U.S. Department of Labor

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Issue Date: 08 November 2004

In the Matter of
Linda S. Walters
Complainant

Case Number 2004 STA 00039

v.

Angelo Luppino Inc
Respondent

RECOMMENDED DECISION AND ORDER
DISMISSING COMPLAINT

This case arises from a complaint filed under the employee protection provisions of Section 405 of the Surface Transportation Assistance Act of 1982 (hereinafter "the Act" or "STAA"), 49 U.S.C § 31105, and the regulations promulgated at 29 C.F.R. § 1978. Section 405 of the STAA protects a covered employee from discharge, discipline or discrimination because the employee has engaged in protected activity pertaining to commercial motor vehicle safety and health matters. This matter is before me on Complainant's request for hearing and objection to findings issued on behalf of the Secretary of Labor by the Regional Administrator of the Department of Labor's Occupational Safety and Health Administration (OSHA) after investigation of the complaint. 49 U.S.C. § 31105(b)(2)(A), 29 C.F.R. § 1978.105.

A hearing was held in Duluth, Minnesota, on June 22, 2004. The Complainant was not represented, although she had been advised that she had a right to be fully represented by an attorney or other qualified representative. The Respondent was represented by Robin C. Merritt, Esquire, Hanft, Fride, a Professional Association in Duluth, Minnesota. At hearing, the Complainant, Marvin Shepard, Patrick Hanson, Michael Schmidt, Paul Luppino and Angelo Luppino all testified. Seventeen (17) Complainant's Exhibits ("CX") were admitted into evidence as CX 1-17. Transcript ("Tr.") at 12, 126. Seven (7) Respondent's Exhibits ("RX") were admitted into evidence as RX 1-7. Tr. at 12. I also entered three administrative law judge ("ALJ") exhibits into evidence as ALJ 1-3 without objection from the parties. Tr. at 136. Subsequent to hearing, the record remained open for the submission of briefs. Although the Respondent submitted a brief, the Complainant failed to do so.

I also left the record open to give the Complainant an opportunity to produce certain documents that she had subpoenaed from the U.S. Department of Transportation. On or about August 31, 2004, I received an *ex-parte* communication from the Complainant, a letter addressed to me with attachments, which included notice to Respondent that a Civil Penalty had been

levied by the U.S. Department of Transportation, based on a compliance review performed by that agency on September 18, 2003. The Respondent did not respond to a *Notice of Ex Parte Communication* that I served on September 2, 2004. I hereby enter those documents into evidence as a composite exhibit at CX 18.

ELEMENTS OF PROOF

To establish a *prima facie* case of retaliatory discharge, the complainant must prove: (1) that she engaged in protected activity under the STAA; (2) that she was the subject of an adverse employment action; and (3) that there was a causal link between her protected activity and the adverse action of the employer. ***Moon v. Transport Drivers, Inc.,*** 836 F.2d 226, 229 (6th Cir. 1987). The Secretary has taken the position that in establishing the "causal link" between the protected activity and the adverse action, it is sufficient for the employee to show that the employer was aware of the protected activity at the time it took the adverse action. *See* ***Osborn v. Cavalier Homes,*** 89-STA-10 (Sec'y July 17, 1991); ***Zessing v. ASAP Express, Inc.,*** 92-STA-0033 (Sec'y Jan. 19, 1993).

The employee protection provisions of the Surface Transportation Assistance Act provide in relevant part:

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

49 U.S.C. § 31105(a).

Claims under the Surface Transportation Assistance Act of 1982 are adjudicated pursuant to the standard articulated in ***McDonnell Douglas Corp. v. Green,*** 411 U.S. 792 (1973). Under that framework, the complainant must initially establish a *prima facie* case of retaliatory discharge, which raises an inference that the protected activity was likely the reason for the adverse action. Once a *prima facie* case is established, the burden of production then shifts to the respondent to articulate, through the introduction of admissible evidence, a legitimate, nondiscriminatory reason for its employment decision. If the respondent is successful, the *prima facie* case is rebutted, and the complainant must then prove, by a preponderance of the evidence, that the legitimate reason proffered by the respondent were but a pretext for discrimination. ***Moon,*** *supra*; *see also* ***Texas Dep't of Community Affairs v. Burdine,*** 450 U.S. 248, 253 (1981).

