U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 22 April 2005

CASE NO.: 2005-STA-00021

In the Matter of

DAN S. GAGE,
Complainant

v.

SCARSELLA BROTHERS, INC.,
Respondent

Appearances:

Dan S. Gage, in *pro se*.
Renton, WA
for Complainant

Tamarah E. Knapp. P.E.
Seattle, WA
for Respondent

Before:
Gerald M. Etchingham
Administrative Law Judge

RECOMMENDED DECISION AND ORDER DISMISSING CASE

This proceeding arises under the provisions of Section 405 of the Surface and Transportation Assistance Act, 49 U.S.C.§ 31105 (hereinafter referred to as the "STAA")[1].

On January 27, 2005, Complainant Dan S. Gage's ("Complainant's") complaint under the "whistleblower" protection provisions of the STAA, against Respondent, Scarsella Bros. Inc., ("Employer" or "Respondent") was received by the Secretary of Labor. Among other things, Complainant alleged that his employment with Respondent was terminated because he "dinged-up his rig" and reported that his truck's right-side bumper was bent. The Occupational Safety and Health Administration ("OSHA") conducted an investigation; thereafter, the Secretary of

[1] The STAA was enacted for the purpose of promoting safety on the nation's highways, and, among other things, prohibits any person from discharging or otherwise discriminating against an employee in retaliation for having engaged in certain safety-related activities. The Department of Labor regulations implementing the STAA are set forth at 20 C.F.R. § 1978.

Labor, through her agent, the Regional Administrator for OSHA, issued findings on February 10, 2005, finding that Complainant's claim lacked merit. On February 16, 2005, Complainant requested a hearing before an administrative law judge.

A formal hearing was held in Seattle, Washington, on March 18, 2005. Complainant represented himself, in *pro se*. Respondent was represented by its general counsel Tamarah E. Knapp, P.E. The following exhibits were admitted into evidence: Complainant's Exhibit ("CX") 1; Respondent's Exhibits ("RX") 1-6; and Administrative Law Judge Exhibit ("ALJX") 1[2]. Respondent's Exhibits 7 and 8 were not admitted into evidence having either been withdrawn or denied for reasons referenced in the record. TR[3] at 7-19. Complainant was the only witness to testify. Documentary evidence was offered and oral arguments were made. The parties waived their right to submit post-hearing briefs, the record closed, and I took the matter under submission.

After reviewing all of the evidence, I find that Complainant did not take part in a protected activity at any time during his employment with Respondent. Complainant clearly stated that he made no safety disclosure to Respondent at any time and that the reported right-side bumper dent was merely cosmetic and in no way affected his truck's operation or threatened anyone's safety.

STIPULATIONS

The parties stipulate, and I accept that:

1) Respondent engaged in intrastate trucking operations and, in 2004, maintained its place of business in Seattle, Washington. In the regular course of this business and at all times relevant herein, Respondent's employees operated commercial motor vehicles affecting intrastate commerce principally to transport dirt to Sea-Tac Airport in the Seattle/Tacoma area in Washington;

2) Respondent is now, and at all times relevant herein, was a person as defined by 49 U.S.C. § 31101(3)(a).

3) On or about September 8, 2004, Respondent hired Complainant as a driver of a bellydump trailer with gross vehicle weight in excess of 10,000 pounds;

4) At all times relevant herein, Complainant was an employee in that he was a driver of a commercial motor vehicle having a gross vehicle rating of 10,000 or more pounds used on the highways in interstate commerce to transport dirt.

5) Complainant was employed by a commercial carrier, and, in the course of his employment, he indirectly affected commercial motor vehicle safety pursuant to 49 U.S.C. § 31105.

[2] ALJX 1 is comprised of my February 23, 2005 Notice of Hearing and Pre-Trial Order issued in this case.
[3] The abbreviation "TR" refers to the March 18, 2005 hearing transcript.

