

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 11 January 2006

CASE NO.: 2005-STA-40

In the Matter of:

JOHN SIMON
Complainant

v.

SANCKEN TRUCKING CO.
Respondent

APPEARANCES:

Paul O. Taylor, Esq.
For the Complainant

Richard J. Puchalski, Esq.
For the Respondent

RECOMMENDED DECISION AND ORDER

This case arises under Section 405 of the Surface Transportation Assistance Act of 1982 (The Act), as amended and recodified, 49 U.S.C. § 31105, and its implementing regulations at 29 CFR Part 1978. John Simon (Simon or Complainant) filed a complaint under the Act with the Occupational Safety and Health Administration (OSHA) on April 8, 2005. Following an investigation, the Area Director of OSHA determined on June 6, 2005 that the complaint was without merit. Complainant made a timely request for a hearing and the case was referred to the Office of Administrative Law Judges. A hearing was held before the undersigned in Chicago, Illinois on September 27 and 28, 2005. Complainant's exhibits (CX) 1-3, 6-7, 11-16, and 19-23 and Respondent's exhibits (RX) 1-7 were admitted into evidence. The parties filed timely post-hearing briefs.

STIPULATIONS

1. The Complainant was hired as a trainee by Respondent on or about November 22, 2004 and became a full time truck driver on or about December 6, 2004.
2. Respondent is engaged in interstate trucking and is subject to the employee protection provisions of the Act.

3. As an employee of the Respondent, Complainant operated commercial vehicles on the highways in interstate commerce having a gross weight rating of 10,001 pounds or more.
4. On or about December 22, 2004, Simon filed a complaint with OSHA alleging he was being discriminated against for refusing to violate Federal Motor Carrier Safety regulations.
5. His complaint was dismissed by OSHA on March 31, 2005. No objections were filed.
6. Complainant suffered a job-related injury on or about January 19, 2005. He worked on January 20 and 21, 2005.
7. Complainant was off work on January 22, 2005 due to the job-related injury, and his physician released him to return to work effective March 9, 2005.
8. Complainant went to Respondent's office on March 10, 2005 and submitted his Department of Transportation medical card, which was copied and returned to him. At this time Glen Stevens and Complainant engaged in a conversation.
9. Complainant did not show up for work on March 11, 2005.
10. On March 11, 2005, James Sancken terminated Simon's employment.
11. On April 8, 2005, Complainant filed a complaint with OSHA alleging that Respondent discharged him in violation of the Act's employee protection provisions.
12. On June 6, 2005, the Secretary of Labor issued a preliminary order concerning the April 8, 2005 complaint.
13. On June 13, 2005, Complainant filed an objection to the Secretary's findings in this case.
14. The U.S. Department of Labor's Office of Administrative Law Judges has jurisdiction over the parties and subject matter of this proceeding.

ISSUE

Did Respondent discriminate against Complainant in violation of the employee protection provisions of the Act?

SUMMARY OF THE EVIDENCE

Complainant applied for the position of truck driver with Respondent on November 18, 2004 and was interviewed by Sue Sancken and James Sancken. TR 25.¹ Sue Sancken told Complainant that he would be working Monday through Friday hauling jet fuel, and that he would earn at least \$52,000 a year. TR 26. Claimant stated that this arrangement would work out and that he would rather not work weekends, because he is a single father and wanted to spend weekends with his daughter. TR 26, 152, 153. Complainant began working as a driver trainee hauling, loading, and unloading diesel and jet fuel. TR 28. Complainant became a full time truck driver on December 6, 2004 hauling jet fuel from East Chicago, Indiana to airports in Michigan, Illinois, and Wisconsin. Stipulation 1, TR 31. Complainant told two of Respondent's dispatchers that as his driving runs exceeded 100 miles, the hours needed to be logged. TR 36. He attempted to inform James Sancken of this but he was not available. TR 38. Complainant spoke to Kent Miller of the Federal Motor Carrier Safety Administration (FMCSA) on December 13, 2004 regarding Respondent's failure to log hours and Miller said that he would call Respondent about the matter. TR 40. Complainant later sent a written complaint to the FMCSA. CX 16. *See also* CX 17.

On December 17, 2004, James Sancken met with Complainant and asked him if he had called FMCSA. TR 41. Sancken said that Respondent was not going to log anything and that if Complainant did not like it, he did not want his job very much. TR 41. On December 17, 2004, Sancken took Complainant off the jet fuel runs and assigned him to hauling diesel fuel for the Chicago Transit Authority (CTA). TR 45. He was still working Monday through Friday. *Id.* Complainant filed his initial complaint with OSHA on December 22, 2004. CX 3, TR 47. He discussed the complaint with Sue Sancken in a January 20, 2005 telephone conversation, telling her that he objected to being assigned to the CTA runs because he would earn less money. TR 48-49, 156, 157.