I note that the Complainant is *pro se*, but she still must make a *prima facie* case. While a *pro se* complainant may be held to a lesser standard than legal counsel with regard to matters of

procedure, the burden of proving the elements necessary to sustain a claim of discrimination is no less. ***Flener v. H.K. Cupp, Inc***., 90-STA-42 (Sec'y Oct. 10, 1991).

STIPULATIONS

Although the Respondent had initially objected to timeliness of the Complainant's filing, and to my jurisdiction, those issues were withdrawn at hearing. Tr. at 16.

The parties agree that on July 30, 2003, the Complainant, Linda S. Walters, took Truck No.L-11 to be inspected by the Michigan State Police. As a result of that inspection, the vehicle was ordered taken out of service. *Id*.

The Respondent also stipulated that the Complainant was engaged in protected activity and that she was the subject of an adverse employment activity arising from her protected activity. Tr. at 17-18.[1]

After a review of the evidence, I accept that the facts substantiate the stipulations and I accept them.

FINDINGS OF FACT

Complainant's Testimony

The record shows that the Respondent laid the Complainant off from her job as a truck driver on July 30, 2003. Tr. at 36. Complainant alleges that on that same day, she had "launched" an investigation of safety concerns with the Michigan state police and the U.S. Department of Transportation. *Id*. at 39.

The Complainant was asked to respond whether or not the employer had notice that she was engaged in a protected activity at the time it took adverse action by removing her from her job. She stated that Paul Luppino, an owner of the Respondent, asked her on the night before she was laid off why she had been stopped and the truck had been taken out of service. The Complainant advised:

> And I did say that it was a flat tire because I was alone with him, and he had witnessed lots of arguments, he had witnessed lots of abuse, and he okayed it by never intervening. And I didn't know whether I was completely safe with him. That's the reason that I did it.

Tr. at 33.

She also gave him a "mandatory report" that explained that there had been safety violations. *Id*. She alleges that:

> 1. All the seams were separated in the floor boards causing exhaust to come up in the cab;
> 2. The taillight didn't work;

[1] I note that the Respondent's Brief does not recognize the stipulation.

3. Two of the clearance lights didn't work;
4. Axle 2 had some problem, too, with the air bag doubling up. There was no defroster, in other words, you use a rag;
5. Axle 3 "I believe, was a junked Air Ride system off of another truck, which causes it not to deploy, which means it didn't hold up its equal weight on the roller";
6. End gate latch had cracks to the back of the box;
7. Sub-frame that holds up the box had cracks;
8. Suspension system above the air bag also had cracks.

Tr. at 34.

She alleges that all of the defects were related to Paul Luppino either verbally or by report. *Id*. at 34-35, 39.

The Complainant testified that she had not worked since July 30, 2003. She alleged that, while she did look for work, she has "dual disabilities… I couldn't push carts or stand all day and check out groceries, that type of thing. On March 22nd I had surgery." *Id*. 36.

She alleges that as a result of the layoff, she would have received an automatic 50 cents per hour pay adjustment that she lost because of the adverse action. *Id*. She also alleges that she lost an additional four hours of pay because of the safety violation. *Id*. at 37.

However, on cross examination, the Complainant admitted that she had not verbally advised Paul Luppino of her safety concerns about Respondent, which had been conveyed to official sources. Tr. at 39. She explained that "… you've got a disgruntled employee, you've got someone who's got the Federal Motor Carrier in their place tearing all their records apart, who do you think would have done that?"

Q (by Respondent): Well, you did not tell them you were doing that, correct?
A (by Complainant): Most people would hide that, yes, for fear of safety.

Id. at 40.

The Complainant inquired whether she could obtain alternative work but was told that the Respondent had a driver sweeping the shop. *Id*. at 40. The Complainant alleged that there was another truck available, formerly assigned to Lisa Holmes[2], who was away at college. *Id*. "I don't know the date that Lisa went back to school, but I do know that would have been available." *Id*. at 41.

