U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 23 April 2010

Case No.: **2010-STA-00010**

In the matter of

WILLIAM OPHARDT, JR.,
Complainant

v.

ISON INTERNATIONAL, LLC,
Respondent

RECOMMENDED DECISION AND ORDER

This proceeding involves a complaint under the "whistleblower" employee protection provisions of Section 405 of the Surface Transportation Assistance Act of 1982 (the Act), as amended, 49 U. S. C. Section 31105 (formerly 49 U. S. C. § 2305), and its implementing regulations found at 29 C. F. R. Part 1978. Section 405 of the Act provides protection from discrimination to employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when the operation would be a violation of these rules.

On October 6, 2009, Complainant filed a complaint with OSHA, alleging that the Respondent terminated his employment on September 22, 2009 for making safety complaints. The Complainant was denied by OSHA and the Complainant filed an appeal to the Office of Administrative Law Judges.

A formal hearing was held in High Point, North Carolina on January 26, 2010. The Complainant submitted twenty-two exhibits (CX 1-22)[1], and the Respondent submitted nine exhibits (RX 1-9).

STIPULATIONS

1. Respondent is a person within the meaning of 1 U.S.C. § 1 and 49 U.S.C. § 31101.

2. Respondent is a commercial motor carrier within the meaning of 49 U.S.C. § 31101.

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[1] The following abbreviations

CX – Complainant's exhibits;
RX – Respondent's exhibits; and
TR – Hearing transcript.

3. Complainant is a commercial motor vehicle driver within the meaning of 49 U.S.C. § 31101.

ISSUE

1. Whether Complainant engaged in activity protected under the Act, and if so,

2. Whether the protected activity was a substantial factor in the adverse employment action against Complainant, and if so,

3. Whether the Respondent's reason for suspending and then terminating the Complainant was a pretext for discrimination, and if so,

4. Whether the Complainant is entitled to damages.

The STAA employee protection provision prohibits disciplining or discriminating against an employee who has made protected safety complaints or refused to drive in certain circumstances:

(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 emp1oyee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or

(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.

(2) Under 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. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

49. U.S.C. § 31105(a). Subsection (A) and (B) of the quoted provision are referred to as the "complaint" clause and the "refusal to drive" clause, respectively. LaRosa v. Barcelo Plant Growers, Inc., ALJ Case No. 96-STA-10, slip op. at 1-3 (ARB Aug 6, 1996).

In order to prevail on an STAA complaint, a complainant must make a *prima facie* case of discrimination by showing that: (1) he engaged in protected activity, (2) the employer was aware of his activity, (3) he was subject to adverse employment action, and (4) there was a causal link between his protected activity and the adverse action of his employer. See Clean Harbors Envtl. Serv., Inc. v. Herman, 146 F. 3d. 12, 21 (1st Cir. 1998); Moon v. Transp. Drivers, 836 F. 2d 226, 229 (6th Cir. 1987); Roadway Express, Inc. v. Brock, 830 F. 2d 179, 181 n.6 (11th Cir. 1987). Under the STAA, the ultimate burden of proof usually remains on the complainant throughout the proceeding. Byrd v. Consol. Motor Freight, ARB Case No. 98-064, ALJ Case No. 97-STA-9, slip op. at 5 n.2 (May 5, 1998).

The employer may rebut the *prima facie* showing by producing evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. The employer must clearly set forth, through the introduction of admissible evidence, the reasons for the adverse action. The explanation provided must be legally sufficient to justify a judgment for the employer. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); see also Bechtel Constr. Co. v. Secretary of Labor, 50 F. 3d 926, 934 (11th Cir. 1995). Once the employer produces evidence sufficient to rebut the "presumed" retaliation raised by the *prima facie* case, the inference simply "drops out of the picture," and the trier of fact proceeds to decide the ultimate question. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507-11 (1993).

At the hearing, David Martin, the Respondent's representative, testified that Phil Ison owns International Distribution Services (IDS), a trucking company, and Ison International, an importer of furniture. Martin, Ophardt, and several other people drove trucks for IDS. (TR 9).