Michael Millard of the FMCSA conducted a compliance review of Respondent as a result of a written complaint received from Complainant. TR 120. Complainant had reported that Respondent was not requiring drivers to log their hours of service as required by DOT regulations. TR 121. The compliance review lasted two to two and one half days and ended on March 10, 2005. TR 120. Millard wrote a report determining that Respondent was violating (DOT) regulations regarding driver logs. CX 6, TR 125. On March 10, 2005, Millard informed James Sancken that Respondent had received an "unsatisfactory" rating which would result in fines and suspension of its operations in interstate commerce if the violations were not corrected. TR 142, 147. *See* CX 9. Millard testified that he believed that Complainant disclosed to Respondent that he had made the complaint with FMCSA but he could not state this for a fact. TR 145, 146.

On March 8, 2005, Complainant called Glen Stevens, Respondent's dispatcher, and told him he had been cleared to return to work following his job-related injury. Stevens told Simon he needed a physical which Complainant had on March 9, 2005. TR 58. Complainant spoke to Stevens again on March 9 about returning to work and told him that he had passed the physical,

¹ Sue Sancken is the co-owner of Respondent with her husband; James Sancken is Sue Sancken's son and Respondent's vice president. TR 148, 263.

but Stevens said that the office was closing early and that he would have to contact him later. TR 59, 200. Complainant arrived at Respondent's office at 7:00 a.m. on March 10, 2005. TR 60. TR 60, 201. Stevens, James Sancken, and Deborah Bellefeuille, one of Respondent's employees, were present in the office. TR 201. Stevens spoke to Simon through a sliding glass window that was between the office and the waiting area. *Id.* Stevens asked Complainant for his medical card and medical release form. Complainant said that Respondent already had his medical release form which Stevens then retrieved. TR 62. Stevens told Complainant that the medical release form had to be signed. TR 62, 202. Complainant agreed to have it signed. *Id.*

Stevens then informed Complainant that the only shift available was a Thursday to Monday shift at \$100 a day and that he could "take it or leave it". TR 63, 203. Complainant stated that he did not know if he could take this shift because he would have to work weekends and needed to make arrangements for the care of his daughter. TR 63-64. Complainant asked Stevens to provide him with a job description and said that he would let Stevens know whether he would take the job. TR 64. Stevens did not tell Complainant that he would have to report to work on March 11 at 5:00 am. TR 64. Stevens testified that Complainant said that "I don't work weekends" and that he would need to talk to somebody. TR 203. Stevens stated that Complainant did not respond the first two times he was asked about the job but the third time, he stated that he would be there the next day but that he did not work weekends. TR 203-204. (Bellefeuille and James Sancken corroborated Stevens' testimony. TR 239-240, 264-265. However, Bellefeuille and Sancken's desks were behind Stevens and were several feet from the sliding glass window. Complainant was on the third or fourth step of the stairs leading down to the garage which were at a right angle to the window when he allegedly said that he would be at work the next day. TR 241, 286. I do not find that the testimony of Bellefeuille and James Sancken is credible regarding Complainant's response as they could not have heard what Complainant said from their locations.)

The next day, March 11, 2005, Tim Miller, the driver assigned to work with Complainant, called the office at 5:00 a.m. and left a message that Complainant had not shown up for work. TR 204-205, 292-293. Complainant called Stevens later that day and Stevens asked him why he was not working. TR 71. Complainant responded that he did not know what Stevens was talking about, that he had not been assigned a specific shift, and that he needed a job description. TR 71, 74, 205. On advice of counsel, James Sancken fired Complainant on that day because he had not shown up for work. TR 266. *See* CX 7, RX 5. On March 12, 2005, Complainant wrote a letter in response.² He testified that he was upset when he wrote this letter

² The letter states in pertinent part:

I received the letter of termination sent March 11, 2005, You expecting me to do what you say when you say to do it regardless of UNITED STATES DEPARTMENT OF TRANSPORTATION, LAWS and REGULATIONS, is why I did not show up for work. I was told on March 10, 2005, by your office this was expected of me. As you know, you and I have had conversations on this matter before. I have not and will not break laws for this job. Effective immediately, I am leaving.

Further, instead of changing your policy, I was threatened with my job, harassed and discriminated against for not breaking laws, by you and your Company.

because he could not believe that he had been terminated. He had been accused of not showing up for work when he was not even scheduled to work. He characterized the letter as a “smart aleck” answer to the termination letter. TR 99-100.