The Complainant also admitted that because her truck was out of service, Paul Luppino asked her to call in twice a week to check on the status of the repairs, but she admittedly failed to do so. *Id*. at 42. She related that she did not do so because:

What happened is he wasn't going to talk to me at all except asking what I got stopped for and what's this, which he meant the citation. I said, Paul, I said, You're a nice man. I

[2] Tr. at 42.

> want to know why you would allow all this abuse. You watch the mechanics holler at me, you watch people put me down when I'm asking for help with repairs on the truck. You don't do anything.
> He said, Well, you really can't do the job, he said. And he said, Look at you, you're old in the ditch. The paving crew fired you the first day.
> Well, I think that he thought that I would feel bad, that I would just crawl away, but that isn't what I did. And I said, Could I call about the truck then?
> Well, he said, I suppose you could call on Sunday.
> So that's how it got going. Called on Sunday and he said, No, we haven't started on the truck yet. Call Wednesday and see whether we did.

Id.

On August 15, 2003, she filed her whistleblower complaint.

The Complainant also admitted that she did not know whether or not Lisa Holmes had left before she filed the claim with OSHA.

According to her testimony, the only person Complainant had told about her safety concerns was Billy Delveck (ph.). She did not call him to testify. *Id*. at 44.

Marvin Shepard's Testimony

Mr. Shepard, a fellow driver for Respondent, confirmed that the company had had a history of safety violations and that some of the trucks were in violation of safety rules. Tr. at 45-63. However, he related that when he complained about safety, the company mechanics performed necessary repairs to his truck. When asked whether there was work soon after July 30, 2003, Mr. Shepard stated that he had been laid off and that work was so slow that by September [2003], other drivers had also been laid off. *Id.* at 53. Although he was a senior driver, he was called back intermittently:

> He [Mr. Luppino] called -- he called me back. You know, if he picked up something, he called me back. I was off -- off a day or two, then I'd come back to work. I'd be off a day or two and come back to work.

Id. at 53. Mr. Shepard testified that he did not know whether any other drivers were working for Respondent during this period of time. *Id*.

Mr. Shepard also testified that Respondent had a seniority policy: "Well, they go by order, you know, the ones that were hired first, they -- however far down on the pole you are. You know, I've been there nine years, so there are guys that are under me." *Id*. at 55.

Mr. Shepard did infer that when reports were given to the company, they were closely scrutinized for safety concerns.

Patrick Hanson's Testimony

Mr. Hanson, a mechanic for Respondent, was challenged by the Complainant as to his qualifications and certification to perform inspections and make repairs. *Id*. at 64-68. Mr. Hanson was asked about the safety of the truck assigned to the Complainant in July, 2003. Mr. Hanson begrudgingly admitted that the Complainant's assigned truck had had a history of problems, such as steering difficulty, holes in the floor board, a malfunctioning end gate latch, and a broken defroster. *Id*. at 80-88, 102. On July 29, 2003, the Complainant showed Mr. Hanson a broken throttle cable. *Id*. at 88. The Complainant alleges that she had had an altercation that day about the safety of the truck, however, Mr. Hanson denied that he had witnessed it. *Id*. at 89-90. Mr. Hanson did admit that he had had to unload her truck on that date. *Id*. He also later admitted that an altercation had taken place. *Id*. at 91-92.[3] Mr. Hanson also admitted that the Complainant was having trouble with her latch. *Id*. at 93.

Mr. Hanson alleged that the Complainant had caused the need for repair on July 29, 2003, because she had permitted debris such as sunglasses, plastic spoons, and pens and pencils into the mechanism. *Id*. at 95, 102-103.

Mr. Hanson testified that after July 30, 2003, it took a long time to fix the truck in question because aluminum welding was needed and it was not an easy task. *Id*. at 97. The first company could not perform the weld, so it was sent to a second one for repair, and was not completed until August 27, 2003. *Id*. at 98; RX 6.

The record shows that an annual inspection was performed on the truck on August 13, 2003. Tr. at 100; RX 3-5. The record shows that there was a defect in the clearance lights that needed repair. *Id*. Mr. Hanson alleged that all he had to do to put the truck into service on that date was to reinstall floor vents. *Id*. at 103.

