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Issue Date: 15 September 2006

Case No: 2006-STA-00027

In the Matter of

LORI J. DICKEY,
Complainant,

v.

WEST SIDE TRANSPORT, INC.,
Respondent.

Before: **LARRY W. PRICE**
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the "whistleblower" protection of Section 405 of the Surface Transportation Assistance Act of 1982 (hereinafter STAA), 49 U.S.C. § 31105, and the regulations at 29 C.F.R. Part 1978. The STAA prohibits covered employers from discharging or otherwise discriminating against employees who engage in certain protected activities related to their terms or conditions of employment.

Complainant was employed as a truck driver by Respondent from February 24, 2005 until her employment terminated on January 10, 2006, as a result of the events underlying the current dispute. On January 24, 2006, she filed a complaint with the Department of Labor alleging Respondent violated the STAA. Following an investigation, the Regional Administrator for the Occupational Safety and Health Administration, dismissed the complaint on March 31, 2006. On April 12, 2006, Complainant filed a notice of objection and a request for a hearing.

A formal hearing was held in Tampa, Florida, on May 23, 2006 where the Parties were afforded full opportunity to present testimony, submit documentary evidence, and submit post-hearing briefs. Complainant's Exhibits 1 (pp. 1-7, 10-25), 2 and 3 (pp. 1-6) and Respondent's Exhibits A–H were received into evidence.[1]

[1] A joint hearing was held with the case of James E. Dickey v. West Side Transport, Inc., Case No 2006-STA-00026. Although the Parties were afforded the opportunity to submit evidence post-hearing, none was submitted.

ISSUE

Whether Respondent terminated Complainant because she engaged in activity protected by 49 U.S.C. § 31105.

FINDINGS OF FACT

Based upon the hearing testimony and supporting evidence, I make the following findings of fact:

1. Respondent is a commercial motor carrier engaged in transporting freight on the highways and maintains a place of business in Cedar Rapids, Iowa. Complainant and her husband, James E. Dickey, were hired on February 26, 2005, as drivers of Respondent, to wit, to drive commercial motor vehicles with a gross weight of 10,001 pounds or more. (Tr. 19).

2. The Dickeys had approximately 16 years truck driving experience. The Dickeys have filed a lawsuit against Freightliner which includes allegations that they sustained carbon monoxide poisoning in 2002 as a result of driving Freightliner trucks. (Tr. 51,152; RX H, p. 7). Other complaints have been made concerning Freightliner trucks. (CX 1, pp.14-23).

3. Complainant and Mr. Dickey had previously worked for Respondent as owner-operators and because they were good drivers, Respondent had asked them to return and drive Respondent's trucks as company drivers. (Tr. 22).

4. The Dickeys were given a new Freightliner truck. By September 2005 they had driven it for 153,000 miles with no problems. In accordance with company practice, this truck was taken over by a single driver and the Dickeys were given another new Freightliner truck #26080. (Tr. 24, 53).

5. The Dickeys drove truck #26080 without reported incident until November 11, 2005. On this date, Mr. Dickey lost consciousness momentarily and nearly crashed. (Tr. 25).

6. Complainant completed the driving back to the terminal in Cedar Rapids. Upon their return, they informed Respondent of the incident and that Mr. Dickey was seeking medical care at the VA hospital. The Dickeys informed Respondent about their concern for a tumor on the back of Mr. Dickey's neck and the possibility of an aneurysm. (Tr. 58, 95).

7. Mr. Dickey was seen at the VA hospital on November 14, 2005. In the intake interview Mr. Dickey reported having "5-6 'blackout' spells over the past two months." (RX B, p. 18). In the history taken at that time, Mr. Dickey reported developing spells in the three to four months previous and having suffered three or fours such spells, though never

before while driving. Various medical tests (EEG, MRI) were ordered and Mr. Dickey was to follow-up on completion of diagnostic testing. On November 14, 2005, Dr. Jantzen ordered "no driving for 6 months as per Iowa driving laws and seizure precautions." (RX. B, p. 11; CX2, p.2, 4). At that time neither Complainant nor Mr. Dickey believed Mr. Dickey's symptoms were due to carbon monoxide poisoning. (Tr. 110).

