U.S. Department of Labor

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Issue Date: 29 March 2005

CASE NO: 2004-SOX-00064

In the Matter of

WILLIAM TRODDEN
Complainant

v.

OVERNITE TRANSPORTATION CO.

and

UNION PACIFIC CORPORATION OF OMAHA
Respondents

DECISION AND ORDER

This proceeding arises from a complaint filed under § 806 of the Corporate and Criminal Fraud Accountability Act, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A ("the Act"). The Act protects employees of publicly traded companies who provide information to designated authorities, indicating their belief that the employer has violated a rule or regulation of the Securities and Exchange Commission ("SEC") or another federal law relating to fraud against shareholders. 18 U.S.C. § 1514A(a)(1). The regulations promulgated under the Act are contained in 29 C.F.R. Part 1980 and became effective on August 24, 2004.

Mr. Trodden ("Complainant") filed this claim against Overnite Transportation and Union Pacific ("Respondents"), alleging that he was wrongfully terminated in violation of the Act. The Occupational Safety and Health Administration ("OSHA") received the complaint on February 30, 2004. The Regional Administrator ("Administrator"), acting on behalf of the Secretary of Labor, dismissed the complaint on June 4, 2004, finding no reasonable cause to believe that Respondents terminated Complainant's employment in violation of the Act. Complainant requested a formal hearing on July 14, 2004 and his case was referred to me on July 20, 2004. After being continued at the request of Respondents, the hearing was held before me on November 24, 2004 in New York, New York.[1] Seven exhibits were admitted into evidence at the hearing.[2] Following the hearing, the parties were given the opportunity to submit closing

[1] The transcript of the hearing consists of 153 pages and will be cited as "Tr. at --."
[2] All seven exhibits were offered by Complainant and therefore will be cited as "CX-1" through "CX-7."

arguments in brief form.[3] This decision is rendered after careful consideration of the entire record, the arguments of the parties and the applicable law.

FINDINGS OF FACT

Respondents are engaged in the business of less-than-truckload ("LTL") transportation services and are among the largest providers of such services in the United States. (CX-6). Complainant is a former employee of Respondents.

Complainant represented himself in this matter and testified on his own behalf at the November 24th hearing.[4] He testified that he began working for Respondents in 1999 and was working for Respondents as a manager in Nanuet, New York in 2001, and as a manager in Newark, New Jersey in 2003. (Tr. at 11-12). He alleges that Respondents terminated his employment because he resisted orders, both express and implied, to inflate performance measures, which were reported to the SEC.

According to his testimony, Complainant was learning to falsely update shipments by the second week that he worked for Respondents.[5] (Tr. at 11). Apparently, Complainant obeyed orders, either express or implied, to do so during his tenure with the company, with the exception of a period of several weeks beginning in mid-July and lasting through August of 2003. (Tr. at 12). Complainant testified that while on vacation in July, he realized that the only way to bring about needed changes, such as gaining authorization to hire additional staff, was to let Respondents' records reflect the problems that the terminal was experiencing by ceasing to inflate the numbers. (Tr. at 122). But according to his testimony, Complainant was being harassed by his superiors during the time that he refused to falsify data, and was finally threatened by his manager, Mr. Driscoll, to delay shipments or else he would be replaced by someone from the Richmond, Virginia office. (Tr. at 12, 105, 121). However, Mr. Driscoll, who is Respondents' Northeast Region Vice President, testified that he never impliedly or expressly directed Complainant to falsify his on-time service numbers, was not aware that Complainant was falsifying the numbers and never threatened to replace Complainant with someone from the Richmond office. (Tr. at 148-49).

Complainant testified that other terminals had stopped falsifying records in the summer of 2003, including the Nanuet, Philadelphia and Deer Park terminals (Tr. at 123) and that the managers of those terminals were also harassed and given extra work. (Tr. at 126). However, Mr. Kershner, Respondents' Vice President of Quality and Operations Support, testified that the audit team had contacted every service center manager in the Northeast region and that each manager denied being coached, pressured or directed to misreport service numbers. (Tr. at 143).