With respect to when Mr. Hanson might have received a copy of the July 30, 2003 ticket, he testified it would have been the following day. *Id*. at 108.

Michael Schmidt's Testimony

Michael Schmidt was called by the Complainant. He testified about an incident involving paving that occurred in May, 2003. Tr. at 110-123.

The Complainant alleged that she attempted to show, through Mr. Schmidt, that other employees violated company rules prohibiting swearing and interfering with other employee's work, and to show that Respondent was not credible. Tr. at 124.

[3] Mr. Hanson stated: "All I can say is I heard loud voices. I went back and I tried to explain to you. You got mad because your truck wasn't going to be fixed at that particular moment. And I said it will be fixed in the morning because everything is too hot and we have to get under the cab." *Id*.

Paul Luppino's Testimony

Respondent called Paul Luppino, Vice President of the Respondent company. He testified that the Complainant was told she should keep a daily log and, every time there was something wrong, she was to tell a mechanic, so that the problem could be fixed. *Id*. at 138. He denied that she was told not to keep a log of deficiencies. *Id*.

On July 30, 2003, the Complainant told Mr. Luppino that she needed a ride from the police station in Michigan. She told him that she had been pulled over and inspected because her truck had had a flat tire. *Id*. at 140. He testified that he was unaware, as of August, 2003, whether the Complainant had filed a safety report with the Motor Vehicle Safety Administration. *Id*. He testified that he found out about it a month later, more or less. *Id*. at 141.

Mr. Luppino noted that there was a delay in placing Complainant's vehicle back in service, as there were several other company vehicles that needed repair, and the company sent it to outside mechanics for repair. *Id*. at 142. He stated that as a result of the unavailability of Complainant truck's he had nothing for her to drive. *Id*. Therefore, Mr. Luppino told her call back on "Sunday night or Wednesday" to see how the truck repairs were progressing. *Id*. He testified that there were no other trucks available. *Id*. She asked him whether she could perform light work. She had performed light work when her truck was being repaired once before. Mr. Luppino testified that another driver was performing "light work" because his truck needed repairs, and that he did not need anyone else. *Id*. Mr. Luppino alleged that the Complainant phoned him for the first two weeks after the truck was removed from service. The truck was finally repaired August 27, 2003. *Id*. at 143.

As of August 27, 2003, Mr. Luppino advised that the company had just finished a "big job" and that the large trucks were not needed. *Id*. at 144. At that time, he laid off other drivers. *Id*. He testified that he decides who is laid off and that "usually" it is based on seniority. *Id*. "The last person hired is usually the first to go." *Id*. Mr. Luppino further stated that the truck (L-11) was not used more than two (2) days for the remainder of the year. *Id*. He testified that other drivers were laid off for the season. *Id*. at 145. One of those was Mr. Shepard, and he was called back only a few days for the entire year. *Id*.

On cross examination, Mr. Luppino was not asked further about the seniority policy.

Angelo Luppino's Testimony

The Respondent also called Angelo Luppino, President of Respondent company. He denied that the Complainant was told not to report or document safety violations. *Id*. at 154. He also testified that as of August, 2003, the Complainant had filed a claim of safety violations against the Respondent with the Federal Motor Safety Administration. *Id*. He testified that he did not ask his employees to delay repairs on Complainant's truck (L-11). *Id*. at 155.

Complainant again questioned about the paving incident that occurred in May, 2003. *Id*. She alleged that the company failed to pay her the "prevailing wage" on a state project in Michigan. *Id*. at 158. However, the witness denied this, stating that the "office girls know where [sic] we have to pay you the wage, and they handle that end." *Id*.

The witness was also asked whether he had ordered a "bald" rear tire removed after she had told Mr. Luppino about it on July 28, 2003. He admitted that he had discussed a bald tire with her. *Id*. at 162. He also admitted that she had had arguments with mechanics and that he had given false information on safety reports. *Id*. at 162-171. Mr. Luppino denied it. *Id*. He testified that the mechanics had twelve drivers and eighty pieces of equipment to repair. *Id*. at 165.

