Metro supervisor declined his request to remove passengers and he refused to drive. The supervisor relieved him of duty and he was placed on administrative leave. After an internal investigation, he was terminated.

The Law

National Transit Systems Security Act

SEC. 1413. PUBLIC TRANSPORTATION EMPLOYEE PROTECTIONS.

(a) IN GENERAL.—A public transportation agency, a contractor or a subcontractor of such agency, or an officer or employee of such agency, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done—

(1) to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to public transportation safety or security, or fraud, waste, or abuse of Federal grants or other public funds intended to be used for public transportation safety or security, if the information or assistance is provided to or an investigation stemming from the provided information is conducted by—

(A) a Federal, State, or local regulatory or law enforcement agency (including an office of the Inspector General under the Inspector General Act of 1978 (5 U.S.C. App.; Public Law 95-452);

(B) any Member of Congress, any Committee of Congress, or the Government Accountability Office; or

(C) a person with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct;

(2) to refuse to violate or assist in the violation of any Federal law, rule, or regulation relating to public transportation safety or security;

(3) to file a complaint or directly cause to be brought a proceeding related to the enforcement of this section or to testify in that proceeding;

(4) to cooperate with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board; or

(5) to furnish information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with public transportation.

(b) HAZARDOUS SAFETY OR SECURITY CONDITIONS.—

(1) A public transportation agency, or a contractor or a subcontractor of such agency, or an officer or employee of such agency, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for—

(A) reporting a hazardous safety or security condition;

(B) refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties, if the conditions described in paragraph (2) exist; or

(C) refusing to authorize the use of any safety- or security-related equipment, track, or structures, if the employee is responsible for the inspection or repair of the equipment, track, or structures, when the employee believes that the equipment, track, or structures are in a hazardous safety or security condition, if the conditions described in paragraph (2) of this subsection exist.

(2) A refusal is protected under paragraph (1)(B) and (C) if

(A) the refusal is made in good faith and no reasonable alternative to the refusal is available to the employee;

(B) a reasonable individual in the circumstances then confronting the employee would conclude that—

(i) the hazardous condition presents an imminent danger of death or serious injury; and

(ii) the urgency of the situation does not allow sufficient time to eliminate the danger without such refusal; and

(C) the employee, where possible, has notified the public transportation agency of the existence of the hazardous condition and the intention not to perform further work, or not to authorize the use of the hazardous equipment, track, or structures, unless the condition is corrected immediately or the equipment, track, or structures are repaired properly or replaced.

(3) In this subsection, only subsection (b)(1)(A) shall apply to security personnel, including transit police, employed or utilized by a public transportation agency to protect riders, equipment, assets, or facilities.

According to the Joint Explanatory Statement of the Conference Committee, this provision is modeled on the employee protection provisions of the Federal Rail Safety Act, 49 U.S.C. § 20109, and the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 ("AIR21").

I have found no language making the NTSSA, enacted on August 3, 2007, retroactive. *See, Brune v. Horizon Air Industries, Inc.,* ARB No. 04-037 (ARB Jan. 31, 2006) (Wendell H. Ford Aviation Investment and Reform Act for the 21st Century not retroactive). Nor does the overall legislation, within which it is found, suggest an earlier effective date. *Id.* As the Administrative Review Board has pointed out, there is a presumption against retroactivity and retroactivity is not favored. *Id.* Retroactive application would impose and increase liability on transportation systems for past conduct. *Id.* It would impose new duties on employers which had not previously existed at the time of the events complained of herein.[1] Thus, I find nothing rebutting the traditional presumption.

The legal burden of proof under the NTSSA is similar to the burden specified in AIR21, SOX and the PSIA. The complainant must establish that the protected activity was a "contributing factor" in the unfavorable personnel action alleged in the complaint. NTSSA, Sec. 1413(c)(2)(B)(ii). Relief may not be ordered notwithstanding this showing if the "employer" demonstrates by "clear and convincing evidence" that it would have taken the same unfavorable personnel action in the absence of the protected activity. NTSSA, Sec. 1413(c)(2)(B)(iii).

Summary Judgment

Any party may move, with or without supporting affidavits, for summary decision on all or any part of a proceeding. 29 C.F.R. § 18.40(a). The Administrative Law Judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that the moving party is entitled to summary decision. 29 C.F.R. § 18.40(d).[2]

The Administrative Review Board has offered specific guidance on the issue of summary decision. In *Reddy*, the Board announced the following procedure for adjudicating such motions:[3]

[1] The Record of Warning and two-day suspension for the alleged November 26, 2005 incident would, in any case, not be timely because no complaint was filed within 180 days. However, it could be considered as background for the August 30, 2007 matter. *See, Brune, supra*.