6) Respondent was Complainant's sole employer as Respondent provided the equipment that Complainant selected to drive, Respondent paid his wages, and directed Complainant's work hours, and instructed him as to how to use the equipment it provided.[4]

TR at 21-34; CX 1 at 9-12; RX 1, 3-6. Because there is substantial evidence in the record to support the foregoing stipulations, I accept them. Also, I find that Respondent engaged in interstate trucking through use of Interstate Routes 5 and 90 and with trucking operations in Washington and Idaho and administrative notice that Routes 5 and 90 are interstate highways. TR at 22 and 24.

ISSUES

The unresolved issue in this proceeding is:

1) Whether Complainant engaged in protected activity;

FACTUAL BACKGROUND

Complainant is a truck driver and a Teamster union member. TR at 41. His work with Respondent as a driver in November 2004 was covered under a collective bargaining agreement between the Teamsters and Respondent. *Id*.

In late August or early September, 2004, Complainant received a call from his union hiring hall for him to attend a try-out for an airport job hauling dirt as part of a federal construction project. TR at 41;CX 1 at 5. Six truckers tried-out for the position and Complainant was one of two drivers awarded employment by Respondent, a government contractor. *Id*.

The trucking work with Respondent specifically involved transporting dirt from Auburn, Washington to Sea-Tac Airport as fast as the dirt could be turned around, a job estimated by Complainant to involve 400 miles driving per day. CX 1 at 5. Sea-Tac was building a third runway and the additional dirt was needed as fill to build the runway. *Id*.

Complainant started the job on September 8, 2004 and worked until November 4, 2004. Stip. Fact No. 3; RX 3-6. He believed that the pay rate was "good," most of the equipment, including the vehicle driven by Complainant, was new but working conditions were hectic. CX 1 at 5. Respondent provided Complainant the vehicle he was driving on November 4, 2004. *Id.*

Complainant's Actions on November 4, 2004

Complainant believed that Respondent terminated his employment as a driver on November 4, 2004 because on November 4, 2004, he returned his vehicle with a "dinged up" bumper. CX 1 at 6. Complainant alleges that he was terminated before Respondent's representatives reviewed the tally sheet he prepared from November 4, 2004 that explained that

[4] Because there is no dispute as to Respondent being Complainant's sole employer, the joint employer doctrine is inapplicable here.

Complainant's truck's right side bumper was bent due to being pushed through muck to get the load next to the 12th Avenue mud wall. RX 4 at 2. Complainant further explained that the bumper dent was caused when his vehicle sunk deeper in the muck and he could not steer and plowed through the mud wall. *Id*. Complainant did not think his vehicle was returned with any defects as he checked-off the box indicating "NO DEFECTS." *Id*. In fact, Complainant testified that the bumper dent was cosmetic only and the dent did not pose any safety risk or concern to Complainant that he would be in any increased danger by driving the vehicle with the bumper dent. TR at 43-44.

Complainant filed this action under STAA because he believed that he was terminated from employment by Respondent without just cause. TR at 42. He further testified that the Teamster collective bargaining agreement prevented Respondent from terminating his employment without just cause. *Id*. Complainant was not required to make an oral report at #:00 a.m. on November 4, 2004 of the returned vehicle with a bumper dent as the tally sheet report of the dent was sufficient. TR at 42; RX 4 at 2 .

In the course of his work as a trucker, Complainant drove on public highways. TR at 43-44, 47-48. If a truck that he was driving was dangerous to be driven, he shut it down and stopped driving. *Id*. In the past, before his work with Respondent, Complainant has refused to drive trucks that he believed were unsafe. *Id.* But he did not consider Respondent's vehicle to be unsafe at any time or in any way as it was a new vehicle with no defects. *Id.*; RX 3-6.

