

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 19 October 2010

CASE NO.: 2010-NTS-4

In the Matter of:

SIMON C. HILL,
Complainant

v.

CHAMPAIGN-URBANA MASS TRANSIT DISTRICT,
Respondent

Appearances:
Simon Hill, pro se,
For the Complainant

David E. Krchak, Esq.,
For the Respondent

BEFORE: RICHARD A. MORGAN
Administrative Law Judge

DECISION AND ORDER DENYING RELIEF

I. Procedural History

The complainant filed his whistleblower complaint with the Occupational Safety and Health Administration [hereinafter "OSHA"] on July 15, 2009 under the National Transit Systems Security Act [hereinafter "NTSSA" or "Act"], 6 USC § 1413. After an investigation, the Area Administrator determined the complaint to be without merit finding that "there is no reasonable cause to believe that respondent violated" the NTSSA. On December 31, 2009, the Administrator informed the parties of the results of his investigation. In a letter dated January 20, 2010, the complainant expressed his desire for a formal hearing. The complainant is not currently and was not at the time of the hearing represented by counsel.

The matter was tried on July 20, 2010 in Springfield, Illinois. Complainant's Exhibits ("CX") 1-2 were admitted. Respondent Exhibits ("EX") 1-5 were admitted. The parties were offered the opportunity to submit closing briefs. The Respondent did so on September 16, 2010.

II. NTSSA Provisions

The employee protection provision of NTSSA are set forth at 6 USC § 1142. Subsection (a) proscribes discrimination against public transportation agency employees as follows:

A public transportation agency . . . (or employees thereof) shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done -

(1) to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation, relating to public transportation safety or security, (or fraud, waste or abuse . . .) if the information or assistance is provided to or an investigation stemming from the provided information is conducted by –

(A) . . .

(B) . . .

(C) a person with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct;

(2) to refuse to violate or assist in the violation of any Federal law, rule, or regulation, relating to public transportation safety or security;

(3) to file a complaint or directly cause to be brought a proceeding related to the enforcement of this section or to testify in that proceeding;

(4) . . .

(5) to furnish information to . . . any Federal, State, or local regulatory or law enforcement agency as to the facts of any (accident or) incident resulting in injury or death to an individual or damage to property occurring in connection with public transportation.

Subsection (b)(1), Hazardous Safety or Security Conditions, proscribes discrimination against public transportation agency employees who:

(A) report a hazardous safety or security condition;

(B) refuse to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties, if the conditions described in paragraph (2) ("protected activities") exist;

(C) . . .

(2) A refusal is protected under paragraph (1)(B) and (C) if –

(A) the refusal is made in good faith and no reasonable alternative to the refusal is available to the employee;

(B) a reasonable individual in the circumstances then confronting the employee would conclude that –

- (i) the hazardous condition presents an imminent danger of death or serious injury; and
- (ii) the urgency of the situation does not allow sufficient time to eliminate the danger without such refusal; and

(C) the employee, where possible, has notified the public transportation agency of the existence of the hazardous condition and the intention not to perform further work, (or not to . . .), unless the condition is corrected immediately . . .

III. Stipulations and the Parties' Contentions

A. Stipulations

1. The Champaign-Urbana Mass Transit District (hereinafter "MTD") is a "public transportation agency" covered by the Act and an "employer" under the NTSSA, i.e., an operator of public transportation eligible to receive federal assistance.
2. Mr. Hill was employed by the Respondent as a maintenance employee assigned to the Respondent's Urbana, Illinois, facility.
3. Mr. Hill was an "employee" of the public transportation agency at all relevant times.
4. Mr. Tom Huskisson was the Complainant's co-worker.
5. Both Messer's Hill and Huskisson were "probationary" employees at all relevant times.
6. Mr. Hill's supervisor was Mr. Kenneth Napper.
7. The Respondent's Director of Maintenance was Mr. Dave Moore.
8. On or about June 2 and June 28, 2009, Mr. Hill and Mr. Huskisson engaged in verbal arguments, on the job.
9. Both Mr. Hill and Mr. Huskisson were verbally counseled regarding their arguments.
10. On or about June 7, 2009, Mr. Hill provided Mr. Dave Moore a written letter detailing his interaction with Mr. Huskisson on June 7, 2009.
11. On or about June 28, 2009, Mr. Hill filed a written "Incident Report" regarding his interaction with Mr. Huskisson and reported he "did not feel safe around him."
12. On June 30, 2009 both Mr. Hill and Mr. Huskisson were given written warnings, by Mr. Napper, for their behavior toward one-another.
13. Mr. Hill was terminated on or about July 6, 2009.
14. Mr. Huskisson was also contemporaneously terminated, on or about July 6, 2009.
15. The decision to terminate Mr. Hill and Mr. Huskisson was made by Mr. Moore, the Director of Maintenance.
16. Mr. Hill timely filed his whistleblower complaint, on July 15, 2009.
17. The Secretary issued findings, on December 31, 2009, stating that although the Complainant had engaged in protected activity by reporting workplace violence issues it was not a contributing factor in his termination. The employees' conduct had disrupted the workplace and the Respondent had terminated both employees to "eliminate any possible physical threats to the staff".

