



In the Matter of:

ROBERT C. LEIDIGH,

ARB NO. 97-132

COMPLAINANT,

ALJ CASE NO. 87-STA-12

v.

DATE: December 18, 1997

FREIGHTWAY CORPORATION,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

This case arises under the employee protection provision of the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C.A. §31105 (West 1996). Complainant, Robert C. Leidigh (Leidigh), alleged that Respondent, Freightway Corporation (Freightway), violated the STAA when it discharged him from his position as a truck driver. In a Recommended Decision and Order (R. D. and O.) the Administrative Law Judge (ALJ) found that Freightway terminated Leidigh's employment for legitimate, nondiscriminatory reasons and recommended dismissal of the complaint. The ALJ's findings of fact are supported by substantial evidence on the record as a whole, and therefore are conclusive. 29 C.F.R. §1978.109(c). We accept the ALJ's recommendation and dismiss the complaint. Both parties filed briefs in response to the Board's Notice of Review and Order Establishing Briefing Schedule. Complainant subsequently requested permission to file an additional, or amended, brief. We hereby deny that request, having concluded that no further or modified arguments would change our view of the outcome in this matter.

BACKGROUND

Leidigh's Employment with Freightway

Freightway hired Leidigh as a truck driver assigned to its Defiance, Ohio terminal in July 1976. T1. 26.¹ Leidigh drove trucks leased to Freightway by B & H Trucking. T2. 207-208. He filed various grievances or complaints during his employment, beginning in about 1983. T2. 70; CX 8.

¹ "T1." refers to the transcript of the hearing held on May 14, 1996. "T2." refers to the hearing held on July 10 and 11, 1996.

In October 1985, Leidigh had a disagreement with Freightway's president, Jay Kaplan, concerning a physical examination, and Kaplan allegedly chased Leidigh off company property. T2. 61-63. Leidigh did not return to work because he feared Kaplan. T2. 65. Instead, Leidigh filed a grievance concerning his "unjust termination" in which he prevailed and won back his job. CX 6; T2. 69.

Leidigh asked a mechanic in April 1986 to repair a trailer assigned to him that he believed had a dangerous defect in its brakes. T2. 109-114; CX 2-5. A few days later, Leidigh wrote a letter to the Occupational Safety and Health Administration (OSHA), Kaplan, and his union, complaining that he was being "singled out for coercion, threats, and misuse" for refusing to drive the defective trailer. CX 17.

Later that month, Kaplan wrote a letter (options letter) informing all of the drivers that Freightway was closing the Defiance terminal because B & H Trucking was cancelling the lease that provided the terminal's trucks. CX 11. The letter asked the drivers to respond by May 10, 1986 regarding their employment options, as follows: (1) exercise their seniority right and transfer to the Toledo terminal to drive a Kaplan Enterprises truck; (2) become an owner-operator; or (3) retire or seek employment elsewhere.

Leidigh contends that he did not timely respond to the options letter because he was afraid of working for Kaplan in Toledo. T2. 82, 157. Leidigh testified that he wanted assurance from Kaplan that he would not be harmed if he accepted the transfer to Toledo, T2. 85, although he did not ask Kaplan to give him such a promise. T2. 249, 256.

On the final date for responding with his choice of options, Leidigh instead wrote a letter to his union asking for advice on his rights under the options letter, CX 16; T2. 82, 84, but he did not receive a response. T2. 155. When Rich Pursel of Freightway asked Leidigh what choice he had made, Leidigh was noncommittal. T. 278. Leidigh wrote to the union again on May 17, complaining that Pursel was trying to force him to quit because he could not drive to the Toledo terminal in his old car, which was not dependable. CX 9.² Leidigh again wrote to his union on May 24, CX 10, and again received no response.

Pursel extended the deadline for Leidigh to report his choice of options. T2. 279. On May 19, 1986, Pursel wrote to Leidigh, directing him to report to the Toledo terminal and, if not, to sign a form tendering his voluntary resignation. CX 13. Pursel and Leidigh spoke almost daily until Leidigh's wife told Pursel to "get off" Leidigh's back. T2. 279, 306. Leidigh never gave Pursel an answer. T2. 280, 283.

On May 23, 1986, Leidigh wrote to Kaplan and to his union asking for a voluntary layoff until such time as he could exercise his company seniority. CX 12. A layoff would have preserved Leidigh's seniority. The company denied the request for voluntary layoff because it was impractical, would adversely affect another driver with less seniority than Leidigh, and was not one of the options available to all the Defiance terminal drivers. T2. 166, 330-331.

² Leidigh claimed no knowledge of Freightway's policy that allowed drivers to take company tractors home and use them to get to the terminal. T. 89.

On June 3, 1986, Freightway sent a letter informing Leidigh that his employment was terminated voluntarily because he had not been available for dispatch since May 23 and had not contacted the office since May 27, 1986. CX 14; T2. 283-285. Leidigh claimed that he did not resign voluntarily. He grieved the termination but it was upheld under the union contract. T2. 171. Leidigh filed this complaint, alleging that his discharge violated the STAA.