After he was terminated by Respondent, Complainant had temporary jobs with T. J. Lambrecht Construction, Inc., Berger Excavating Contractors, Inc., and Perkins Quality Exteriors, Inc. TR 76-79. He earned \$6923.26 for Lambrecht, \$4410 for Berger, and \$1125.76 for Perkins, a total of \$12,459.02. *Id.*, CX 13, 21.

CONCLUSIONS OF LAW

Liability

Section 31105 of the Act provides, as pertinent, that:

- (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 motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or
 - (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.

To prevail in a whistleblower proceeding under the Act, the complainant must establish that his employer took adverse employment action against him because he engaged in protected activity. Under the traditional burden shifting analysis, the complainant must initially prove a *prima facie* case by showing: (1) that he engaged in protected activity, (2) that his employer was aware of his protected activity, (3) that he suffered an adverse employment action, and (4) the existence of a causal link or nexus raising an inference that he was retaliated against because of his protected activity. If the complainant makes out a *prima facie* case, the burden shifts to the employer to articulate a legitimate business reason for taking the adverse employment action, and the complainant must then prove that the articulated reason is a pretext and that the employer discriminated against him because of his protected activity. *Shannon v. Consol. Freightways*, ARB No. 98-051, ALJ No 1996-STA-15 (ARB April 15, 1998). However, if a case has been fully tried on the merits, it is not particularly useful to analyze whether the complainant has established a *prima facie* case. Rather the relevant inquiry is whether the complainant established by a preponderance of the evidence that he was discharged or disciplined for his safety complaints. *Pike v. Public Storage Companies, Inc.*, ARB No. 99-072, ALJ No 1998-STA-35 (ARB Aug. 10, 1999).

Complainant engaged in protected activity under the Act by filing his first whistleblower complaint with OSHA, by making internal complaints to James and Sue Sancken regarding Respondent's failure to have its drivers complete logs, and by filing a complaint with FMCSA about the violations of DOT regulations requiring that drivers fill out logs when driving over 100 miles. 49 CFR § 395.³ See *Clean Harbors Environ. Serv. Inc. v. Herman*, 146 F. 3d 12 (1st Cir. 1998). (internal complaints are covered under the STA). Respondent unquestionably knew of Complainant's first OSHA complaint and of his internal complaints regarding the drivers' failure to log which were communicated directly to both Sue and James Sancken. I also conclude that Respondent was aware of Complainant's oral and written complaints to FMCSA. On December 17, 2004, James Sancken asked Complainant if he had called FMCSA about Respondent's failure to log. The FMCSA investigation dealt specifically with the subject matter of the complaint Simon had previously made to James Sancken, who probably inferred that Complainant was the whistleblower who had informed FMCSA of Respondent's violations of DOT regulations.⁴ I find that Respondent was aware of Complainant's protected activity.

An adverse action can include not only ultimate employment decisions such as firing or demotion, but also actions that result in adverse effects on the terms, conditions, or benefits of employment. *Calhoun v. United Parcel Service*, ARB No. 00-026, ALJ No. 99-STA-7 (ARB Nov. 27, 2002). See also *Long v. Roadway Express, Inc.*, 88 –STA-31 (Sec'y Sept. 15, 1989). Respondent assigned Complainant to a shift requiring him to work weekends. Respondent knew that Complainant had asked to be off weekends because he had joint custody of his daughter, and it had complied with his request when he was first hired and when he was reassigned to the CTA runs. The reassignment of Simon to a Thursday to Monday shift was an adverse employment action as it involved not merely a reassignment, but a different work schedule that would negatively impact Complainant's family obligations. Complainant was also to be paid only \$100.00 a day, less than he was earning when he was he was previously hauling fuel for Respondent. A reduction in pay also constitutes an adverse employment action.

Respondent's proffered explanation for reassigning Complainant to a weekend shift was that there were no weekday shifts available. TR 263, 291. However, Respondent continued to have the jet fuel and the CTA accounts as of March 10, 2005. TR 167. Complainant drove trucks pursuant to both these accounts on a Monday to Friday shift when he was working from November 2004 to January 2005. Respondent's justification for reassigning Complainant to a weekend shift is therefore not credible. Respondent received the FMCSA's negative report on March 10, 2005, the day that Complainant was told he had to work weekends. The negative report subjected Respondent to fines and a possible suspension of its operations until the violations were corrected. Respondent's reassignment of Complainant to a weekend shift on the same day it received the FMCSA report and its "take it or leave it" attitude clearly show that it was motivated by a retaliatory animus against Complainant because he was a whistleblower rather than by any legitimate business reasons.

