



Issue Date: 02 March 2005

CASE NO.: 2005-STA-00003

In the Matter of

MICHAEL DRAKE,
Complainant,
v.
YELLOW TRANSPORTATION,
Respondent.

RECOMMENDED ORDER DISMISSING REQUEST FOR HEARING

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 31105 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.

Complainant, Michael Drake, was issued a written warning on or about March 15, 2004, for using fatigue as a subterfuge to avoid work. Subsequently, Complainant filed a complaint with OSHA alleging that Respondent violated 49 U.S.C. § 31105.

An investigation by the Regional Administrator for the Occupational Safety and Health Administration found that Complainant went on sick leave for over a month and had surgery for the conditions that led to his fatigue and sick calls. However, since the written warning had expired, the OSHA investigator found that no further investigation was appropriate.

The Complainant appealed and the case was assigned to the undersigned Administrative Law Judge. On February 23, 2005, the Complainant submitted a letter that stated

Your honor due to my health problems and my father has been announced terminally ill, I wish to withdraw my complaint and my understanding is that my warning letter has aged off and is being removed from my file.

29 C.F.R. §1918 111(c) permits a party to withdraw objections to the Secretary’s Preliminary Findings or Preliminary Order at any time before the Findings or Order become final. Creech v Salem Carriers, Inc., 88-STA-29 (Secy’s Sept. 27, 1988, slip op. at 2). The regulations provide that if a party files a written withdrawal of his objections, “[t]he judge shall affirm any portion of the findings or preliminary order with respect to which the objection was withdrawn. §1978.111(c). I treat Complainant’s letter as a request to withdraw his objections to

the Area Director's findings. See Snow v. TNT Red Star Express, Inc., 1991-STA-44, slip op. at 2-3 (Secy's Mar. 13, 1992).

The Respondent filed a motion for summary decision and argued that warning letters are not material adverse job actions that trigger the coverage of laws such as the STAA. Furthermore, Complainant's warning letter has "aged off" and can have no future effect on Plaintiff's employment and this case is therefore moot.

As Yellow described above, warning letters "age off" per the union contract after six months. Nevertheless, even if Complainant contends that even an "aged off" warning letter may still be considered in future employment actions, Yellow represents to Complainant and this Tribunal that, regardless of the union contract, Yellow has removed the contested letter from the Complainant's file. It will not be used in any way in any future discipline involving Complainant.

Thus, the Complainant wishes to withdraw his complaint, and the Respondent has removed all evidence of the action in contention.

ORDER

IT IS ORDERED that Complainant's request for withdrawal of his request for a hearing is hereby **GRANTED** pursuant to 29 C.F.R. §1978.111(c). Accordingly, the September 23, 2004 Secretary's Findings issued by the Area Director of the Occupational Safety and Health Administration is hereby affirmed and reinstated. The complaint, therefore, is hereby **DISMISSED**. This Order is the final administrative action and no Secretarial review is required. Underwood v. Blue Springs Hatchery, 1987-STA-21 (Dep. Secy Nov. 2, 1987) (Order to Show Cause).

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RICHARD K. MALAMPHY
Administrative Law Judge

RKM/ccb
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).