[2] In *Reddy v. Medquist, Inc.*, No. 04-123 (September 30, 2005), the Administrative Review Board ("Board") elaborated on the meaning of "genuine issue of material fact." It stated, "[a] 'material fact' is one whose existence affects the outcome of the case. A 'genuine issue' exists when the nonmoving party produces sufficient evidence of a material fact so that a fact-finder is required to resolve the parties' differing versions at trial. Sufficient evidence is any probative evidence." *Reddy* at 4.

[3] The Board noted that, because it reviews issues of law *de novo*, its procedure for reviewing a grant of summary decision is the same as the Administrative Law Judge would follow in ruling on the motion.

> Once the moving party has demonstrated an absence of evidence supporting the nonmoving party's position, the burden shifts to the nonmoving party to establish the existence of an issue of fact that could affect the outcome of the litigation. The nonmoving party may not rest upon mere allegations, speculations, or denials in his pleadings, but must set forth specific facts in each issue upon which he would bear the ultimate burden of proof. If the nonmoving party fails to sufficiently show an essential element of his case, there can be no genuine issue as to any material fact since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Reddy* at 4-5.

The Board further emphasized that, in a summary decision ruling, the evidence must be viewed in the light most favorable to the nonmoving party. *Id.* at 5. Additionally, the summary decision ruling shall not include a weighing of the evidence or determination of the truth of the matters asserted. *Id.*

Therefore, the Board has put forth a two-step burden-shifting process, whereby summary decision may only be granted if, given the parameters stated above, the moving party meets its burden AND the nonmoving party fails to meet its own. Conversely, if EITHER the moving party fails to meet its burden OR the nonmoving party succeeds in meeting its burden, summary decision must be denied.

Discussion of Facts and Law

Protected Activity

As previously stated, Respondent first argues that Complainant cannot show that he engaged in protected activity. More specifically, Respondent asserts that Complainant did not engage in protected activity.

The Respondent submitted two compact disks with video of the August 30, 2007 incident, which I have reviewed, as well as supporting affidavits. The Complainant had been assigned to transport passengers from the Mall of America, in Bloomington, MN, to a State Fair, in St. Paul, MN, in a 60-foot articulated bus. About 75-100 passengers awaited the bus. Metro supervisors, Brad Smith and Brian Morse, helped load. Once loaded, the Complainant informed Morse he would not drive it with passengers standing. The bus was well-equipped with vertical rails, ceiling rails, seat back rails, and straps extending from the ceiling, intended to support standees. Each standee was able to reach a handrail or stanchion for support. A white standee line was painted across the aisle behind the driver's position. All passengers were standing behind the line.

Both Smith and Morse advised him that Metro rules permit standees so long as passengers stand behind the white "standee line" painted on the floor near the driver's position. There were about 15-20 standees and "all passengers were standing safely behind the standee line." The Complainant became mildly agitated and continued his refusal. Smith directed him to retrieve his gear so a replacement driver could assume the route. The Complainant boarded the

bus, created a minor disturbance by criticizing the supervisors, and told passengers he would not drive. He then left the bus. The passengers, who had been delayed some twenty minutes, applauded when the replacement arrived and drove them to the fair.

Assistant Manager Christy Bailly drove the Complainant back to the garage. He saw Assistant Manager Ellen Jackson, who advised him he was on administrative leave pending an investigation and to leave. The Complainant insisted only Steve Jaeger, the Transportation Manager South Garage, could suspend him. Rather than leave, as instructed, the Complainant went to the drivers' room and spoke with other drivers. Upon learning of this, Ms. Jackson again told him to leave whereupon he pointed his finger in her face and yelled "shut up, Lady, do not talk to me." Another driver, Stephen Leko, told him not to speak to her that way and said he should leave. Rather than leaving, the Complainant continued yelling, motioning Ms. Jackson away, turned his back on her and began shoving his back into her to push her away. When Assistant Garage Manager Bob Barton arrived and intervened, the Complainant pointed his finger in his face and continued yelling. Barton asked Jackson to call the Metro police and the Complainant left. The police prepared a report.

Mr. Barton conducted an investigative hearing, on August 31, 2007, attended by Ms. Jackson, the Complainant and his union representative, Mr. Larson. After a few moments, the Complainant became belligerent and began yelling and screaming. Mr. Lawson took him out of the room, but the same happened again upon their return. Based on his outbursts and concerns over the potential for workplace violence, Mr. Barton asked the Complaint for his Metro identification and keys.

Metro terminated the Complainant for creating a hostile work environment, failure to follow a manager's directive, and refusing to work. No union grievance was filed. When Mr. Jaeger asked if he could obtain his signature on the termination documents, the Complainant swore at him and hung up the telephone.

