U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

RICHARD F. CACH, **ARB CASE NO. 96-129**

COMPLAINANT, **ALJ CASE NO. 95-STA-12**

v. **DATE: August 20, 1996**

DISTRIBUTION TRUCKING COMPANY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1/]

FINAL DECISION AND ORDER

This case arises under section 405 (employee protection provision) of the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C.A. § 31105 (West 1994). Before us for review is the Recommended Decision and Order (R. D. and O.) issued on April 22, 1996, by the Administrative Law Judge (ALJ). The ALJ found that Complainant failed to prove unlawful discrimination and recommended that the complaint be dismissed. We agree.

Complainant Richard Cach was employed by Respondent Distribution Trucking Company as a truck driver from November 1986 until his discharge in July 1994. Complainant was assigned to the Clackamas Distribution Center in Portland, Oregon. On April 8, 1993, Respondent adopted a policy regarding the timing and documentation of lunch and rest breaks for hourly drivers, including Complainant. The policy required drivers to take their first 15-minute rest break between the second and third hours of the shift. The one half-hour lunch break was scheduled between the fourth and sixth hours of the shift, and the second 15-minute rest

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[1/] On April 17, 1996, the Secretary of Labor delegated authority to issue final agency decisions under, *inter alia,* the Surface Transportation Assistance Act, and the implementing regulations, to the newly created Administrative Review Board. Secretary's Order 2-96 (Apr. 17, 1996), 61 Fed. Reg. 19978 (May 3, 1996). Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order and regulations under which the Administrative Review Board now issues final agency decisions. *See* 61 Fed. Reg. 19982 for the final procedural revisions to the regulations implementing this reorganization.

break was scheduled before the eighth hour of the shift. The policy precluded drivers from combining any of the breaks and required drivers to document the location of the breaks on their trip sheets.

On April 21, 1993, Complainant received a two-day suspension for, among other things, failing to specify the precise location of lunch and rest breaks on his trip sheet for April 19, 1993. Complainant contends that Respondent suspended him in retaliation for an unscheduled layover that he took earlier that month due to fatigue. Hearing Transcript (T.) 202-204.

On January 3, 1994, Complainant received another two-day suspension. On January 12, he filed a STAA complaint alleging that the suspension was imposed "in retaliation for his failure to operate a commercial motor vehicle during the week ending January 1, 1994, because he was too ill to drive." Complainant's Exhibit (PX) 1. Respondent received notification of the complaint on January 26. On February 28, 1994, Complainant received a warning letter for violating the lunch and rest break policy on February 11, 1994. In particular, he combined the one half-hour lunch break and a 15-minute rest break during overtime, *i.e.,* beyond the eighth hour of the shift. On April 1, 1994, Respondent received notification that the Regional Administrator for Occupational Safety and Health had found Complainant's January 12 STAA complaint to be meritorious. Respondent was ordered to compensate Complainant for wages lost during the suspension. By letter dated May 12, 1994, Complainant requested that Respondent comply with the back pay order. PX 3.

On May 25, 1994, Respondent issued Complainant a letter of suspension for violating the lunch and rest break policy. Respondent alleged that Complainant had combined a lunch and rest break on May 20 and had taken a break during overtime on May 19. On May 31, 1994, Complainant filed a second STAA complaint regarding Respondent's compensation practices for drivers who were ill. PX 5. Respondent received notification of that complaint on June 6. On July 16, 1994, Complainant filed a third STAA complaint alleging "selective and discriminatory" enforcement (on February 28 and May 25) of the lunch and rest break policy because he had filed the initial (January 12) STAA complaint. PX 6. Respondent was notified of the third STAA complaint on July 23. On July 28, Respondent discharged Complainant because he had violated the break policy on July 25. On August 4, 1994, Complainant filed a fourth STAA complaint alleging that the discharge was retaliatory. The third and fourth STAA complaints are at issue in this case.

The ALJ found that the temporal proximity between the protected STAA complaints and the disciplinary actions raised an inference of causation sufficient to establish a *prima facie* case of unlawful discrimination. R. D. and O. at 9-10. *See Yellow Freight System, Inc. v. Martin,* 954 F.2d 353, 356-357 (6th Cir. 1992) (regulatory complaints constitute protected activity); *Couty v. Dole,* 886 F.2d 147, 148 (8th Cir. 1989) (adverse action followed protected activity so closely in time as to justify inference of retaliatory motive). He also found that Respondent had rebutted the presumption raised by the *prima facie* case by articulating a legitimate, nondiscriminatory reason for imposing discipline, *i.e.,* violation of the lunch and rest break policy. *Id.* at 10-12.

Finally, the ALJ found that Complainant had failed to meet the ultimate burden of proving that the proffered reason was not the true reason for the adverse action *and* that the protected activity was. *Id.* at 12-15. *See St. Mary's Honor Center v. Hicks,* 113 S.Ct. 2742, 2747 (1993); *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 255 (1981). In so doing, the ALJ credited the testimony of Respondent's general manager that "complainant's blatant and reckless disregard of [the] lunch and break policy" motivated him in imposing discipline. R. D. and O. at 12. The ALJ also pointed to Respondent's treatment of other drivers in finding that Complainant was not subject to "selective and discriminatory" enforcement of the policy.[2/] *Id.* at 13-15. These findings are supported by substantial evidence in the record considered as a whole and thus are conclusive. 29 C.F.R. § 1978.109(c)(3)(1995). Accordingly, we adopt the recommended decision of the ALJ, copy appended. The complaint IS DISMISSED.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM,
Member

JOYCE D. MILLER
Alternate Member

[2/] Even if we were to find that the protected activity motivated Respondent in part to discipline Complainant, Respondent's treatment of other known violators establishes that it would have reached the same decision in the absence of protected activity. *See Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989); *Mt. Healthy City Sch. Dist. Bd. Of Ed. v. Doyle,* 429 U.S. 274 (1977) (dual motive analysis).