CONCLUSIONS OF LAW

Witness Credibility

Mr. Gage was a very credible witness. He testified that he never had any safety concern while employed by Respondent. TR at 41-44. Respondent's vehicles were relatively new with no defects. CX 1 at 5; RX 4 at 2. Complainant testified that he believed he was terminated from employment with Respondent not for any protected activity disclosure, but, instead for failing to telephone respondent at 3:00 a.m. to report a cosmetic "ding" or dent caused by normal wear and tear on the vehicle he was driving on November 4, 2004. TR at 41-44. This "ding" or bent bumper was never a safety concern to Complainant and he reported "NO DEFECTS" to his vehicle when he mentioned the cosmetic bumper "ding". TR at 41-44, 47-48; RX 4 at 2. At no time did Complainant refuse to operate his vehicle for any reason. TR at 43-44.

Discussion

In a nutshell, Complainant's position in this case is that under the terms of the collective bargaining agreement between the Teamsters and Respondent, as a government contractor, Respondent could not terminate Complainant's employment without just cause. Complainant's return of Respondent's vehicle at 3:00 a.m. on November 4, 2004 with a cosmetic dent on its right-side bumper was not good or just cause to terminate Complainant especially since the dent was the result of normal wear and tear and was cosmetic in nature. Moreover, Complainant testified that the dent did not amount to a "defect" that created any safety concern.

Complainant fails to prove that there was a protected activity in this case and cannot establish a *prima facie* case under the STAA. *See Moon v. Transport Drivers, Inc*., 836 F.2d 226 (6th Cir. 1987); *Wrighten v. Metropolitan Hospitals, Inc*., 726 F.2d 1346 (9th Cir. 1984).

The employee protection terms of the STAA provide that:

> No person shall discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because the employee refuses to operate a vehicle when such operation constitutes a violation of any Federal rule, regulation, standard, or order applicable to commercial motor vehicle safety or health or because the employee has a reasonable apprehension of serious injury to himself or the public due to the vehicle's unsafe condition. The unsafe conditions causing the employee's apprehension of injury must be of such nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a bona fide danger of an accident, injury, or serious impairment of health, resulting from the unsafe condition. In order to qualify for protection under this subsection, the employee must have sought from his employer, and have been unable to obtain, correction of the unsafe condition.

49 U.S.C. §§ 31105(a)(1)(B) and 31105(a)(2).

STAA burdens of proof and production are derived from Title VII cases, in particular, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny. *See Clean Harbors Environmental Services, Inc. v. Herman*, 146 F.3d 12 (1st Cir. 1998); *Moon v. Transport Drivers*, Inc., 836 F.2d 226 (6th Cir. 1987); *Kenneway v. Matlock, Inc*., 88-STA-20 (Sec'y June 15, 1989). To establish a prima facie case, a complainant must show that 1) he engaged in protected activity under the STAA; 2) he was subject to an adverse employment action; and 3) there was a causal link between his protected activity and the adverse action of his employer. *Moon*, 836 F.2d at 229; *See also, Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Wrighten v. Metropolitan Hospitals, Inc*., 726 F.2d 1346 (9th Cir. 1984).

Once the complainant establishes a prima facie case, the burden shifts to the employer to rebut the presumption of discrimination by producing evidence that the adverse action was taken for a "legitimate non-discriminatory reason." Burdine, 450 U.S. at 254. The employer "need not persuade the court that it was actually motivated by the proffered reasons." Id. However, the evidence must be sufficient to raise a genuine issue of fact as to whether the employer discriminated against the employee. Id. "The explanation provided must be legally sufficient to justify a judgment for the [employer]." Id. at 255. In spite of this shifting burden, the complainant at all times retains the ultimate burden of persuading the trier of fact that he was discriminated or retaliated against. Id. at 253.

Whether The Complainant Engaged In Protected Activity

The alleged protected activity in this case is that Complainant failed to orally report the cosmetic "ding" to his vehicle's bumper at 3:00 a.m. when his shift ended. In contrast to disclosures involving alleged safety violations, here Complainant says he was terminated from

employment not because of a reported safety violation but, instead, for not orally reporting cosmetic dent caused by normal wear and tear that did not involve any violation or any safety regulation or threat of harm or defect. At no time did Complainant have a belief that driving his vehicle with the "dinged" or bent right-side bumper posed any danger or safety risk at all. Complainant never sought from Respondent or was unable to obtain correction of any unsafe activity.

