U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk - Suite 204
Newport News, VA 23606

(757) 591-5140
(757) 591-5150 (FAX)

Issue Date: 15 September 2006

Case No: 2006-STA-00026

In the Matter of

JAMES E. 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 he was terminated on December 29, 2005, as a result of the events underlying the current dispute. On January 24, 2006, he 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]

ISSUE

[1] A joint hearing was held with the case of Lori Dickey v. West Side Transport, Inc., Case No 2006-STA-00027. Although the Parties were afforded the opportunity to submit evidence post-hearing, none was submitted.

Whether Respondent's termination of Complainant's employment violated 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 his wife, Lori 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 included 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 Ms. 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, Complainant lost consciousness momentarily and nearly crashed. (Tr. 25).
6. Ms. Dickey completed the driving back to the terminal in Cedar Rapids. Upon their return, they informed Respondent of the incident and that Complainant was seeking medical care at the VA hospital. The Dickeys informed Respondent about their concern for a tumor on the back of Complainant's neck and the possibility of an aneurysm. (Tr. 58, 95).
7. Complainant was seen at the VA hospital on November 14, 2005. In the intake interview Complainant reported having "5-6 'blackout' spells over the past two months." (RX B, p.18). In the history taken at that time, Complainant 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 Complainant 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 Ms. Dickey believed Complainant's symptoms were due to carbon monoxide poisoning. (Tr. 110).
8. Because Complainant 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 Complainant was employed by Respondent and Complainant was aware of this policy. (Tr. 52; RX A, pp. 4-5).

9. On November 14, 2005, Complainant informed Respondent that he could not drive until medical testing was completed. Complainant 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, Complainant returned to the VA hospital. Complainant reported that on the day of the near accident he was "exhausted" and had been putting in 6000 miles/week. Dr. Jantzen opined that Complainant may have sleep apnea and suggested he obtain a polysomnogram and a sleep deprived EEG. (RX B, pp. 9-10). Dr. Jantzen signed a release allowing Complainant to return to driving truck. As Complainant 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 Dickey's drove truck #26080 without incident for the next month. On December 12, 2005, Complainant experienced another episode and nearly rear-ended another vehicle. (Tr. 35, 67-68).
12. On December 14, 2005, Complainant 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 Ms. Dickey smoke cigarettes. (Tr. 75, 89).
13. Complainant was diagnosed with "spells of unknown etiology" and Dr. Holstein restricted Complainant 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. Complainant informed Respondent that pursuant to doctor's orders, he could not work until he underwent a sleep study. Complainant 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. Complainant knew he needed to get the sleep study done within fourteen days or he would be fired. (Tr. 97). As was done in November, Complainant 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 Complainant first raised the correlation between truck #26080 and possible carbon monoxide symptoms. (Tr. 190). On December 16, 2005, Complainant took his personal vehicle and returned to his home in Florida to pursue the testing recommended by the VA hospital. Ms. Dickey was assigned another truck and continued driving for Respondent. (Tr. 37, 75).
16. On December 29, 2005, pursuant to company policy, Complainant was terminated because he had been off work for more than fourteen days. (CX C, p. 1).

17. Dr. Vitalis of the Zephyrhills VA Clinic saw Complainant on January 6, 2006. Dr. Vitalis attributes Complainant's incident as "clearly due to acute CO poisoning that developed while operating an inadequately ventilated vehicle." (CX 1, p. 6). Other than Complainant's subjective history, it is not clear on what Dr. Vitalis based this opinion.
18. Complainant has never undergone polysomnogram testing as recommended by his doctors. No doctor has ever released Complainant to resume truck driving. (Tr. 39). The latest medical report, dated February 7, 2006, states "Mr. Dickey has not been cleared to drive commercial vehicles as of this date." (CX 1, p. 7). Complainant has been told by Respondent that once he gets a doctor's release to return to work, he will be rehired. (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." (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. Considering the above findings of fact and the entire record, I find Complainant did not suffer carbon monoxide poisoning in November or December 2005. I further find the carbon monoxide concentration in the cab of truck #26080 while the engine was running was not elevated or at a level that would pose harm to occupants.

LAW AND CONTENTIONS

A. Legal Standard

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) he engaged in protected activity, (2) he was subjected to an adverse employment action, and (3) the adverse action was taken because of his 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.

The Parties do not dispute that Complainant was terminated, which is an adverse employment action. There is also no dispute that Complainant engaged in protected activity when he raised the correlation between truck #26080 and the possible carbon monoxide symptoms he was suffering.

Respondent argues, and the Court finds, that Complainant was terminated, not because of retaliation, but because he was medically disqualified from driving. The overwhelming weight of the evidence supports this conclusion. In November, when Complainant first reported having spells, he was taken off work by his doctor. When Complainant informed Respondent that he could not drive until medical testing was completed, Complainant was reminded of the sick leave policy and that if he missed fourteen consecutive days of work, he would be automatically terminated. When Dr. Jantzen signed a release allowing Complainant to return to driving truck, as Complainant had missed less than fourteen days, he was reinstated to drive and resumed driving truck #26080.

In December, when he had another spell, Complainant returned to the VA hospital where he reported "spells where he looses time." Complainant was diagnosed with "spells of unknown etiology" and Dr. Holstein restricted Complainant from driving until he had a sleep study. 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)."

When Complainant informed Respondent that he could not work until he underwent a sleep study, he was told the same thing that he was told in November, that pursuant to company policy he would be automatically terminated subject to rehire if he was off work more than fourteen days. The medical reports Complainant provided to Watson did not even mention carbon monoxide as a possible cause of Complainant's problems. And the work excuse required that Complainant have polysomnogram testing – which has nothing to do with carbon monoxide poisoning. I find that Complainant's report that he suspected carbon monoxide poisoning had absolutely no bearing on the decision to terminate Complainant. Respondent treated Complainant exactly the same both before and after his report that he suspected carbon monoxide poisoning. The only reason that Complainant was terminated was that he was, and still remains, medically disqualified from driving commercial vehicles.

I find that the preponderance of evidence establishes that Respondent had a legitimate nondiscriminatory reason for terminating Complainant. I find that Complainant has not established by a preponderance of the evidence that he was terminated as retribution for his raising concerns about possible carbon monoxide poisoning. Accordingly, I recommend that the Secretary enter the following order pursuant to 29 C.F.R. § 1978.109(c)(4).

ORDER

The complaint of James E. Dickey is **DENIED**.

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).