U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 04 March 2011

Case No.: **2010-STA-00073**

In the matter of:

RICHARD PARKS,
Complainant,

v.

MAIL CONTRACTORS OF AMERICA, INC.,
Respondent.

Appearances: Richard Parks, Pro Se
For the complainant

Sheila McDonald, Esq.
For the respondent

Before: Richard K. Malamphy
Administrative Law Judge

DECISION AND ORDER

This proceeding arises from a claim under the Surface Transportation Assistance Act (STAA or the Act), 49 U.S.C. § 31105 (2007), and the implementing regulations found at 29 C.F.R. Part 1978 (2008). Section 405 of the Act provides protection to covered employees who report violations of commercial motor vehicle safety rules or refuse to operate vehicles in violation of those rules from retaliatory acts of discharge, discipline, or discrimination.

On March 26, 2010, Richard Parks ("Complainant") filed a complaint with the Occupational Safety and Health Administration ("OSHA") alleging that Mail Contractors of America ("Respondent") terminated his employment on March 24, 2010 in retaliation for having complained about a large pot hole in the company parking lot. On September 10, 2010, the Secretary of Labor, acting through her agent, the Regional Administrator of OSHA, found that Complainant's claim did not have merit. On September 28, 2010, the Complainant filed a request for a formal hearing before an Administrative Law Judge.

A formal hearing was held in High Point, North Carolina on November 23, 2010, at which time all parties were afforded full opportunity to present evidence and argument as provided in the Act and the applicable regulations. At the hearing, the following exhibits were admitted: Complainant's exhibits ("CX") 1 through 5 and Respondent's exhibits ("RX") 1 through 21. (TR 6).

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations and pertinent precedent.

ISSUES

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.

SUMMARY OF THE EVIDENCE

A. Testimony of Richard Parks

Complainant testified he was first hired by Mail Contractors of America around Christmas of 2009 as a "casual." (TR 1). Around mid-January 2010 he was hired full-time. (TR 1-2). He drove a white Volvo day cab pulling about a 53-foot box trailer. (TR 11).

Complainant testified he made safety complaints regarding the Employer's facility ("Greensboro Terminal") before he was fired to the terminal manager Doug Campbell. Complainant stated he "called his parking facility a mud bog or a mud pit." (TR 12). Complainant explained he was afraid he would fall due to the slippery mud and injure a preexisting back injury. (TR 13). He said he submitted a written complaint to Mr. Campbell regarding the mud in the middle of January, but that he did not bring a copy of that complaint to the hearing. (TR 15). Complainant testified he never spoke with Pat Wampler about the muddy conditions at the Greensboro Terminal. (TR 17). He said he suffered a minor injury as a result of the mud that he did not file a worker's compensation report on. (TR 15-16).

He admitted he was in an accident on March 12 in the vicinity of the company's office. (TR 8). He stated that he hit a "big chug hole" in the parking lot when he was pulling out, causing pain in his collarbone. (TR 26). He explained that he didn't see the vehicle that collided with his truck in the dark and that it didn't have its headlights on. (TR 8). He described the

accident as "minor." (TR 3). He said he was cited with "failure to yield." (TR 20). He said the ticket was later dismissed. (TR 24).

He described previous reports of his having driven recklessly as "hearsay." He explained that he had "engaged with another tractor trailer" who he had beaten to an empty spot. He stated that he got the information of another driver who saw the incident and gave it to Doug Campbell. (TR 9-10). A second incident occurred in Richmond, Virginia and involved another driver who said he ran him off the road. Complainant testified it was 6 a.m. and raining. He was driving 60 mph. The other driver called the 1-800 number on Complainant's truck and reported the truck number. (TR 10). Complainant suggested the other driver may have been in his blind spot. (TR 10-11). He also said an assistant terminal manager later told him it wasn't his truck involved at all. (TR 11).

Approximately three weeks after Employer terminated him, Complainant stated he began working for T and T Enterprises. (TR 12).

Complainant said he signed that he received a copy of the Employer's Employee Handbook, but that he had not actually received one. (TR 18). He said he was familiar with the company's open door policy but that his previous experiences led him to believe that complaining to a supervisor under the policy would result in getting fired. (TR 19-20).

When he was hired, Complainant testified the 90 day evaluation period was explained to him and he understood it to mean that he would be on probation for 90 days while his conduct and ability to perform were evaluated. (TR 20-21). He said he understood that certain actions would result in discharge during that period. He said that some people who got in a preventable accident during that time would get a write-up and others would be terminated. (TR 21).

Complainant agreed he had never alleged any safety defects in the trucks he drove or that he was made to work more hours than required by the Department of Transportation. (TR 24-25).

B. Testimony of Patricia Ann Wampler

Patricia Ann Wampler testified she is administrative services manager for the Greensboro Terminal and was employed at the terminal during the time relevant to the present complaint. (TR 28-29). Ms. Wampler testified she is familiar with the Complainant and said she did not recall him every complaining about any commercial motor vehicle safety issues. (TR 29).