8. Because Mr. Dickey had been employed less than twelve months, he was not covered by FMLA and was subject to Respondent's sick leave policy. That policy provides that any employee who is unavailable for work for 14 consecutive days will be subject to automatic termination if the medical condition is not work related. This policy had been in effect before, during and after the Dickeys were employed by Respondent and they were aware of this policy. (Tr. 52; RX A, pp. 4-5).

9. On November 14, 2005, Mr. Dickey informed Respondent that he could not drive until medical testing was completed. Mr. Dickey was reminded of the sick leave policy and that if he missed fourteen consecutive days of work, he would be automatically terminated. (Tr.36, 62, 186, 188).

10. On November 21, 2005, some of the medical testing having been completed, Mr. Dickey returned to the VA hospital. Mr. Dickey reported that on the day of the near accident he was "exhausted" and had been putting in 6000 miles/week. Dr. Jantzen opined that Mr. Dickey may have sleep apnea and suggested he obtain a polysomnogram. (RX B, pp. 9-10). Dr. Jantzen signed a release allowing Mr. Dickey to return to driving truck. As Mr. Dickey had missed less than fourteen days, he was reinstated to drive and the Dickeys resumed driving truck #26080. ((Tr. 32-34, 64, 189). At that time the Dickeys thought truck #26080 was completely safe. (Tr. 112).

11. The Dickeys drove truck #26080 without incident for the next month. On December 12, 2005, Mr. Dickey experienced another episode and nearly rear-ended another vehicle. (Tr. 35, 67-68).

12. On December 14, 2005, Mr. Dickey returned to the VA hospital where he reported "spells where he looses time." He underwent additional blood tests including his carboxhemoglobin level which showed a 3.2 COHb level. (RX B, p. 4). The only medical evidence is that this level is consistent with the baseline levels for smokers. (RX D, p. 2). Both Complainant and Mr. Dickey smoke cigarettes. (Tr. 75, 89).

13. Mr. Dickey was diagnosed with "spells of unknown etiology" and Dr. Holstein restricted Mr. Dickey from driving until he had a sleep study. (RX B, p.8). Dr. Holstein prepared a work excuse dated December 14, 2005, that stated "Mr. Dickey should not drive his truck until he has undergone polysomnogram testing. (sleep study). (RX B, p. 1).

14. Mr. Dickey informed Respondent that pursuant to doctor's orders, he could not work until he underwent a sleep study. Mr. Dickey gave the work excuse and his other medical documents to Laura Watson who told him he needed to get the sleep study done within

the next fourteen days. (Tr. 36, 37). There is nothing in the medical records provided to Watson that indicated any problem with carbon monoxide poisoning or any connection with a defect in truck #26080.

15. The Dickeys knew that Mr. Dickey needed to get the sleep study done within fourteen days or he would be fired. (Tr. 97). As was done in November, Mr. Dickey was reminded of the policy that he would be automatically terminated subject to rehire if he was off work more than fourteen days. (Tr. 68–72). He was told that once he was medically qualified to drive, he could reapply for employment. (Tr. 39). It was during this meeting that the Dickeys first raised the correlation between truck #26080 and possible carbon monoxide symptoms. (Tr. 190).

16. On December 16, 2005, Mr. Dickey took his personal vehicle and returned to his home in Florida to pursue the testing recommended by the VA hospital. Complainant was assigned another truck, #25093, and continued driving for Respondent. (Tr. 37, 75).

17. On December 29, 2005, pursuant to company policy, Mr. Dickey was terminated because he had been off work for more than fourteen days. (RX C, p. 1).

18. Mr. Dickey has never undergone polysomnogram testing as recommended by his doctors. No doctor has ever released Mr. Dickey to resume truck driving. (Tr. 39).

19. Truck #26080 was sent to the University of Iowa to be tested for emissions leaking into the cab. An Industrial Hygienist detected no characteristic diesel exhaust odor in the cab during the testing period. She concluded that "carbon monoxide concentration in the cab while the engine was running was not elevated or at a level that would pose harm to occupants." The report is dated January 5, 2006. (RX D).