The Respondent submitted sworn affidavits from Metro dispatcher Larry Pederson and an uninvolved bus driver, Beth Bennett, describing an incident related to bus number 532, two years earlier, on November 26, 2005. Mr. Pederson had assigned the bus to the Complainant who refused it and immediately began swearing at him for the assignment in front of several drivers. Driver Bennett corroborated the swearing and the fact the Complainant "got very upset," getting "furious" and yelling profanities. The Complainant inspected the bus and claimed it had a functional problem with the rear door. When informed no other buses were available, he nonetheless took the bus out on time and completed his route without incident. The Complainant received a Record of Warning and a two-day suspension for his conduct.

The Respondent submitted a memorandum from Mr. Jaeger, dated March 17, 2008, concerning the Complainant's 2005 bus safety concerns. Mr. Jaeger's research revealed that no service was performed, on bus number 532 from November 1, 2005 through December 15, 2005, for any air pressure problem. The second bus complained about, number 2007, had been retired from service in 2003.

The Respondent also submitted a statement from Metro dispatcher, Sharyn Basso concerning a July 4, 2007 incident. The Complainant had inspected the bus she had assigned him and reported it was allegedly not operational. He wanted another bus, but was told to wait for a mechanic to inspect his assigned one. He "loudly" called Ms. Basso a "bitch" and left the room. When she noticed he was having continuing problems, she assigned him another bus which had been inspected. He again cursed her, inspected the bus and departed.

Garage management met with the Complainant concerning his pattern of behavior in 2004 and July 2007 and he was allowed to continue working with no loss of pay.

The Respondent submitted an expert opinion by Mr. Andrew C. Ervin, in which he addressed the August 30, 2007 incident. Prior to his 2007 retirement, Mr. Ervin was Manager of Safety, Training and Claims for the Metro Regional Transit Authority, Akron, Ohio. He had successfully completed the U.S. Department of Transportation's ("USDOT") Transit Safety and Security Program and is an Associate Staff Member of USDOT's Transportation Safety Institute. He has overseen the creation and/or delivery of many training programs with numerous public and private transit-related organizations, including the National Transit Institute, USDOT's Transportation Safety Institute, the American Public Transportation Association, the Canadian Urban transportation Association, the Ohio Department of Transportation, and the Ohio Transit Risk Pool. He is also a certified trainer/facilitator for a variety of bus safety classes sanctioned by American and Canadian transit agencies.

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Mr. Ervin reviewed the videos, the complaint, and the route map. He stated that transit authorities generally do not have hard and fast rules regarding standees because they do not know how many passengers will need transport on any route. Safety standards are governed by the "physical limits of the bus's interior." Standing loads are normally considered safe "so long as no passengers are forward of the white line situated alongside the driver, and all standing passengers are able to reach a handrail, seat back handhold or stanchion to support them during their trip." Generally, such "express" routes, such as this, tend to be involved in fewer accidents than local routes. The standing load on this bus was "safe and consistent with loading practices routinely employed by transit authorities nationwide." The load here was "considerably below the safe loading capacity of a 60-foot bus." He opined that no "objective person could conclude it constituted a hazardous condition at all, much less one which presented an imminent danger of death or serious injury."

The Respondent correctly observes that the Complainant "has not introduced any evidence whatsoever to demonstrate that his bus was unsafely loaded. . . nor can he provide any compelling evidence to this effect."

Complainant's earlier pleadings alleged that he engaged in protected activity by making internal complaints regarding the loading condition of his work vehicle. He points to no rule, law, regulation, industry practice, or standard regarding standing passengers on buses. He alleges that: his refusal to drive was made in good faith after asking supervisors to remove some passengers; he believed the hazardous condition presented an imminent danger of death or serious injury; and, the urgency of the situation did not allow for sufficient time to eliminate the danger without such refusal.

The Complainant had also alleged that he had engaged in "protected activity" on November 26, 2005 and July 4, 2007, and was discriminated against well before the effective date of the Act. On November 26, 2005, he reportedly discovered and reported a leak to the air system which controls bus number 532's doors and brakes. On July 4, 2007, he alleged a dispatcher instructed him not to inspect his assigned bus. He declined to, reported this to the Control Center, and filed a union grievance. However, he has presented no supporting evidence to support these two claims.

For guidance only, I observe the Department of Transportation ("DOT") standard, set forth in 49 C.F.R. sections 392.62(a) and 393.90, related to standees on buses, engaged in interstate commerce, merely require all standees to be "rearward of the standee line" (which shall be based on a perpendicular plane drawn through the rear of the driver's seat and perpendicular to the longitudinal axis of the bus). The federal rule also requires posting of a sign pointing out it is a violation of law for a bus to be operated with passengers in the prohibited area. Section 392.2 provides that "every commercial motor vehicle must be operated in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated. However, if a regulation of the Federal Motor Carrier Safety Administration imposes a higher standard of care than that law, ordinance, or regulation, the Federal Motor Carrier Safety Administration regulation must be complied with."