"In analyzing protected activity under § 405(b) [now §31105(a)(1)(B)], courts have treated the "when" and "because" clauses separately. Under the "when" clause ('when such operation constitutes a violation of any Federal rules...'), 'a driver must show that the operation would have been a genuine violation of a federal safety regulation at the time he refused to drive - a mere good faith belief in a violation does not suffice.' (emphasis added) *Yellow Freight Sys., Inc. v. Martin*, 983 F.2d 1195, 1199 (2d Cir. 1993); *see also Brame v. Consolidated Freightway*s, 90-STA-20 (Sec'y June 17, 1992); *Robinson v. Duff Truck Lines, Inc.,* 86-STA-3 (Sec'y March 6, 1987) (the Secretary has consistently required a complainant to prove that a truck was actually unsafe when he seeks protection under the 'when' clause). Under the 'because' clause, the complainant need not prove that his refusal to perform an act was grounded in an actual violation, only that his belief in the perceived danger was genuine and reasonable. *Yellow Freight Sys., Inc. v. Reich*, 38 F.3d 76, 82 (2d Cir. 1994). The complainant's concern could be couched in terms of either driving unsafe vehicles or engaging in unsafe acts. See 128 Cong. Rec. 29192 (1982); *see also Brock v. Roadway Express, Inc*., 481 U.S. 252, 262 (1987). Section 405(b) [31105(a)(1)(B)(ii)] also requires that the complainant have 'sought from and was unable to obtain correction of the unsafe activity.' *See Lewis Grocer Co. v. Holloway*, 874 F.2d 1008, 1011-12 (5th Cir. 1989)." *Faust v. Chemical Leaman Tank Lines*, 92-SWD-2 (ALJ Dec. 4, 1995).

No Violation Shown Under the "When" Clause

Complainant is unable to avail himself of the "when" clause of § 31105(a)(1)(B)(i) by showing that he was discharged "for refusing to operate a vehicle when such operation constitutes a violation of any Federal rules...." The Complainant fails to meet the language of the clause for two reasons. As referenced above, the key timing for proving any alleged violation of a Federal rule is "at the time he refused to drive." *See Martin, supra*. Here, Complainant never refused to operate his vehicle for safety reasons. Complainant presented no evidence that his vehicle was unsafe or violated any Federal rule, regulation, standard, or order as of November 4, 2004. Instead, the evidence shows that Complainant was terminated for the damaged bumper he caused while driving and not for any protected activity disclosure he made. TR at 41-44, 47-48; CX 1 at 5-6; RX 3-6.

Secondly, Complainant produced no credible evidence that his vehicle would have been in violation of any Federal rule, regulation, standard, or order had he driven it with a bent right-side bumper.

Based on the record presented, Complainant has not shown by a preponderance of the evidence that he was involved in any protected activity or that his report of a non-defect, non-safety-related cosmetic bumper dent caused his vehicle to be in actual violation of Washington

State or federal safety standards. 49 U.S.C. § 31105(a)(1)(B)(i) requires that a complainant show an actual violation of a commercial motor vehicle safety regulation. It is not sufficient that the driver had a reasonable or good faith belief about a violation. *Yellow Freight System, Inc. v. Martin*, 983 F.2d supra. at 1199. Even so, Complainant did not have any reasonable good faith belief about a violation. Instead, he characterized the bumper dent as "cosmetic" and normal wear and tear and not as a safety risk in any way. TR at 41-44, 47-48.

No Reasonable Belief of Safety Problem or Opportunity for Employer to Correct Alleged Problem Under the "Because" Clause

Having not met the "when" clause for a protected activity, Complainant's alleged protected activity could only come within the ambit of the statute if it is covered by the "because" clause. The "because" clause has not been argued as applicable in support of Complainant's case and is unavailable to Complainant without any evidence that he harbored any genuine and reasonable belief that his operation of his vehicle was a perceived danger with the cosmetic right-side bumper dent.