20. Truck #26080 has been driven over 50,000 miles since this testing without any complaints regarding any exhaust emissions. (Tr. 176; RX G).

21. Complainant continued to drive truck #25093. Complainant continued to be dispatched by Mike Roberts. Roberts and his wife were close friends of the Dickeys. (Tr. 55). Complainant drove loads to Indianapolis and Georgia and then went home to Florida for the holidays for two weeks. (Tr. 103).

22. Mediation was set for January 9, 2006, in Philadelphia in the Dickeys' lawsuit against Freightliner. At her request, Complainant was dispatched to Chicago then Philadelphia to attend the mediation. (Tr. 119). Prior to her arrival in Philadelphia, Complainant had driven truck #25093 more than 3,400 without complaint. (Tr. 117-118; RX H, pp. 29-30). Complainant alleges she suffered facial burns, blackheads and her eyes were burning from fumes inside the truck. Complainant did not seek any medical attention for these complaints at any time. (Tr. 133-134).

23. Mr. Dickey drove his personal vehicle to Philadelphia for the mediation. Complainant had removed some personal items from truck #25093 before she had left Florida. While

at the mediation, Complainant's attorney advised that she was making a serious mistake if she continued to drive truck #25093 and something happened. (CX 3, p.5).

24. On January 10, 2006, Complainant reported her concerns about carbon monoxide problems with truck #25093. While still at the motel, she contacted Roberts and told him "I cannot drive this truck until it is fixed." (Tr. 104). She was told to contact the shop. Complainant was first directed by the shop to take the truck to the TA truck stop in New Jersey and have it looked at. Complainant drove truck #25093 the eleven miles to the TA. A mechanic at the TA told Complainant that a too short hose was the cause of the problem. (Tr. 128).

25. While at the TA she called Roberts. Complainant was told not to put truck #25093 in the shop because nobody else believed the accusations about truck #25093 being unsafe. (RX H, p. 63; Tr. 171). Complainant told Roberts "she was having problems with carbon monoxide fumes in the truck, that her – her eyes were burning from the fumes, that she could not stand to drive it anymore . . . and she was going to have to quit because she couldn't stand to driving the truck anymore like that." (Tr. 203; RX H, pp. 33-35). Complainant does not actually know what was leaking into the truck. (Tr. 104, 106).

26. Complainant was told to drive the truck 530 miles to Kingsport, Tennessee, but she refused stating "no, not until it's fixed." She communicated with Watson and stated she wanted the truck looked at by a mechanic. Watson told her no and she was asked to drive the truck to the Bordentown drop site and she again refused. (Tr. 129; 203-205). At that time, Respondent made the decision to terminate her employment. (Tr. 163).

27. Jeff McCarthy was sent to pick up truck #25093 and drive it to Bordentown. McCarthy was aware that Complainant felt she had carbon monoxide poisoning. McCarthy wanted to get a carbon monoxide test kit to put in truck #25093 but was reassured by Roberts that nothing was wrong with truck #25093. (RX H, p. 46).

28. Joseph Laughman drove truck #25093 1,100 miles from Bordentown back to Cedar Rapids without incident or complaint. (Tr. 147- 152).

29. Truck #25093 was sent to the University of Iowa to be tested for emissions leaking into the cab. The results did not indicate any problems related to diesel exhaust contamination inside truck #25093. (RX E).

30. Truck #25093 has been driven approximately 32,000 miles since this testing without any complaints regarding any exhaust emissions. (Tr. 176; RX G).

31. There is no medical evidence that any health problems Complainant was suffering from were related to exhaust emissions inside truck #25093.

LAW AND CONTENTIONS

Congress included section 405(b) in the STAA for the purpose of insuring that employees in the commercial motor transportation industry who make safety complaints, participate in proceedings, or refuse to commit unsafe acts, do not suffer employment consequences because of these actions. See Roadway Express, Inc. v. Dole, 929 F.2d 1060 (5th Cir. 1991) (citing 128 Cong. Rec. 29192, 32510 (1982)). Consequently, the STAA protects all employees of commercial motor carriers from discharge, discipline, or discrimination for filing a complaint about commercial motor vehicle safety, testifying in a proceeding on safety, or refusing to operate a commercial motor vehicle when operation would violate a Federal safety rule or when the employee reasonably believes it would result in serious injury to himself or others. See 49 U.S.C. §31105(a). Respondent is a commercial motor carrier and Complainant operated commercial motor vehicles. The provisions of STAA are applicable to the underlying dispute.