The OSHA Report (RX 1) states that

> Complainant told OSHA that at the time he began work with Respondent on or about August 28, 2009 he was assigned a 2002 Freightliner truck which Complainant believed had a leaking air brake through the truck's dash even though Respondent denied there was a brake problem with the truck. Complainant later complained again to his supervisor, David Martin, about a brake problem with the truck. In addition to the brake complaint, Complainant alleged he complained about some dash lights not working, some bad tires and a lack of working electrical plugs-in for personal hygiene and food storage appliances.
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> Martin subsequently assigned Complainant to 2004 International truck on or about September 18, 2009. Prior to starting the dispatch in that truck, Complainant complained to Martin about the truck idle being set for only a few minutes before shutting off the truck. This was a fuel saving option for the truck. Complainant left on the dispatch on or about September 20, 2009. Respondent stated that later that night, Complainant phoned Martin complaining about the truck not having air conditioning when he and his wife were trying to sleep. Martin stated he wanted Complainant to run one trip with that truck to obtain a realistic fuel consumption estimate. Complainant told OSHA he asked Martin for permission to obtain a hotel room at company expense but Martin

> refused. Both parties essentially agreed there was discussion about Complainant possibly obtaining "Idle Air", but Complainant told OSHA that service was not available at the truck stop at which he parked. Martin told OSHA Complainant stated he could not work under those conditions and that he quit. However, Complainant stated he would finish the trip. Martin stated he accepted Complainant's statement and on September 21, 2009, secured a backhaul for Complainant which was about 167 miles in the same direction as Complainant had to travel back to Respondent's yard in North Carolina.
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> On September 22, 2009, Complainant called Martin who was present with Respondent owner, Phil Ison. Complainant asked for a load back to North Carolina. Martin stated he advised Complainant the backhaul was to load at 10:45am on September 24, 2009, which meant Complainant would have to lay over a day. Martin stated Complainant became angry and demanded Respondent get him a motel room for two days or else Complainant threatened to bring the truck right then. Martin said he told Complainant he'd call back in a few minutes. Martin then conferred with Ison who suggested "Idle Air" as an option but Martin knew the service was not available at the truck stop near the intended loading location. Complainant called Martin loudly asking what Respondent's intentions were. Martin suggested Complainant start toward the loading location and that R would get them a motel room for the night of September 23, 2009. Martin stated Complainant kept threatening to bring the truck back empty if he didn't get two nights in a motel. Complainant confirmed to OSHA that he told Respondent that if Respondent could not pay for a motel room, he would have to bring the truck back empty. Respondent stated that ultimately Ison told Complainant to bring the truck back to North Carolina. Complainant took the truck back and did not work again for Respondent.
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> OSHA does not believe Complainant's -lack of air conditioning complaints, threats to return with an empty truck and refusal to pick up a scheduled nearby load were protected activities. Thus, the complaint is dismissed.

The Complainant testified that his first assignment was in a 2002 Freightliner which had a loss of some dashboard lights and plug ins for items such as refrigerated coolers. (TR 29). There was one occasion when the brakes did not work due to an air leak.

The Complainant was then assigned an International which had "no-idle" on it. This meant that the truck would idle only for a limited time and then would have to be restarted. When the motor was off there was no air-conditioning in the vehicle. (TR 33). Most trucks would idle all night to provide comfort.

Some truck stops have a system called "Idle Hours" where for a hourly fee an air conditioner is placed in the window of a truck.

On September 20, 2009, the Complainant was in Lake Charles, Louisiana with his wife and there was no Idle Hours location in that vicinity.

The Complainant called Martin and Phil Ison and asked the owner to pay for a motel while he waited for the next load. The Complainant testified that Ison said "You should have never been on that load. I told David to fire you before you ever left." He even told me that he talked Mr. Ison into allowing me to take that load. (TR 34, 35).