Here, the bus involved was constructed and designed to accommodate standing passengers with ample straps and grab rails and a standee white line. The Complainant has presented no evidence of any standard, rule, practice, or law governing standees. There is no question that, at the time and place specified, the bus had standees and that they were able to stand behind the standee line. On the contrary, the Respondent submitted ample evidence that such standees may be transported so long as they stand behind the line and that the bus was loaded in accordance with industry standards. There is no question that the Complainant refused to drive with "any" standees. While the Complainant may have believed, in "good faith", the standees posed a safety concern, his concern is simply not supported when examined using the Act's "reasonable individual" standard. There is no question the Complainant had reported the condition and his refusal to drive (unless what he perceived as a safety concern was resolved) was communicated to his supervisors. Nor is there any question that one of the reasons he was terminated was his refusal to drive that day.

A "reasonable person" is one who "acts sensibly, does things without serious delay and takes proper but not excessive precautions. . ." Black's Law Dictionary, Seventh Ed. (1999) at 1273. Under the circumstances of this case, the Complainant's concern was "excessive." There is no evidence that the loading of the bus posed a hazardous condition presenting an imminent danger of death or serious injury or that the urgency of the situation did not allow sufficient time to eliminate the danger without a refusal to drive. The evidence also shows other buses were on their way to the pickup point which could have accommodated the passengers standing, had that been necessary.

The Complainant has failed to carry his burden of setting forth specific facts from which some issue of material fact can be discerned.

Similarly, Respondent has carried its burden by showing an absence of evidence supporting Complainant's assertion he engaged in protected activity or that any "protected activity" resulted in his termination.

Discrimination Based on Protected Activity

The Complainant had previously argued that the temporal proximity between the protected activity of August 30, 2007, and his discharge on September 7, 2007, raised the inference of causation. He points out that the Respondent admitted he had notified a supervisor of the hazard and that animus is shown by the Respondent's admission he was discharged, in part, due to his refusal to drive the bus.

There is no temporal proximity between the incident of November 26, 2005 and the driver's discharge. The Complainant did not present evidence that the events of July 4, 2007 contributed to his discharge. The Complainant has presented no more than mere allegations concerning those incidents and no evidence. Even, if those incidents occurred as he described and are actionable, they would not alter the fact that the employer's bases for the discharge were not related to any protected activity.

No evidence has been presented that the Respondent's motivations or stated reasons in discharging the Complainant were not legitimate. There is abundant, "clear and convincing" evidence establishing the Complainant was discharged based on his well-documented pattern of confrontational conduct, abusive language, refusal to work, and failure to follow his supervisors' directives.

Thus, even viewing the evidence in a light most favorable to the nonmoving party, the Complainant simply has not presented evidence raising genuine issues of material fact.

Conclusion

In summary, I find that Respondent has carried its burden of showing that no issue of material fact exists as to protected activity and the legitimacy of the reasons for discharge. The Respondent is entitled to a decision on these issues as a matter of law. Complainant has failed to carry his burden of setting forth specific facts from which some issue of material fact could be discerned.[4] Therefore, Respondent's Motion for Summary Decision should be granted.

[4] "The non-moving party may not rest upon mere allegations or denials of such pleading. Such response must set forth specific facts . . ." 29 C.F.R. section 18.40(c).

RECOMMENDED ORDER

It is hereby ORDERED that the Respondent's Motion for Summary Decision be GRANTED and the Complainant's complaint be DISMISSED. It is FURTHER ORDERED that the hearing scheduled to begin on September 16, 2008, in Minneapolis, Minnesota, is **cancelled**.

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RICHARD A. MORGAN
Administrative Law Judge

NOTICE OF REVIEW: Review of this Recommended Decision and Order Granting Respondent's Motion for Summary Decision is by the Administrative Review Board pursuant to ¶¶ 4.c.(43) of Secretary's Order 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002). Regulations, however, have not yet been promulgated by the Department of Labor detailing the process for review by the Administrative Review Board of decisions by Administrative Law Judges under the employee protection provision of the National Transit Systems Security Act of 2007. Accordingly, this Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave, NW, Washington DC 20210. *See generally* 5 U.S.C. § 557(b). However, since procedural regulations have not yet been promulgated, it is suggested that any party wishing to appeal this Decision and Order should also formally submit a Petition for Review with the Administrative Review Board. All further inquiries and correspondence in this matter should be directed to the Board.