

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 07 February 2008

CASE NO.: 2008-STA-9

IN THE MATTER OF

MARCOLM CARTER
Complainant

v.

GDS TRANSPORT, LTD.
Respondent

RECOMMENDED DECISION AND ORDER

BACKGROUND

This claim arises under Section 405 of the Surface Transportation Act (the Act), 49 U.S.C. § 31104. The Act protects employees from discharge, discipline or discrimination for filing a complaint about commercial motor vehicle safety and for refusing to operate a vehicle when such operation constitutes a violation of Federal Motor Vehicle Safety Regulations or because of the employee's reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment.

PROCEDURAL HISTORY

The Complainant filed a complaint with the Secretary of Labor alleging that he was discriminatorily terminated in violation of the Act. Following an investigation of this matter, the Secretary of Labor, acting through her agent, the Regional Administrator of OSHA, issued findings on September 21, 2007, that his complaint was without merit. (ALJ 1). The Complainant requested a formal hearing, and on December 12, 2007, a hearing was held in Dallas, Texas, at which

time all parties were given an opportunity to present evidence and arguments. This decision is based on the record made that day at that de novo hearing.

ISSUES

1. Whether the Complainant engaged in activity which is protected within the meaning of the Act; and
2. Whether any adverse action taken against Complainant was due to his engaging in protected activity.

LAW

In 1982, Congress enacted § 405 of the Surface Transportation Assistance Act, 49 U.S.C. § 31104. This legislation was designed to promote safety on the highways by protecting employees from discriminatory action due to an employee's engagement in protected activity. Section 405 of the Act provides:

No person shall discharge, discipline, or in any manner discriminate against an employee with respect to the employee's compensation, terms, conditions, or privileges of employment for refusing to operate a vehicle when such operation constitutes a violation of any Federal rules, regulations, standards or orders applicable to commercial motor vehicle safety or health, or because the employee's reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment. 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.

To prevail under the Act, a complainant must prove by a preponderance of the evidence that he or she engaged in protected activity, that the employer was aware of the activity, that the employer took adverse employment action against the complainant, and that there was a causal

connection between the protected activity and the adverse employment action.

STATEMENT OF EVIDENCE

Complainant began working for Respondent in November of 2006. The entire time he worked for Respondent, he drove a bus until he was terminated on June 1, 2007, earning, he testified, \$415.00 per week. Complainant possesses a commercial driver's license and had previous experience as a truck driver. The Respondent operates commercial vehicles under contract with Texas Instrument and provides daily shuttle service for their employees to and from public transportation terminals to the Texas Instrument "campus". Both parties fall within the requirements and protection of the Act.

During his term of employment, Complainant drove bus number 75. According to Complainant, starting in April of 2007, he began to make verbal and written complaints about various problems and concerns he had with bus number 75, some of which were of a safety nature and others were not. In support of his testimony, Complainant offered in evidence as his Exhibit 1, inspection tickets noting various deficiencies with the bus. Employer's Exhibit 6 also contains the same, if not more, inspection tickets and these were all the subject of an extensive cross-examination of the Complainant.

Throughout April and May of 2007, Complainant complaints ranged from the condition of the tires, the brakes, the horn, the speed odometer, the passenger's door, the emergency window and the passenger's air condition system. According to Complainant, some of the problems were addressed by Respondent and others he thought were not. Toward the end of May the air condition system in the passenger area apparently became Complainant's biggest concern and, he said, the source of complaints from his passengers. Frustrated with what he perceived to be indifference on the Respondent's part for the comfort of the passengers, on May 30, 2007, Complainant called the Operation Manager, Rick Schuler, who Complainant said hung up on him. He then called Curtis Woodley, the Assistant Supervisor, who told Complainant he would look into the problem, and next he called Alex Costello, the Director of Operations, who explained to Complainant the bus was being taken out of service and was being replaced rather than the air conditioning system being repaired at great cost.¹

¹ Earlier over \$400.00 had been spent to remedy the air conditioning problems, but to no avail because the whole unit needed replacing. (Employer's Exhibit 6).

Although admitting on cross-examination the lack of proper air conditioning was not a safety issue to him, the Complainant was so aggravated over the situation of the passengers perceived discomfort, that when he reported to work on May 31, 2007, he informed Mr. Woodley he would not drive bus number 75, and upon learning no other bus was available he went home. The next day Complainant was terminated for walking away from the job the day before.

Complainant is now working driving his own truck and has been since mid-November 2007. He seeks in damages his lost wages from June 1 to November 15 (22 weeks), plus compensatory damages for the grief the termination caused him and his family. In that regard, Complainant testified that he had not been able to support the family after his termination and he and his wife had separated, but are trying to work their marriage out. Complainant does not seek reinstatement, saying he would not work for Respondent again.

Curtis Woodley oversees the conditions of the buses for Respondent. He is not a mechanic. He starts and checks the buses each morning and talks with the drivers. If he feels a bus should be pulled from service and repaired he testified he sends the bus to one of five DOT Certified “Vendors” for repair. No “in-house” repairs are attempted.

Mr. Woodley testified that he addressed the problems raised by Complainant in April and May and remedied those that needed attention. Specifically, he testified he had tires replaced, the horn fixed, and the ABS light was determined to be only dust on the brake drums. As far as the air conditioning on bus 75, Mr. Woodley explained the bus was being sold and since two weeks earlier repairs had failed to correct the air conditioning problem, no need was seen in replacing the compressor.² Mr. Woodley also testified he did not view the air conditioning problem as a safety concern.