Reportedly, Ison told Martin

> to fire me because I was a complainer. He said, "I've dealt with people like you." He said, "It's never going to change. He said, "If I fix one thing on the truck I've got to fix everything." He says, "You're going to complain no matter what." And he says, "You should never have been on that load."
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> Then he also told me, he says, "Well, what if I just go ahead and put you and your wife out right where you're at, me and David come and get that truck?"
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> No, I don't know if he could have done that legally of not, but I didn't want to take the chance and that's when he told me - that was on 9/22 at 5:00 – and that's when he told me, he says, "Listen, I'm tired of it. You're done." He says, "Bring my truck back to the yard." (TR 36).

The company would not contribute to a stay in a hotel and Ison had told him to return home. Therefore, the Complainant brought the empty truck back to North Carolina.

Martin testified that he told the Complainant that the company would pay for one motel night in Grammercy, Louisiana where the next pick up was scheduled. Martin indicated that Internationals were new at the company but that the Freightlingers would idle all night.

Martin testified that the Complainant stated on the phone that "You don't hear me. You don't understand me. I'm not moving this truck nowhere." (TR 39).

Martin stated that the Complainant wasn't fired because of complaining. He quit on the 20th and then this - where he refused to pick up that load and bring our truck back – he was coming back the same exact way empty or loaded, but one paid money and he would have made money. Instead he cost me six thousand dollars $6,000.00). (TR 42).

Martin testified that the Complainant and Ison were screaming at each other over the phone. Martin stated that

> He's telling me, you don't understand I'm not bringing it nowhere. I'm bringing the truck back to you empty and that's not just me saying it, that's him saying it to OSHA, that he confirmed that. So, when a person works for you is telling the boss what he's going to do, what would you do? (TR 43).

The Complainant then testified that

> I just want to get paid for what I done and I was told - I was there the whole time. If I had planned on bringing that truck back empty, I would have done it before we got on the phone arguing for days and all this other junk. It would have been - and, yes, they never offered to pay for a hotel, never offered to pay for half. I told him to at least pay for half, you know, for a couple of days. (TR 44).
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> If they would have paid for the hotel, I would stayed out there. I didn't plan on quitting. I was complaining about the truck, the heat. You know, I like driving a truck. I liked the run I was taking. I was not going to go anywhere. I didn't like the conditions in which I was working under. That' s what I was complaining about and Mr. Ison told me that was why I was fired, that I should never have been on the load? (TR 45).

Martin stated that when the Freightliner had mechanical problems the company had paid for the Complainant to stay in a motel during the repair period.

Ison told the Complainant

> "Bring my truck back to North Carolina and you're done," and that's when we left. I was going to get the load. All I wanted was for them go in halves for the hotel room. I didn't want - I'd already paid for a hotel room for a couple of nights. I didn't want to have to sleep or pay for another hotel room or sleep in those conditions. I was going to get the load. I didn't want to drive back empty and lose money. I didn't plan on - I planned on working for them still. (TR 52).

The Complainant was seeking what he thought that he was owed – slightly over one thousand dollars. He also wanted a change in the DAC report which now indicated that he "quit under a load." (TR 53).

DISCUSSION

There is no doubt that the Respondent falls under the Act and the Complainant is a commercial motor vehicle driver.

The Act focuses on hours of driving and the safety of vehicles.

The undersigned Administrative Law Judge would acknowledge that summer nights in the South can be quite uncomfortable without access to air conditioning.

This case focuses on a dispute over creature comfort. The Complainant has not alleged that there were safety defects in the International or that he was forced to work more than the allowable hours.

It is concluded that the Complainant did not engage in protected activity as his complaints were not pertinent to provisions of the Act.

The Respondent's decision to terminate the employment of the Complainant was justified under the circumstances in this Case.

ORDER

It is recommended that the complaint filed by the Complainant be DENIED.

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RICHARD K. MALAMPHY
Administrative Law Judge

RKM/ccb
Newport News, Virginia

NOTICE OF REVIEW: The administrative law judge's Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. See 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002).

Within thirty (30) days of the date of issuance of the administrative law judge's Recommended Decision and Order, the parties may file briefs with the Board in support of, or in opposition to, the administrative law judge's decision unless the Board, upon notice to the parties, establishes a different briefing schedule. See 29 C.F.R. § 1978.109(c)(2). All further inquiries and correspondence in this matter should be directed to the Board.