To establish a prima facie case under the STAA, a complainant must demonstrate that (1) she engaged in protected activity, (2) she was subjected to an adverse employment action, and (3) the adverse action was taken because of her protected activity. Yellow Freight Sys., Inc. v. Reich, 27 F.3d 1133, 1138 (6th Cir. 1994). After a prima facie case is established, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the employment decision. Moon v. Transportation Drivers, Inc., 836 F.2d 226, 229 (6th Cir. 1987). If the employer articulates a non-discriminatory reason for the adverse employment action, the complainant bears the burden of showing that the employer's reason is pretextual and the real reason for the adverse action was retaliation. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993).

However, since this case was fully tried on its merits, it is not necessary for the Court to determine whether Complainant presented a prima facie case and whether Respondent rebutted the showing. U.S.P.S. Bd. of Governors v. Aikens, 460 U.S. 711, 713-14 (1983); Roadway Express, 929 F.2d at 1063. Once the respondent has produced evidence in an attempt to show that the complainant was subjected to adverse action for a legitimate reason, it no longer serves any analytical purpose to answer the question whether the complainant presented a prima facie case. Ciotti v. Sysco Foods of Philadelphia, 97-STA-30 at 5 (ARB July 8, 2003). Instead, the relevant inquiry is whether the complainant prevailed by a preponderance of the evidence on the ultimate question of liability. Id.

PROTECTED ACTIVITY

A refusal to operate a commercial motor vehicle is protected by the STAA if the driver refuses to operate the vehicle for one of the two reasons provided by statute. Specifically, the STAA provides protection to an employee who refuses to operate a motor 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 a serious injury to the employee or the public because of the vehicle's unsafe condition.

49 U.S.C. § 31105(a)(1)(B). Furthermore, the STAA defines what qualifies as "reasonable apprehension." Under the statute, "an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health." Id. § 31105(a)(2). Moreover, "[t]o qualify for the protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition." Id.

Actual Violations

The first method by which a refusal to operate a vehicle is classified as protected activity is if the refusal is made because "the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health." Id. §31105(a)(1)(B)(i). Complainant argues that by continuing to drive truck #25093, she would have violated 49 CFR §392.66. According to the federal regulations:

> No person shall dispatch or drive any commercial motor vehicle or permit any passengers thereon, when the following conditions are known to exist, until such conditions have been remedied or repaired: (1) Where an occupant has been affected by carbon monoxide; (2) Where carbon monoxide has been detected in the interior of the commercial motor vehicle; (3) When a mechanical condition of the commercial motor vehicle is discovered which would be likely to produce a hazard to the occupants by reason of carbon monoxide.

49 C.F.R. § 392.66 (2003). Moreover, 49 CFR § 396.17 states that a driver shall "be satisfied that the motor vehicle is in safe operating condition.

It has consistently been held that to come within the protection of this prong of the refusal to drive provision, the complainant must show by a preponderance of the evidence that an actual violation of a regulation would have occurred. Yellow Freight Sys., Inc. v. Reich, 38 F.3d 76 (2d Cir. 1994); Cook v. Kidimula Int'l, Inc., 95-STA-44 at 2 (Sec'y Mar. 12, 1996); Robinson v. Duff Truck Line, Inc., 86-STA-3 (Sec'y Mar. 6, 1987), aff'd, Duff Truck Line, Inc. v. Brock, 848 F.2d 189 (6th Cir. 1988) (per curiam) (unpublished decision available at 1998 U.S. App. LEXIS 9164). To establish a violation, it is not sufficient that a driver demonstrate a good faith subjective opinion. Instead, a complainant must prove that her assessment of the condition is correct. Brame v. Consolidated Freightways, 90-STA-20 (Sec'y June 17, 1992) (finding driver's refusal to drive a truck was improper because the only evidence of faulty breaks was his subjective opinion).