Assuming *arguendo* that the "because" clause is offered in this case, Complainant's claim must be rejected once again because he did not engage in protected activity. Complainant must show that he had "reasonable apprehension of serious danger to himself or the public ...." See 49 C.F.R. § 31105 (a)(2). Thus, in order for activity to be protected under this standard, the employee subjectively must fear injury (that is, the factfinder must be convinced that the employee actually was apprehensive that serious injury might result from driving) and the employee's fear must be objectively reasonable (that is, a "reasonable individual" would have the same apprehension).

Complainant was not concerned about his safety when driving his vehicle on November 4, 2004 with its cosmetic right-side bumper dent. In fact, Complainant testified that he had no safety concerns about driving a vehicle with the cosmetic right-side bumper dent. TR at 41-44, 47-48; RX 4 at 2. Complainant did not even characterize the bumper dent as a defect due to its minor nature. *Id.*

Complainant's work termination did not come about from any safety concerns of Complainant. Complainant cannot invoke the protection of the "whistleblower" statute to relieve himself of the consequences of Respondent's action terminating Complainant's employment unprotected by STAA.[5]

Accordingly, there is no evidence directly supporting the existence of any defects in Complainant's vehicle. Moreover, Respondent produced evidence, such as the driver vehicle

[5] Complainant may have a viable wrongful termination cause of action against Respondent under Washington State law or a valid grievance under the collective bargaining agreement between Respondent and the truckers' union. This Recommended Decision and Order only addresses Complainant's whistleblower complaint under STAA and his failure to present a prima facie case thereunder. My jurisdiction to resolve this case is limited to my application of the facts in this case to the STAA and does not extend to Washington State employment law or grievances under a collective bargaining agreement.

inspection reports or tally sheet, which the U.S. Department of Transportation requires every motor carrier driver to file daily and in which the driver must "list any defect or deficiency discovered by or reported to the driver which would affect safety of operation of the motor vehicle or result in its mechanical breakdown." 49 C.F.R. § 396.11(b) (2000). Respondent's evidence shows "NO DEFECTS" was reported by Complainant. RX 4 at 2.

Further, because Complainant failed to allege a protected activity took place, he also failed to enlist the assistance of his employer, Respondent, in sorting out any perceived safety concerns he might genuinely have had, he cannot avail himself of the protection of the statute even if he did engage in protected activity. See 49 U.S.C. § 31105(a)(2)("... [E]mployee must have sought from the employer, and been unable to obtain correction of the unsafe conditions.); *see also Perez v. Guthmiller Co., Inc*., 87-STA-13, (Sec'y Dec. December 7, 1988), slip op. At p. 4)(Same.)

I also find that the Complainant has failed to establish by a preponderance of the evidence that he engaged in the protected activity of refusing to drive because of an allegedly unsafe condition of his vehicle. Complainant's testimony alone is insufficient to meet his ultimate burden of persuasion that he refused to drive his vehicle because he had a reasonable apprehension of injury due to the unsafe condition of that truck and that he sought, and was unable to obtain correction of such condition.

Since Complainant has not established that he engaged in protected activity under either the "when" or "because" clauses of §31105(a)(1)(B), and moreover, did not contact his employer regarding any allegedly unsafe condition on or before November 4, 2004, he has not made out a prima facie case that he engaged in protected activity and his complaint must be dismissed.

RECOMMENDED ORDER

IT IS RECOMMENDED that the STAA complaint filed by Dan S. Gage be **DISMISSED**.

A

Gerald Michael Etchingham
Administrative Law Judge

NOTICE:

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, Room S-4309, 200 Constitution Avenue, NW, Washington D.C. 20210. See 29 C.F.R. §1978.109(a); 61 Fed. Reg. 19978 (1996). The parties may file with the Administrative Review Board, United States Department of Labor, briefs in support of or in opposition to the Recommended Decision and Order within thirty days of the issuance of this Recommended Decision unless the Administrative Review Board, upon notice to the parties, establishes a different briefing schedule. 29 C.F.R. § 1978.109(c).