Protected Activity

As set forth above, the parties stipulated that the Complainant was engaged in protected activity. The record shows that the Complainant complained about safety conditions. It is reasonable to infer from this fact pattern that the Respondent knew or alternatively, should have inferred, that the Complainant complained about safety. *See* proffer of the citation, CX 3, to Paul Luppino. *Id*. at 152.

Adverse Action

The parties also stipulated that the Complainant was removed due to her protected status and her whistleblowing activity. I accept that the totality of the evidence substantiates the stipulation. Inclusion in a lay off constitutes adverse action. ***Nichols v. Bechtel Construction, Inc.***, 87-ERA-44, @ 7-8 (Sec'y Oct. 26, 1992); *See also* ***Emory v. North Bros. Co.,*** 86-ERA-37 (Sec'y May 14, 1987). A causal connection between the protected activity and the adverse employment action may be circumstantially established by showing that the employer was aware of the protected activity and that adverse action followed closely thereafter. *See* ***Couty v. Dole***, 886 F.2d 147, 148 (8th Cir. 1989). Thus, proximity in time can be considered solid evidence of causation. ***White v. The Osage Tribal Council***, 95-SDW-1, slip op. at 4 (ARB Aug. 8, 1997). *See also* ***Carson v. Tyler Pipe Co.***, 93-WPC-11 (Sec'y Mar. 24, 1995) (ten months between protected activity and adverse action sufficient to raise inference of causation); ***Thomas v. Arizona Public Service Co***., 89-ERA-19, (Sec'y Sept. 17, 1993) (one year sufficient to raise inference of causation). Here, there was one day between the protected activity and lay off.

Legitimate Nondiscriminatory Purpose

An employer attempting to rebut a *prima facie* case of discrimination must produce evidence that the adverse action was taken for a legitimate, nondiscriminatory reason. The employer "need not persuade the court that it was actually motivated by the proffered reasons." ***Burdine***, *supra* at 254. The evidence, however, must be sufficient to raise a genuine issue of fact as to whether the employer discriminated against the employee. "The explanation provided must be legally sufficient to justify a judgment for the [employer]." *Id*. at 255.

Once the truck in question, L-11, was taken out of service, the Complainant had no truck to drive. She was admittedly laid off, but asked for alternative work pending the repair. She had been given that kind of work previously. Although the Complainant alleged that there was another truck available, formerly assigned to Lisa Holmes, the Respondent alleges that Ms. Holmes' truck was in operation until September, 2003. *Id*.

Paul and Angelo Luppino both testified that there was no other work available, and the record establishes that the Complainant had less seniority than the other eleven truck drivers employed during August, 2003, by Respondent. Mr. Shepards' testimony substantiates the Respondent's position (Tr. at 53) and is accepted as credible on this issue.

I note that Respondent failed to produce a written company policy as to the use of seniority on layoff, and I note that Paul Luppino advised that he is the sole arbiter as to layoff and that he qualified the use of seniority with the adverb, "usually." *Id*. at 144-145. However, I accept that the Respondent has met its burden on this issue.

I note also that, although the Complainant maintained that Respondent was dilatory in having the truck repaired, I credit the testimony that the aluminum welding had to be done by an outside contractor.

Pretext

Complainant must prove that Respondent's stated reasons for its actions were pretextual, i.e., that Respondent's policy of lay off based on seniority was not the true reason for the adverse action, but rather Complainant was subjected to such adverse action because of her protected activity. ***Burdine***, *supra;* ***Leveille v. New York Air Nat'l Guard***, 94-TSC-314 @ 4 (Sec'y Dec. 1, 1995). Complainant must establish that her subsequent lay off was in retaliation for the protected activities, and not for the reason advanced by Respondent. Complainant may demonstrate this burden by showing that the discrimination was more likely the motivating factor or by showing that the proffered explanation is not worthy of credence. ***Burdine***, *supra*. This standard is further explained in ***St. Mary's Honor Center v. Hicks***, 509 U.S. 502, 519 (1993), "[i]t is not enough . . . to disbelieve the employer; the fact finder must believe the plaintiff's explanation of intentional discrimination." (emphasis in original). Thus, Complainant must prove that Respondent intentionally discriminated against her when it failed to provide her with other inspection duties subsequent to lay off, and that Respondent's proffered explanation regarding the lay off, failing to provide alternative work or recall her were a mere pretext.