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[3] Both parties' briefs were received on February 28, 2005. Complainant's brief will be cited as "CB at --" and Respondents' brief will be cited as "RB at --."

[4] Complainant was sworn in before he gave his opening statement. Since he was under oath, I will consider all of the statements he made during the course of the hearing as testimony.

[5] As I understand it from the testimony at trial, when Respondents fail to deliver a shipment on time, they can simply deliver that shipment late and record it as a late shipment or record it as excused from service, which does not count against Respondents' on-time delivery percentage. (*See* Tr. at 135). Complainant's testimony then, seems to suggest that deliveries were being listed as excused from service, when in reality, they were late at the fault of Respondents, which led to an inflated on-time percentage.

In addition, Mr. Driscoll testified that he never instructed any service center manager to misrepresent service numbers. (Tr. at 148).

The on-time percentage was discussed in a SEC filing (CX-6) and was listed as 97 percent, which is overstated, according to Complainant. (Tr. at 14). He also testified that trucking companies differentiate themselves by their on-time percentages and that a rating of 97 percent would increase the value of Respondents' stock. (Tr. at 15). In addition, Complainant introduced a press release into evidence (CX-4), which reports a 98 percent on-time service percentage.

Complainant also testified that the on-time percentage had been misstated in the 2002 and 2003 "Recurring Audit Items" report. (Tr. at 109). Mr. Rasmussen, Respondents' Regional Director of Operations for the Northeast region, testified regarding the 2002 report and admitted that data integrity was described as entirely unsatisfactory. (Tr. at 64). Mr. Driscoll also testified regarding this document and admitted that the report indicates that Respondents' service calculations had been overstated by an average of 5.7 percent. (Tr. at 80). Complainant testified that despite unsatisfactory audit reports,[6] issued in 2001 and 2003, in conjunction with the respective terminals that he managed in each of those years, he was not disciplined, and in fact, received a promotion. (Tr. at 12, 113).

Complainant's employment was terminated on December 1, 2003. (Tr. at 12). According to his testimony, he was told by others within the company, including Mr. Rasmussen, that he was discharged for problems that he caused in the summer and that he should have gone along with the inflation scheme. (Tr. at 12, 105-06). However, Mr. Rasmussen testified that although he spoke to Complainant three or four times after he was discharged, he gave no opinion regarding Complainant's termination, and instead was trying to assist Complainant in securing new employment. (Tr. at 52).

By Complainant's own admission, he was not aware of the Act until after he was terminated and began looking for remedies. (Tr. at 12). Complainant secured new employment on January 25, 2004. (Tr. at 16).

Mr. Driscoll testified that his decision to terminate Complainant was based on the fact that Complainant had provided false and misleading information to the Housing Authority.[7] (Tr. at 95).

Ms. Janet Clouse, who has worked for Respondents in their Weyanoke, New Jersey terminal since August 20, 1990 (Tr. at 21-22), was called to testify on behalf of Complainant. Ms. Clouse is responsible for keeping the payroll records for the Weyanoke office, including the number of hours worked by each employee, but has no access to salary information for those employees. (Tr. at 30-33). Ms. Clouse testified regarding three letters (CX-1, CX-2 and CX-3),

[6] The testimony seems to suggest that these audits were unsatisfactory in the area of data integrity and that Respondents were not bothered by the fact that their data was being reported improperly.

[7] Mr. Driscoll referred to the agency as the Federal Housing Authority, although the remainder of the testimony indicates that the letters were actually provided to the Bergen County Housing Authority. However, it has no impact on the resolution of this claim whether the letters were provided to a local or federal agency.

which are addressed to "Whom it may concern" and contain information regarding the wages earned and hours worked by a fellow employee, Ms. Rotella. Ms. Clouse testified that she typed the three letters at the direction of Complainant (Tr. at 34-38) and that she had watched him sign two of the letters. (Tr. at 35, 39). The remaining letter was signed by Mr. Brennan, who was Respondents' Operations Manager, since Complainant was not in the office when Ms. Rotella requested that it be signed. (Tr. at 37). However, Ms. Clouse testified that Complainant had instructed her to type that letter on September 17, 2002. (Tr. at 43-44). Complainant, on the other hand, testified that he was on vacation the entire week of September 17, 2002. (Tr. at 109). Ms. Clouse also testified that on one occasion, she confronted Complainant regarding the discrepancy between the number of hours that Ms. Rotella actually worked and the number of hours that the letter stated that she worked per week, but according to Ms. Clouse, Complainant did not respond. (Tr. at 38-39).