Complainant's evidence clearly does not reach the strict limitation imposed by this interpretation of the first prong. When refusing to drive, Complainant relied solely on her opinion that carbon monoxide was leaking into the cab of truck #25093. The testing performed on the truck and the subsequent use of the truck by Laughman and other drivers convinces this Court that truck #25093 was not defective and that there was no actual violation of any regulation, standard, or order of the United States related to

commercial motor vehicle safety or health. This Court finds specifically that there was no actual violation of 49 C.F.R. § 392.66

Without any evidentiary support other than her subjective opinion that an actual violation of a regulation would have occurred, I find Complainant's refusal to drive is not protected activity under the first prong of the STAA.

Reasonable Apprehension

The STAA also provides protection to the employee if her refusal to drive is based on a "reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition." 49 U.S.C. § 31105(1)(B)(ii). To establish a complaint under this work refusal provision, a complainant must establish that (1) she refused to operate the vehicle because she was apprehensive of an unsafe condition of the vehicle, (2) her apprehension was objectively reasonable, (3) she sought to have the respondent correct the problem, and (4) the respondent failed to do so. See Brick's Inc. v. Herman, 148 F.3d 175, 181 (2d Cir. 1998); see generally Yellow Freight Sys., Inc. v. Reich, 8 F.3d 980 (4th Cir. 1993) (discussing these requirements in regard to a refusal to work based on fatigue).

The Parties do not dispute that Complainant refused to drive because of her alleged concern that the vehicle was unsafe due to carbon monoxide or other dangerous fumes leaking into the cab. Moreover, it is clear that Complainant made Respondent aware of her alleged concern and unsuccessfully sought to have Respondent correct the problem. Thus, the focus of the dispute is whether Complainant was truly apprehensive of an unsafe condition and whether Complainant's apprehension was objectively reasonable. Specifically, the analysis is whether the Complainant has met her burden of showing by a preponderance of the evidence that her alleged apprehension of serious injury to herself or others was objectively reasonable. See Brunner v. Dunn's Tree Serv., 94–STA-55 (Sec'y Aug. 4, 1995).

Was Complainant truly apprehensive of an unsafe condition in truck #25093?

I found Complainant to be a credible witness. While I find that Complainant has not proven that either truck #26080 or truck #25093 had any defect that could cause carbon monoxide poisoning, I find that she truly believed that carbon monoxide or some other dangerous fumes were leaking into the cab of truck #25093. While the timing of her complaint (following so closely on the heals of the mediation) might cause questioning of her motivation, I find that her knowledge of other similar complaints, her husband's incidents in November and December 2005, her burning eyes and facial burns led her to believe that carbon monoxide or some other particulates were leaking into the cab of truck #25093.

Was Complainant's apprehension objectively reasonable?

The STAA provides the applicable standard to determine if a complainant's apprehension is reasonable. According to the statute, "[u]nder paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition

establishes a real danger of accident, injury, or serious impairment to health." 49 U.S.C. § 31105(a)(2). To meet this standard, Complainant must provide evidence establishing that a reasonable person would conclude that there was a "bona fide danger of an accident or injury" due to the unsafe condition of the vehicle. Calhoun v. United Parcel Serv., 02-STA-31, at 21 (ALJ June 2, 2004) (citing Robinson v. Duff Truck Line, Inc., 86-STA-3, at 9-10 (Sec'y Mar. 6, 1987), aff'd sub. nom Duff Truck Line, Inc. v. Brock, 848 F.2d 189 (6th Cir. 1988)).