Ms. Wampler explained that drivers are required to submit a log at the completion of each twenty-four hour period and she maintained those logs. (TR 30). The logs also include a driver vehicle inspection report in which the driver notes any problems with equipment he inspects. (TR 31). Complainant submitted logs between September 12, 2009 and March 11, 2010. (TR 30). On a February log Complainant had noted his odometer mileage might not be right. (TR 31). On January 12 and 13, 2010 he noted his truck had a bad clutch. (TR 32). A repair order from the company's shop show the truck was taken out of service, road tested, and returned to service on January 16. (TR 33).

Ms. Wampler testified she did not recall a particular complaint from the Complainant regarding the condition of the yard, but that company employees shared a general frustration about the inclement weather and how it affected the state of the yard. (TR 33). It was the worst winter weather the area had experienced in a long time, she explained. (TR 34). Notices were posted telling employees that management was aware of the condition of the yard and asking them to be safe because nothing could be done as long as the bad weather remained. (TR 35). She explained: "[T]here wasn't a lot we could do, but in the areas that presented special challenges on the yard for the safety of all employees we had them roped off. Where water had collected like a basin and it didn't get time to drain off before the next one hit us, we posted signs all over the terminal to be aware that the yard was extra muddy due to the weather. We urged safety and caution to all employees." (TR 41). Attempts were made to work on the yard during the bad weather and when it cleared the company had the yard landscaped and more gravel laid. (TR 41-42).

Ms. Wampler testified drivers often came to her with complaints, which she would take and follow up on. (TR 34). She had a number of contacts with the Complainant to fix some of his paperwork. (TR 35).

The company received a negative road observation on January 22, 2010. (TR 36). Dispatch sheets showed Complainant was driving the truck that matched the number of the reported truck. (TR 39). The log kept by the Complainant did not match with the location, but Ms. Wampler said she believed his log was not kept correctly. (TR 40).

With regards to the collision Complainant was involved in, Ms. Wampler testified that her understanding was that he left company property, pulled up to a stop sign, and when he pulled away from the sign, struck another vehicle. (TR 42). Ms. Wampler testified that based on her experience and understanding of the crash, it would be considered preventable. [Complainant] was at a stop sign, traffic passing on all – clearly has the right of way because he is at a stop sign. It is up to the driver to make sure beyond the shadow of a doubt that he has clear – to pull out of there was a tractor and trailer. (TR 43-44). Company policy is that once the Safety Committee deems an accident to be preventable, if it occurred within the driver's 90 days probationary period, the driver is terminated. (TR 44, 65-66). The driver has ten days to appeal the decision of the Safety Committee. Ms. Wampler testified that she was not aware of Complainant having appealed the committee's decision in his case. (TR 66).

Ms. Wampler testified Complainant was terminated for being involved in a preventable accident during his probationary period. She testified she was not aware of any complaint Complainant had made to the Department of Labor or any other organization. (TR 63).

C. Testimony of Keith Close

Keith Close became manager of the Greensboro Terminal on July 19, 2010, a position previously held by Doug Campbell. (TR 67-68). He explained that he had heard about the condition of the yard deteriorating due to the winter weather and arranged to have it re-done in preparation for the next winter. (TR 70).

Mr. Close testified company policy is that if a driver has a preventable accident during his 90 day probationary period then he is terminated. Mr. Close testified he knew of no exceptions to that policy since he had begun working at the Employer. (TR 72). Looking at Complainant's accident report, Mr. Close opined that the accident was a preventable accident. (TR 73). He explained that the company decides whether an accident is preventable or not independently from any police investigation and decision whether to issue a citation. (TR 83).

D. Termination Letter (CX 1)

A letter addressed to the Complainant; signed by Doug Campbell, terminal manager; and dated March 24, 2010 stated in part:

> Effective today, the decision has been made to terminate your employment with Mail Contractors of America, Inc. for the following reason(s):
>
> Unsatisfactory performance during initial 90-day probationary period. On 3/12/10 while attempting to turn onto Norwalk Street from Camann Street in Greensboro, NC you struck another vehicle.

(CX 1).

E. DMV Report (CX 2)

A print-out of a page titled "N.C. State Driver License System Driver Status Report" hearing the name of Richard Wayne Parks lists a Class A license with active status and states under "driver problems," "no problems at this time." The print-out bears a date of August 4, 2010.

F. March 12, 2010 Collision

A "Preliminary Accident Report" filled out and signed by Complainant on a company form recorded the date and time of the collision as March 12, 2010 at 7:15 p.m. at the intersection of Norwalk and Swift. Mr. Parks wrote on the form: "At intersection I looked both ways twice after I came to complete stop. I think pulled out about 6 ft into intersection. I then heard a small bang and I never saw any vehicle, but looked quick and car had no lights on. I then checked with other driver to see if he was hurt he was not. I then call MCA and then city police." (CX 3).

Complainant also submitted into evidence a notarized letter signed by a Joanna L. Boyce dated August 20, 2000. The letter, addressed "to whom it may concern" and referencing

"Richard Parks vs. Alexander Kneely" explains that Ms. Boyce witnessed the March 12, 2010 collision. (CX 4).