Following Complainant's discharge, Mr. Driscoll made Ms. Clouse aware of the reason for termination (Tr. at 22) and issued her a verbal warning for her involvement. (Tr. at 33).

According to Mr. Driscoll, the wages and hours worked were substantially understated in the letters marked CX-1, CX-2 and CX-3. (Tr. at 95). Further, he testified that Complainant acknowledged the letters and did not seem to appreciate the severity of the situation. (Tr. at 97). Consistent with that testimony, Complainant testified at trial that the total monetary penalty assessed against Respondents by the Housing Authority could not exceed 3,000 dollars. (Tr. at 126). Mr. Driscoll admitted that nothing on the face of the three letters indicated that they were being sent to a government agency (Tr. at 83). He also admitted that he did not interview the others involved, namely Mr. Brennan, Ms. Clouse and Ms. Rotella, until after Complainant was terminated. (Tr. at 89). However, he did meet with Complainant to discuss the matter twice before firing him. (Tr. at 101). At the hearing, Complainant emphasized that he was the only employee who was terminated as a result of the letters being provided to the Housing Authority. (Tr. at 111).[8]

Ms. Jill Pittman also testified regarding this matter. She works for Respondents as a Human Resources Specialist. (Tr. at 128). In that capacity, she is responsible for receiving and processing all employment verifications. (Tr. at 128). Ms. Pittman testified that Respondents have a policy that all such verifications are to go through the Human Resources Department and that she received a request from the Bergen County Housing Authority on October 3, 2003 to provide information regarding Ms. Rotella. (Tr. at 128).[9] Ms. Pittman testified that she provided the requested information by facsimile and was later contacted by a representative of the Housing Authority by phone and told that the information that she provided did not match the information that had been provided over the past three years. (Tr. at 129). The verification was sent back to Ms. Pittman and she reconfirmed the information that she had previously provided. (Tr. at 129). When she notified the Housing Authority official that the information was correct,

[8] Mr. Driscoll testified that although he terminated Ms. Rotella, the separation was later changed to a resignation. (Tr. at 92-93).

[9] Mr. Driscoll also testified that it is company policy that all verifications of employment information are to be processed through the Human Resources Department in Richmond. (Tr. at 97). In addition, Complainant testified that a government document requesting information regarding Ms. Rotella's employment was received in the terminal sometime between October and December of 2003 and that it was forwarded to Human Resources for processing. (Tr. at 110).

the official sent Ms. Pittman the three letters identified as CX-1, CX-2 and CX-3 and warned Ms. Pittman that the discrepancy was potentially a serious issue. (Tr. at 130). According to Ms. Pittman, the letters understated Ms. Rotella's wage rate and the number of hours that she worked per week. (Tr. at 131). Ms. Pittman, like the other witnesses, admitted that nothing on the face of the letters identified as CX-1, CX-2 and CX-3 indicated that they were going to be sent to the Housing Authority. (Tr. at 132).

DISCUSSION

To establish a prima facie case of discriminatory treatment under the Act, Complainant must show that (1) he engaged in protected activity; (2) Respondents knew of the protected activity; (3) Complainant was the subject of adverse employment action; and (4) circumstances exist suggesting that the protected activity was a contributing factor to the unfavorable employment action. *Collins v. Beazer Homes U.S.A., Inc.*, 334 F. Supp. 2d 1365, 1375 (N.D. Ga. 2004). Once these elements have been established, Respondents can avoid liability if they can show, by clear and convincing evidence, that they would have taken the same unfavorable employment action despite the protected activity. *Id.* at 1376.