While Complainant is not required to prove the existence of an actual safety defect, she must provide sufficient evidence indicating that her assigned vehicle could reasonably be perceived as unsafe. When examining reasonableness under 49 U.S.C. §31105(1)(B)(ii), relevant factors include the driver's apprehension about past experience, the vehicle's susceptibility to the defect at issue, whether other drivers have driven under similar circumstances, and the driver's experience. See e.g., Monde v. Roadway Express, Inc., 01-STA-22, 01-STA-29 at 10 (ARB Oct. 31, 2003); Thomas v. Indep. Grocers of Abilene, Texas, 86-STA-21 (Sec'y Apr. 1, 1987). For instance, in Yellow Freight Sys., Inc. v. Reich, the Second Circuit specifically mentions that the truck driver was "an experienced over the road driver" and was entitled to creditability regarding the vehicle's lack of power and fuel problem. Yellow Freight Sys., Inc. v. Reich, 38 F.3d 76, 86 (2d Cir. 1994) (finding the refusal to drive was reasonable because of fuel system problem).

Complainant had her own subjective opinion that she believed carbon monoxide or other dangerous fumes were coming into the cab. She had years of experience both as a driver and as a diesel mechanic. She had the past experience in which her husband had what she thought was an elevated carbon monoxide level after driving a similar truck. The testing on truck #26080 had just been completed and there is no reason to believe that she was aware of the test results. She was aware of similar complaints being made about Freightliner trucks by other drivers. She further credibly testified that a mechanic at the TA truck stop diagnosed the problem as a short hose that allowed fumes to enter the cab. Given all these facts, it would be reasonable to perceive that truck #25093 was unsafe to operate.

Complainant's refusal to work may still lose its protection if Respondent acted appropriately. Under "whistleblower" provisions of other statutes, it has been determined that while "a worker has a right to refuse work when he has a good faith, reasonable belief that working conditions are unsafe or unhealthful . . . [the R]efusal to work loses its protection after the perceived hazard has been investigated by responsible management officials . . . and, if found safe, adequately explained to the employee." Pensyl v. Catalytic, Inc., 83-ERA-2 (Sec'y Jan. 13, 1984), slip op. at 6-7. This rule was most notably articulated in the Pensyl decision under the Energy Reorganization Act (ERA). Id.; see also Eltzroth v. Amersham Medi-Physics, Inc., 97-ERA-31 (ARB Apr. 15, 1999) (applying the Pensyl standard to find the employer's explanation was adequate under the ERA); Williams v. Baltimore City Public School, 00-CAA-15 (ARB May 30, 2003) (applying the same standard to the whistleblower provisions under the Clean Air Act). It is consistently held that the Pensyl v. Catalytic, Inc. decision, under the ERA, provides the relevant applicable standard in determining whether a work refusal is reasonable under the STAA. See e.g., Boone v. TFE, Inc., 90-STA-7 (Sec'y July 17, 1991) (adopting without comment on this particular ruling, the ALJ's conclusion that the Pensyl decision provides the appropriate standard when determining the "reasonableness" of a work refusal under the STAA)

aff'd, 987 F.2d 1000 (4th Cir. 1992); Thom v. Yellow Freight Sys., Inc., 93-STA-2 (Sec'y July 20, 1993) (adopting the ALJ's analysis of the work refusal clause, which agrees that Pensyl provides the appropriate standard) aff'd sub nom. Yellow Freight Sys., Inc. v. Reich, 38 F.3d 76 (2d Cir. 1994).

Thus, according to the rationale of Pensyl, an important factor in determining whether an employee's apprehension is reasonable, is whether his employer has investigated the hazard, determined the vehicle was safe, and informed the employee of that determination. Here, Complainant was first told to take the truck to the TA truck stop to have it checked out. According to Complainant's credible testimony, the mechanic there told her the truck needed a longer hose to keep fumes out of the cab. While Respondent might have correctly guessed that there was nothing wrong with the truck, the mechanic that investigated the hazard determined that the vehicle was unsafe. In addition to her subjective beliefs and past experience, Complainant now had a mechanic at the truck stop where Respondent instructed her to take the truck for repairs telling her the vehicle was not safe to operate. I find Complainant has produced adequate evidence to demonstrate that a reasonable person, under the circumstances confronting Complainant at the time she refused to drive, would conclude that there was a bona fide danger of accident or injury.

I find that the preponderance of evidence establishes that Complainant's refusal to drive was protected activity under the STAA.

ADVERSE ACTION

Respondent argues that Complainant quit her job with Respondent and that no adverse action was taken against her. I find this argument devoid of merit.