³ I do not find that Complainant engaged in protected activity under § (a)(1)(B). There is no evidence in the record that Complainant ever refused to operate Respondent's vehicles for any reason including the two reasons enumerated in the Act.

⁴ Stevens testified that he may have overheard James or Sue Sancken say that "isn't it coincidental" that Complainant knows so much about the DOT audit. See TR 214-216.

Complainant's discharge on March 11, 2005 also constituted an adverse employment action. Respondent maintains that Complainant was terminated because he failed to show up for work, but I conclude that Complainant did not agree to the Thursday to Monday shift because it would conflict with his need to care for his daughter on weekends. Complainant told Stevens that "I don't work weekends" and stated that he needed to make arrangements for child care on weekends if that was the only shift available. He asked for a job description on March 10 and again on March 11 which suggests that he had not decided to take the shift. Stevens' testimony (as well as the testimony of Deborah Bellefeuille and James Sancken who were too far away to hear what Complainant was saying) that Complainant said "I'll be there" on March 11 is not credible. I do not believe that Complainant would agree to work a weekend shift if he had never worked one before, had requested to be off weekends when he was first hired by Respondent, and required more time to make child care arrangements for his daughter. As Complainant had not agreed to take the weekend shift, Respondent's termination of Complainant for refusal to report to work on March 11 was pretextual.⁵ I find that Complainant's termination was retaliation for his protected activity.

Back Pay and Compensatory Damages

As Respondent discriminated against Complainant in violation of the Act, Complainant is entitled to reinstatement, back pay, and compensatory damages. Complainant seeks reinstatement and Respondent must reinstate him to his previous position at the same rate of pay and the same terms of employment.

A wrongfully terminated employee is also entitled to back pay. The purpose of a back pay award is to return the wronged employee to the position he would have been in had his employer not retaliated against him. *Ass't Sec'y & Bryant v. Mendenhall Acquisition Corp.*, ARB No. 04-014, ALJ No. 2003-STA-36 (ARB June 30, 2005). While there is no fixed method for computing a back pay award, calculations of the amount due must be reasonable and supported by evidence; they need not be rendered with unrealistic exactitude. *Bryant, supra*.

Complainant argues that he was promised an annual salary of at least \$52,000 and that his back pay award should be based on a \$1000 weekly wage. However, there is no substantiation in the record that Complainant was to be paid \$52,000 a year and in fact his compensation was significantly less. Over the seven weeks that Complainant was employed by Respondent as a full time truck driver, he earned \$5,050.79 yielding an average weekly wage of \$721.54. See CX 11, CX 12. From March 11, 2005, the date he was terminated, until the date of this decision and order, 43.4 weeks have elapsed, during which Complainant would have earned \$31,314.83 (43.4 x \$721.54). Subtracting the \$12,459.02 Complainant earned in his post-termination employment, he is entitled to back wages of \$18,855.82. Respondent must also pay Complainant \$721.54 a week until he is reinstated. Interest is due on the back pay award at the rate of interest

⁵ Respondent places great weight on Complainant's March 12, 2005 letter in which he stated that he did not show up for work the previous day because he was being required to violate DOT regulations as an indication that Complaint willfully failed to report to work. The letter was obviously written when Complainant was greatly distressed about his firing and does not override his testimony that he did not report to work on March 11, because he needed more time to decide whether to take the shift and to make arrangements for child care. Respondent also contends that this letter proves that Complainant resigned and was not fired. As Complainant had been terminated the day before this letter was written, Respondent's argument has no merit.

required by 29 CFR § 20.58(a) which is the IRS rate for the underpayment of taxes set out in 26 U.S.C. § 6621.

Complainant suffered emotional distress as a result of his termination and inability to find permanent employment, and therefore I award him \$5,000 for emotional distress.

RECOMMENDED ORDER

IT IS ORDERED THAT Respondent Sancken Trucking Co.:

1. Reinstate Complainant to his previous job as a truck driver;
2. Pay Complainant back pay of \$18,855.82 and \$721.54 a week from the date of this decision and order until his reinstatement;
3. Pay interest on the back pay award;
4. Pay Complainant damages for emotional distress of \$5,000.00;
5. Post a copy of this Decision and Order at its place of business for 90 days and expunge any adverse references to Complainant in its personnel files regarding his termination.

Complainant's counsel has thirty days to submit an application for professional fees and costs. Respondent had twenty days from receipt of this application to submit a response.

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DANIEL L. LELAND
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, 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.