G. Driver Logs (RX 1)

Driver logs from December 12, 2010 to March 11, 2010 show that Complainant consistently marked "vehicle okay" on logs where he was on duty with some exceptions and notes on issues with the trucks. He made the following notes on the following dates: January 12 and 13, "bad clutch;" January 17, "no rear cargo, lights out;" January 21, "front end sup. makes poping sound;" January 25, "bad lights above windshield" and "no upper rear cargo lights;" January 28, "R-Rear light out on back;" January 29, "rear tail light out R-side;" January 30, "no left signal on R-rear;" February 21, "trouble with air lines near air bag;" February 27, "eng. check lite comes on;" March 2, "both spot mirrors can't adjust;" March 5, "the speedometer is no working mileage comes up wrong;" and March 9, "can't adjust left spot mirror."

H. Mail Contractors of America Employee Handbook (RX 3)

Respondent's employee handbook states with regard to a driver's probationary period:

> If any accident is determined Preventable, a Driver normally will receive the following discipline depending upon whether the Preventable accident occurred during his/her initial 90-day evaluation period…
> DURING NINETY (90) DAY EVALUATION PERIOD: If a Driver is involved in a Preventable accident during his/her 90-day evaluation period, he/she normally will be terminated.

(RX 3d).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I find the evidence shows that respondent is a commercial motor carrier within the meaning of 49 U.S.C. § 31101 and falls under the Surface Transportation Assistance Act. I further find that Complainant is a commercial motor vehicle driver within the meaning of 49 U.S.C. § 31101.

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 employee, 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). Subsections (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). The Act protects three types of activities: filing a complaint, refusing to operate a vehicle because of an actual violation or refusing to operate a vehicle because of a reasonable apprehension that the vehicle is unsafe.

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).

The complainant then has the opportunity to prove, by a preponderance of the evidence, that the employer's reason for the adverse action was mere pretext for discrimination. *Burdine*, 450 U.S. at 253. Specifically, complainant must establish that the proffered reason for the adverse action is false and that his protected activity was the true reason for the adverse employment action. *St. Mary's Honor Center*, 509 U.S. 502, 507-508 (1993); *see also Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926, 934 (11th Cir. 1995) (holding that the complainant must "establish that the employer's proffered reason is pretextual by establishing

either that the unlawful reason, the protected activity, more likely motivated the [employer] or that the employer's proffered reason is not credible and that the employer discriminated against him."). Although the burden of production shifts, the ultimate burden of persuasion remains with the complainant to show that the employer intentionally discriminated against him. *St. Mary's Honor Center*, 509 U.S. at 507-508. If the proof establishes that the adverse action was undertaken for both discriminatory and nondiscriminatory reasons, i.e. "mixed motives," the employer must show by a preponderance of the evidence that it would have taken the same adverse action absent the complainant's protected activity. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

A. Complainant's *Prima Facie* Case

1. Protected Activity

The Complainant's claimed protected activity consists of reporting the muddy conditions of the Greensboro Terminal. Complainant testified he made the complaint to the Greensboro Terminal manager Doug Campbell. (TR 12-15). He said that he did so in writing in mid-January. (TR 15). Mr. Campbell did not testify at the hearing and the one company employee who did testify about that time period, Ms. Wampler, stated that she was not aware of any complaints Complainant had made about the yard conditions or any other subject. (TR 33, 63).

The Complainant did not cite a specific motor safety vehicle standard that he believed the Respondent to be in violation of when he made his complaint. Although a complainant, particularly one who is pro se, is not required to cite standards or rules, 49 U.S.C. § 31105(a) nonetheless requires that a complaint "relate" to a violation of a commercial motor safety vehicle standard. A review of the Department of Transportation Federal Motor Carrier Safety Regulations does not reveal any regulation or standard which would apply to the facts of this case.

There is no evidence in the record that Complainant's complaint relates to a motor vehicle safety standard, therefore any complaint Complainant may have made cannot be considered protected activity under the statute.

2. Subject to Adverse Employment Action

The employee protection provisions of the STAA provide that "[a] person may not discharge an employee" for engaging in protected activity under the Act. 49 U.S.C. § 31105(a). The Complainant was terminated on March 24, 2010, and I hereby find that he was subject to adverse employment action within the meaning of the Act.

3. Causal Link Between the Protected Activity and the Adverse Action

Assuming Complainant established that he engaged in protected activity, he must next establish a causal link between the protected activity and the adverse employment action. Complainant offered no explanation as to why he believed there was a causal link. He testified he made the complaint in mid-January. He was fired March 24, at least two months later. As

discussed above, I found the evidence does not support a finding of protected activity; however, if the Complainant had engaged in protected activity, I further find the evidence does not show a causal link between his complaint and his termination.

B. Conclusion

Although it is undisputed that the Complainant suffered adverse employment action when he was terminated on March 24, 2010, the Complainant has failed to establish that he engaged in any protected activity or that such activity had any causal connection to his termination. Because he has failed to carry his burdens of proof under the STAA, the Complainant's claim for relief must be denied.

ORDER

For the foregoing reasons, I hereby ORDER that Richard Parks' claim be DENIED.

A

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/amc
Newport News, Virginia

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1978.110(a) and (b).