While still at her motel, Complainant reported fumes in truck #25093. She told Roberts "I cannot drive this truck until it is fixed." Complainant was told to take the truck to the TA truck stop to have it looked at. She did exactly as directed and was informed by a mechanic that a too short hose was the cause of the problem. She then called Roberts and was told not to put the truck in the shop. Although not stated directly, the Court infers from the circumstances that it was expected that Complainant would not put the truck in the shop and would continue driving as if nothing was wrong. Not surprisingly, Complainant told Roberts "she was having problems with carbon monoxide fumes in the truck, that her – her eyes were burning from the fumes, that she could not stand to drive it anymore . . . and she was going to have to quit because she couldn't stand to driving the truck anymore like that." Complainant was told to drive the truck 530 miles to Kingsport, Tennessee, but she refused stating "no, not until it's fixed." She communicated with Watson and stated she wanted the truck looked at by a mechanic. Watson told her no and she was asked to drive the truck to the Bordentown drop site and she again refused. (Tr. 129; 203-205). At that time, Respondent made the decision to terminate her employment.

The Court finds that Complainant never intended to terminate her employment with Respondent. The Court finds that regardless of the exact terms used, Complainant meant, and Respondent understood, that Complainant was refusing to drive truck #25093 until it was fixed.

Whether it was Roberts, Watson or Hershberger that made the decision to terminate Complainant, it is clear by the weight of the evidence that the decision was made because Complainant refused to drive truck #25093 until it was fixed. And it was this refusal that "left West Side Transport with no alternative but to terminate" her employment. (CX 3, p. 4).

The Court finds by a preponderance of the evidence that Complainant engaged in protected activity when she refused to drive truck #25093 and Complainant's employment was terminated because she refused to drive truck #25093 until it was repaired.

DAMAGES

The STAA provides that:

If the Secretary decides, on the basis of a complaint, a person violated subsection (a) of this section, the Secretary shall order the person to

(i) take affirmative action to abate the violation;

(ii) reinstate the complainant to the former position with the same pay and terms and privileges of employment; and

(iii) pay compensatory damages, including back pay.

49 U.S.C. § 31105(b)(3)(A).

Reinstatement

Reinstatement provides an important protection for employees who report safety violations. "[T]he employee's protection against having to choose between operating an unsafe vehicle and losing his job would lack practical effectiveness if the employee could not be reinstated pending complete review." Brock v. Roadway Express, Inc., 481 U.S. 252, 258-259 (1987). These protections also extend to employees who refuse to drive vehicles because of safety concerns. 49 C.F.R. § 392.7. In the absence of a valid reason for not returning to his former position, immediate reinstatement should be ordered. Dutile v. Tighe Trucking, Inc., Case No. 93-STA-31 (Sec'y Oct. 31, 1994).

Complainant does not want to be restored to her previous position with Respondent. Considering that she now has a job driving in-state that pay similar wages and that her husband can no longer drive truck and accompany her on long hauls, the desire not to return to employment with Respondent seems appropriate. Accordingly, reinstatement is not recommended.

Back Pay

The purpose of a back pay award is to make the employee whole, that is, to restore the employee to the same position he would have been in if not discriminated against. Dutkiewicz v. Clean Harbors Environmental Services, Inc., Case No. 95-STA-34 (ARB Aug. 8, 1997). Back pay calculations must be reasonable and supported by evidence; they need not be rendered with "unrealistic exactitude." Cook v. Guardian Lubricants, Inc., Case No. 95-STA-43 @ 11 (ARB May 30, 1997). Back pay is typically awarded from the date of a complainant's termination until reinstated to his former employment. Any uncertainties in calculating back pay are resolved against the discriminating party. Kovas v. Morin Transport, Inc., Case No. 92-STA-41 (Sec'y Oct. 1, 1993).

Once a complainant establishes that he or she was terminated as a result of unlawful discrimination on the part of the employer, the allocation of the burden of proof is reversed, i.e., it is the employer's burden to prove by a preponderance of the evidence that the back pay award should be reduced because the employee did not exercise reasonable diligence in finding other suitable employment. Polwesky v. B & L Lines, Inc., Case No. 90-STA-21 (Sec'y May 29, 1991); See also Johnson v. Roadway Express, Inc., Case No. 99-STA-5 @ 16 (ARB Mar. 29, 2000)(it is employer's burden to prove, as an affirmative defense, that the employee failed to mitigate damages).