Protected activity is defined by the Act and encompasses two situations. Under 18 U.S.C. § 1514A(a)(1), the employee must reasonably believe that the employer has violated a law protecting shareholders and must provide such information or cause that information to be provided to a supervisor, a member of Congress or a federal regulatory or law enforcement agency. The second category of protected activity, described in 18 U.S.C. § 1514A(a)(2), covers instances in which the employee files, causes to be filed, testifies, participates in or otherwise assists in a proceeding filed against the employer relating to an alleged violation of a law which protects shareholders.[10]

I find that Complainant has not established a prima facie case. While the evidence suggests that Complainant did feel pressured to inflate the on-time delivery percentage, and that he refused to do so for a period of approximately two months, the evidence does not suggest that Complainant told a superior, a member of Congress or a federal officer that Respondents were engaging in questionable activities. And even though I find that Complainant possessed a realistic belief that the SEC was provided with an inflated on-time percentage and that the false on-time percentage may have led to an inflated stock price, the Act requires that Complainant notify either a supervisor, a member of Congress or a federal regulatory or law enforcement agency of the suspected wrongdoing, which Complainant did not do. In effect, this is a whistleblower claim brought by an employee who suspected his employer of committing a fraud against its shareholders and the SEC, but the employee never "blew the whistle," yet he now seeks remedies from a statute designed to protect employees who do "blow the whistle."[11]

[10] More specifically, both subsection (a)(1) and subsection (a)(2) state that the Act protects employees who reasonably believe that the employer has violated §§ 1341, 1343, 1344 or 1348, any rule or regulation of the SEC or any provision of federal law relating to fraud against shareholders.

[11] Respondents argue that Complainant is not protected by the Act because he was not aware of its existence before his employment was terminated. (RB at 11). I find this argument to be without merit. Complainant needed only to reasonably believe that Respondents were violating a law that protects shareholders; he need not show that he knew that his termination was illegal at the time that it occurred.

In addition, although Complainant easily established that he suffered adverse employment action, since his employment was terminated, Complainant also has to show that the adverse action was related to his protected activity. Assuming, *arguendo*, that his actions do amount to protected activity, Complainant did not establish a casual link between that activity and his termination. He testified that he stopped falsifying on-time data for a period of several weeks in July and August of 2003, yet he was not fired until December of that year, at which time he had again been falsifying numbers, as Respondents wanted him to do, for months. In addition, although Complainant tried to establish that other employees of Respondents indicated to him that he was fired for his refusal to falsify the data, I am not persuaded of this, especially in light of Mr. Rasmussen's testimony to the contrary, which I find credible.

Finally, even if Complainant was able to meet his burden of establishing a prima facie case, Respondents have shown by clear and convincing evidence that Complainant would have been terminated despite the fact that he engaged in protected activity. Contrary to company policy, Complainant provided employment verification information for a subordinate worker. Worse, Complainant severely understated the number of hours worked and the amount of money earned by that employee and the employee in turn communicated this information to a government agency. The evidence does not indicate that Complainant knew that the information would be provided to a government official, but this is irrelevant, because as Mr. Driscoll credibly testified, after learning that the information was provided to the Housing Authority, Complainant failed to appreciate the severity of the situation.[12] This was demonstrated further at trial, when Complainant testified as to his belief that the maximum penalty that Respondents could have faced for the providing of inaccurate information to the Housing Authority was 3000 dollars. Clearly, Complainant violated a company policy and did not appreciate the severity of such violation. Therefore, Respondents had a legitimate reason for terminating Complainant's employment.

CONCLUSION

Complainant has not established that he engaged in protected activity, and therefore is not entitled to relief under the Act. Further, Respondents established by clear and convincing evidence that they had a legitimate reason for firing Complainant.

ORDER

It is hereby ORDERED that the claim is DISMISSED.

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RALPH A. ROMANO

[12] Complainant also argues that he signed only one letter that Ms. Rotella provided to the Housing Authority, and that he did not closely review the information contained therein. (CB at 3). Even if true, I find that Respondents still had a legitimate reason for firing Complainant since he signed the letter which was forwarded to a government agency and clearly did not appreciate the seriousness of his offense.

Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).