Related Blacklisting Complaints

After his separation from Freightway, Leidigh applied for jobs with other trucking companies. One of the companies to which he applied sent a reference form to Freightway, which stated in writing that it would not rehire Leidigh because it "cannot afford the legal expense to defend the charges filed with OSHA, National Labor Relations Board (NLRB) and other government agencies. All of the past charges filed were determined to be unfounded." CX 21. On a reference form sent by another potential employer, Freightway stated that Leidigh was a "very hard person to deal with" and it would not rehire him because his "overall attitude towards [the] company" was "very poor." CX 23. Leidigh filed a complaint with the NLRB against Freightway, alleging blacklisting and unlawful refusal to rehire him.

Leidigh also filed a separate complaint alleging unlawful blacklisting under the STAA. The Secretary deferred to the outcome of the related NLRB proceeding concerning the remedy of reinstatement, found that Freightway violated the STAA, and ordered the company to cease and desist from blacklisting Leidigh and to expunge from its records any adverse references to his protected activities. *Leidigh v. Freightway Corp.*, Case No. 88-STA-13, Sec. Final Dec. and Order, June 10, 1991.

At the 1989 hearing on this complaint, the parties agreed that the STAA proceeding concerning Leidigh's discharge would be deferred until the resolution of the concurrent NLRB complaint. ALJX 2 at 3-14; R. D. and O. at 3. Leidigh prevailed in a 1988 initial decision by an NLRB administrative law judge. *See* ALJX 5 at 1. Thereafter, the ALJ recommended approval of the parties' settlement of this complaint and the Secretary dismissed the complaint in July 1990.

On review of the initial NLRB decision, Leidigh again prevailed. The NLRB ordered Freightway to offer Leidigh "immediate employment in the job he would have filled had he been hired on November 18, 1986" and to pay back pay. ALJX 5 at 5. Consequently, Freightway rehired Leidigh in May 1990. Issues arose concerning the amount of back pay owed to Leidigh under the NLRB's order. In a later settlement of the back pay issues, Leidigh agreed to resign from Freightway and not seek reemployment, in exchange for monetary payments made by Freightway. T2. 174-175.

Leidigh later asked the Secretary to reopen this complaint when, pursuant to the NLRB proceeding, it was determined that his seniority date with Freightway was November 1986. *See* CX 24.³ Leidigh was seeking reinstatement and restoration of his 1976 seniority date with

³ Upon rehire, Leidigh's company seniority date was listed as July 1976. CX 24. The union protested, and as a result, the company seniority date was changed to November 1986. Leidigh grieved the alteration in his seniority date, CX 24 (reverse side), apparently without success.

Freightway.⁴ The Secretary found that in settling his STAA complaint, Leidigh clearly did not intend to forfeit ten years of seniority. Jan. 22, 1996 Order of Remand at 4. The Secretary, finding that the parties failed to agree on a material term of settlement, vacated the July 1990 Order, and remanded to the ALJ for a hearing on the merits of this complaint. *Id.*

DISCUSSION

In a case fully tried on the merits, such as this, it is not particularly useful to analyze whether the complainant made a *prima facie* case. *Andreae v. Dry Ice, Inc.*, Case No. 95-ALJ-24, ARB Final Dec. and Ord., July 17, 1997, slip op. at 2 and cases there cited. There is no question that Freightway managers were aware of Leidigh's safety complaints and that they took adverse action when they informed him that his employment had ended. The critical inquiry is whether retaliatory animus motivated the adverse action.

We adopt the ALJ's findings that Freightway terminated Leidigh's employment because he did not make himself available for dispatch for three consecutive days, thereby subjecting himself to termination under the collective bargaining agreement and company policy. R. D. and O. at 18. As the ALJ explained, in view of the cancellation of the B & H Trucking lease that had provided trucks for the Defiance terminal, Freightway needed to reduce the number of employees and could not afford to retain a driver that did not make himself available for dispatch. *Id.*

Leidigh attempted to show that he could not report to work at Toledo because he feared that Kaplan would physically assault him and he needed assurance that Kaplan would not harm him. Contrary to Leidigh's claim, the evidence shows that during the 1985 incident Kaplan never touched Leidigh. Moreover, Leidigh never complained to Kaplan or sought the assurance of personal safety that he believed was necessary. We find that fear of physical assault was not a sufficient excuse for Leidigh's failure to report to Toledo or exercise any other choice given in the options letter. Leidigh's second excuse, that he lacked a reliable car to get to Toledo and back, likewise is unconvincing since Freightway allowed its drivers to use company tractors to get to and from the terminal.

More importantly, Leidigh did not present convincing evidence that discriminatory animus motivated Freightway's otherwise reasonable response to Leidigh's unavailability for work. Leidigh claimed animus against him because the company declined his request for a voluntary layoff status but granted the request of a different employee. The company explained

⁴ In light of our disposition of this complaint against Leidigh, we need not examine whether his seeking reinstatement in this proceeding violated either the letter or the spirit of the NLRB settlement agreement.

to Leidigh that the other employee was granted voluntary layoff for medical reasons. CX 15. Leidigh has not demonstrated that Freightway violated the STAA when it considered his employment to be terminated. Accordingly, the complaint is **DISMISSED**.

SO ORDERED.

DAVID A. O'BRIEN

Chair

KARL J. SANDSTROM

Member