Complainant earned $1100.00 per week in her employment with Respondent. She was out of work until May 2006, a period of sixteen weeks. The Respondent has not proven than that Complainant failed to mitigate damages. I find Complainant has lost wages of $17,600.00.

Restoration of Other Benefits

Because I find Respondent violated the STAA when it discharged Complainant, she "is entitled to any damages that flow from the unlawful discharge." Hufstetler v. Roadway Express, Inc., Case No. 85-STA-8 @ 52 (Sec'y Final Dec. and Ord., Aug 21, 1986), aff'd on other grounds sub nom., Roadway Express, Inc. v. Brock, 830 F.2d 179 (11th Cir. 1997). Once a complainant establishes that he or she was terminated as a result of unlawful discrimination on the part of the employer, a presumption in favor of full relief arises. Gabby v. Abex Corp., 884 F.2d 312, 318 (7th Cir. 1989).

Respondent withheld $569.00 from Complainant for abandoning the truck. As the Court found, Complainant did not abandon the truck, rather she refused to drive the truck until it was repaired. Complainant is entitled to be paid the $569.00 that was withheld.

Complainant is entitled to expungement from her employment records of any adverse or derogatory reference to her protected activities and discriminatory termination of January 10, 2006. See Michaud v. BSP Transport, Inc., Case No. 95-STA-29 (ARB Oct. 9, 1997).

Compensatory Damages

Complainant may be entitled to compensatory damages under the STAA. To recover compensatory damages, Complainant must show that he experienced mental and emotional distress caused by Respondent's adverse employment action. See Dutkiewicz v. Clean Harbors Environmental Services, Inc., supra. An award may be supported by the circumstances of the case and testimony about physical or mental consequences of the retaliatory action and include emotional pain and suffering and humiliation. There has been no claim for and no evidence to support an award of compensatory damages.

Interest

Interest is due on back pay awards from the date of termination to the date of reinstatement. Interest is to be paid for the period following Complainant's termination on January 10, 2006, until the date of payment of back pay is made. Moyer v. Yellow Freight System, Inc., [Moyer I], Case No. 89-STA-7 @ 9-10 (Sec'y Sept. 27, 1990), rev'd on other grounds sub nom. Yellow Freight System, Inc. v. Martin, 954 F.2d 353 (6th Cir. 1992). The rate of interest to be applied is that required by 29 C.F.R. § 20.58(a)(1999) which is the IRS rate for the underpayment of taxes set out in 26 U.S.C. § 6621 (1999). Moyer II, @ 40. The interest is to be compounded quarterly. Ass't Sec'y of Labor for Occupational Safety and Health and Harry D. Cote v. Double R Trucking, Inc., Case No. 98-STA-34 @ 3 (ARB Jan. 12, 2000).

Accordingly, I recommend that the Secretary enter the following order pursuant to 29 C.F.R. § 1978.109(c)(4).

RECOMMENDED ORDER

IT IS HEREBY ORDERED that:

(1) Respondent pay Complainant, Lori J. Dickey, back in the amount of $17,600.00, less authorized payroll deductions, with interest thereon calculated pursuant to 26 U.S.C. § 6621;

(2) Respondent pay Complainant, Lori J. Dickey, the $569.00 that was previously withheld from her pay, with interest thereon calculated pursuant to 26 U.S.C. § 6621;

(3) Respondent shall expunge from the employment records of Complainant, Lori J. Dickey,

any adverse or derogatory reference to her protected activities of January 10, 2006, and her discriminatory termination on January 10, 2006;

So **ORDERED**.

A

LARRY PRICE
Administrative Law Judge

LWP/TEH
Newport News, Virginia

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 DC 20210. 29 C.F.R. § 1978.109(a). The parties may file with the Administrative Review Board, United States Department of Labor, briefs in support of or in opposition to 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).