As to Complainant’s departure, Mr. Woodley testified on Wednesday, May 30, 2007, Complainant called him complaining only about the passenger’s portion of the air conditioning system on bus 75 and saying that Mr. Schuler had hung up

² According to Mr. Woodley after ordering a new bus it takes up to six months to receive delivery. In this instance replacement buses had been ordered for buses number 75 and 76, and the new buses arrived in June shortly after Complainant’s termination.

on him. The next day, May 31, 2007, Mr. Woodley said Complainant appeared for his shift and said "I'm not driving that hot ass bus" and left, but not before Mr. Woodley said he asked the Complainant on three occasions to not leave. On June 1, 2007, when Complainant came to work he was terminated for job abandonment.

Rick Schuler is Respondent's Operations Manager, and he oversees Respondent's fleet of vehicles. He testified Curtis Woodley was first to see the inspection reports, and he would see them only if some question arose. Mr. Schuler said he does not recall seeing any such reports regarding Complainant or bus number 75.

On May 30, 2007, Mr. Schuler testified Complainant called him upset about the failure of the air conditioning system in bus 75, saying "the bus was too damn hot" and demanding something be done. Mr. Schuler said he asked Complainant to calm down and cease shouting and when Complainant did not he hung up on Complainant. Complainant called back immediately and the same scenario occurred again. Next, Mr. Castillo called Mr. Schuler saying Complainant had called him and he had explained to Complainant the bus was being traded for a new one, and it made no sense to repair the air conditioning system in view of the upcoming trade. Mr. Schuler also testified he never viewed the air conditioning problem as a safety issue.

Complainant came and left the job site on May 31, 2007, after refusing to drive bus number 75, and upon hearing of Complainant's actions Mr. Castillo called Mr. Schuler and told him to terminate Complainant for job abandonment. Mr. Schuler said he had never met Complainant until June 1 and at that time gave him a check and informed him he was terminated. Employer's Exhibit 3 is the detail memorandum Mr. Schuler prepared following the termination.³

Don Dean drove bus number 75 on the same route as Complainant, but on a different shift. He testified he had driven the bus as long as Respondent had owned it and never experienced a safety problem. He did agree, however, on occasion the speed odometer was erratic and the ABS light would come on, but he denied any braking problems with the vehicle, acknowledging only the failure of the air conditioning system.

³ Passengers also called Mr. Schuler about the air conditioning and they were told too a new bus was forthcoming.

Duana Craig is a “floating driver.” She never had a problem with bus 75, but agreed she had complained in April of 2007 about the horn not working. She also said she had refused to drive other buses in the past she deemed unsafe and did so without any repercussions.

Garry Castro is the President and owner of Respondent. He never spoke to Complainant about any of his concerns and testified he was not involved with his termination. He was involved, however, with the purchase of new buses and said number 75, a 2002 model, was replaced on June 4, 2007. As far as DOT violations, he acknowledged only that Respondent was in the process of getting physical certificates for each of the drivers.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Complainant and Respondent are both covered under the Act. Clearly, Complainant made safety complaints in April and May of 2007 concerning tires, brakes, etc., as they related to bus number 75. However, I find from the inspection tickets and Mr. Woodley’s testimony that the complaints were addressed if deemed a safety hazard, and that the complaint which led to Complainant’s leaving work was not a safety violation, but related solely to the passengers air conditioning system.

The testimony of the various witnesses was unrefuted that the transporting of Texas Instrument workers from one destination to the other took only a matter of minutes, and no one, not even Complainant, suggested the failure of the air conditioning system in that short period of time amounted to a safety concern. Complainant’s last complaint about anything other than the air conditioning systems was found on his driver’s inspection report of May 21, 2007, where he complained rear air conditioning was broken and ABS light was on, but nevertheless checked “condition of the bus is satisfactory.” (Complainant’s Exhibit 1). Thereafter, Complainant turned his full attention and complaints to the rear air conditioning system as it pertained to the comfort of his passengers; and despite the fact that he was told another bus was forthcoming and there was no need to spend more money on the air conditioning system in bus number 75, Complainant, of his own volition, walked off the job on May 31, 2007, and was terminated the next day for abandonment of his job.

While I believe that earlier Complainant voiced perceived safety concerns, I do not find that to be the reason for his termination. I find Respondent's stated reason for termination of Complainant was not a pretext, but rather was an action Respondent would have taken regardless of any protected activity Complainant might have previously engaged in. In other words, while I find the Complainant to be credible, and I believe the Complainant earlier had genuine safety concerns which he made known to Respondent, the un-refuted reason for Complainant's dismissal was his refusal on May 31, 2007, to drive bus 75 because of lack of air conditioning in the passenger section, not because of any past safety concerns voiced in April and May prior to his termination. This is a whistleblower case. The issue is whether Complainant engaged in protected activity and was terminated for such activity. Voicing complaints about faulty air conditioning system during a five to ten minute bus ride is not a safety concern I find to be classified as protected activity under the Act, and that being Complainant's sole concern that led to his termination, I find his claim should be dismissed for lack of merit.

ORDER

IT IS HEREBY ORDERED that Complainant's complaint is **DISMISSED**.

So ORDERED this 7th day of February, 2008, at Covington, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge

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, Suite S-5220, 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.