Although the Complainant makes the allegation that she was discriminated against by Respondent, she has provided no substantiation for it. She did not show that the Respondent had a policy to provide her another truck or provide her with light work. The record shows that she did not continue to follow up and ceased calling for duty on or before she filed her complaint on August 15, 2003, fifteen days after her truck was sent for repair.

Although she called other employees to show that she was the subject of discrimination, the testimony of Mr. Shepard, a fellow driver, shows that even he was laid off notwithstanding that he had much greater seniority than she. Mr. Shepard had nine years with the company. *Id*.

at 49. I generally accept the Complainant's credibility as to facts, but I must discount her assertion that the motivation for layoff was based on animus related to her protected status. The record shows that after July 30, 2003, the truck she was assigned, L-11, was out of service. The record shows that the Complainant did not request work after the truck repair was accomplished on August 27, 2003.

Although I find that the Luppinos' testimony is suspicious, in that there is apparently no written policy and that the Respondent "usually" used seniority to determine who to lay off, the burden of persuasion on pretext is on the Complainant. There is no indication in the record why the Complainant should have been accorded special reinstatement or light work given the fact that she did not have a vehicle to drive.

Although there was testimony that the Complainant might have received the truck that Linda Holmes had driven, Linda Holmes was not called and the Complainant failed to establish exactly when she might have returned to college. She admitted that she did not know when Ms. Holmes returned to school. *Id*. at 43-44. The Complainant has the burden of proof. The Respondent asserts that it was in September, 2003. I accept the Respondent's position on this issue.

I also find it credible that after the truck was returned to service, there was little or no work for the company, and it would have been unreasonable to recall the Complainant from lay off, even if she had called in as she had been instructed.

I discount the Complainant's testimony as to the Respondent's motivation as speculative, because she has no actual facts to show whether there was a selective variation from company policy or that animus was a motivating factor.

Dual Motive – Alternative Analysis

When evidence supports a finding of both an impermissible and a legitimate motive for an adverse employment action, a dual motive analysis may be warranted. *See* ***Somerson v. Yellow Freight System, Inc***., ARB No. 99-005, 036, ALJ No. 98-STA-9, 11 slip op. at 19 (ARB Feb. 18, 1999) and cases cited therein. "Under the dual motive analysis, when the complainant proves that retaliation was a motivating factor in the respondent's action, the burden shifts to the respondent to show that it would have taken the same action against the complainant even in the absence of protected activities." *Id*. and cases cited therein. The employer's burden in a "dual motive" case resembles an "affirmative defense"; the plaintiff must persuade the fact finder on one point, and then the employer, if it wishes to prevail, must persuade it on another." ***Ass't Sec'y & Lansdale v. Intermodal Cartage Co., Ltd***., 94-STA-22 (Sec'y July 26, 1995), *quoting* ***Price Waterhouse v. Hopkins***, 490 U.S. 228, 246 (1989).

In this case, alternatively, I find that Respondent has proved to a reasonable degree of certainty or probability, that given the Complainant had the least seniority of twelve drivers, and given that she did not have a truck to drive, she would have been laid off anyway, despite her protected activity.

CONCLUSION

Complainant failed to establish that Respondent's legitimate, non-discriminatory reasons for her removal were a pretext to discriminate against her.

RECOMMENDED ORDER

For the foregoing reasons I recommend that Complainant's requests for relief pursuant to the Surface Transportation Assistance Act of 1982 be denied and that her claim be dismissed.

A

DANIEL F. SOLOMON
Administrative Law Judge

Washington, D.C.

NOTICE: This Recommended Order of Dismissal 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, N.W., Washington, D.C. 202l0. See 29 C.F.R. §§ 1978.l09(a); 6l Fed. Reg. l9978 (l996). Pursuant to 29 C.F.R. § 1978.109(c)(2), the parties may file with the Administrative Review Board briefs in support of or opposition to the above-signed's decision and order within thirty days of the issuance of that decision unless the Administrative Review Board, upon notice to the parties, establishes a different briefing schedule.