18. Mr. Hill timely filed a request for hearing before the OALJ, on or about January 10, 2010.

There being adequate support in the record for the parties stipulations in Paragraph IIIA herein, those stipulations are hereby incorporated by reference into Paragraph V as Findings of Fact and Conclusions of Law, as if fully set forth.

B. The Parties' Contentions

1. *Complainant*

The Complainant argues that he engaged in protected activity under the NTSSA when he complained to MTD management about the erratic and dangerous behavior of Mr. Huskisson. He contends that on the basis of these complaints and a complaint made to the Urbana police department, the MTD retaliated against him when it terminated his employment on or about July 6, 2009.

2. *Respondent*

The Respondent contends that the Complainant did not engage in protected activity under the Act. It argues that the Complainant did not allege any violation or abuse of laws or regulations relating to public transportation safety, and that instead his complaints were the result of a personal disagreement between the complainant and Mr. Huskisson. The MTD also argues that even if the Complainant establishes that he engaged in protected activity, it had a legitimate and nondiscriminatory reason to terminate him: he was a probationary employee engaging in repeated disruptive behavior with Mr. Huskisson.

IV. Issues

- I. Whether the Complainant, engaged in "protected activity" under the Act, by informing his supervisor, Kenneth Napper, the Director of Maintenance, Dave Moore, and the local Urbana Police Department of the behavior of former co-worker Tom Huskisson, specifically the latter's verbal abusiveness and threatening actions?
- II. If the Complainant engaged in protected activity as an employee of the Respondent, whether the Respondent was aware of the protected activity?
- III. Did the Complainant, suffer unfavorable personnel actions, i.e. was he either discharged or discriminated against in respect to compensation, terms, conditions, or privileges of employment?
- IV. If the Complainant engaged in protected activity as an employee of the Respondent, and the Respondent was aware of the protected activity, did the protected activity contribute, in part, to the decision by the Respondent to reprimand him and/or discharge him?

- V. If the Complainant establishes a violation of the employee protection provisions of the Act, whether the Respondent has demonstrated by clear and convincing evidence that it would have taken the same actions, even in the absence of the protected activity?
- VI. If the Respondent presented clear and convincing evidence of a legitimate motive for its actions at issue herein, whether the Complainant established by a preponderance of the evidence that the Respondent retaliated against him for engaging in protected activity, i.e., that the Respondent's stated reasons were a pretext?

V. Discussion: Findings of Fact and Conclusions of Law

A. Findings of Fact and Law

The Complainant and Mr. Huskisson were both hired as "service" personnel. Under the Respondent's employment policies, they were "probationary" employees for their first twelve months. (RX 5). Neither individual dealt with the public at all. Their job, on a graveyard shift, required them to fuel and service transit buses, review driver vehicle complaint cards, and park the buses in the Respondent's lot.

The Complainant and Mr. Huskisson had not known each other prior to working for the Respondent. Mr. Huskisson did not testify at the hearing. Mr. Hill testified that initially, he and Mr. Huskisson were on good terms. Their supervisor, Mr. Napper testified that the two got along with other employees and that Mr. Hill was a good employee who took the initiative. On June 7, 2009, the two were involved in an argument over job requirements. Mr. Hill testified that Mr. Huskisson "exploded, screamed at him and walked toward him." He left and reported the incident to two mechanics and his supervisor, Mr. Napper. Mr. Napper spoke with Messrs. Hill and Huskisson. He discussed the correct job requirements and told Mr. Hill there was no cause for concern; Mr. Hill felt otherwise. He memorialized his version of the incident in a letter to Mr. Moore, the Director of Maintenance. (CX 1). Mr. Napper memorialized the incident in a memo which he gave to Mr. Moore. (RX 2). After speaking Mr. Moore, Mr. Napper issued a counseling letter to both Hill and Huskisson. Mr. Napper advised Mr. Hill not to confront Mr. Huskisson with workplace issues and told both of them they were probationary and would be terminated if it happened again. Mr. Napper believed they had reached an understanding. Mr. Hill spoke with Mr. Moore and expressed concern for his safety. Mr. Moore believed that the matter was resolved by the end of their conversation.

On June 28, 2009, Mr. Huskisson and the Complainant had another run-in over the paperwork related to fueling a bus. Mr. Hill and Mr. Huskisson both submitted incident reports concerning the matter. (CX ; RX 1). Mr. Napper drafted and sent a warning letter to Mr. Hill concerning this second incident, advising him the conduct violated the work code and that the District would not tolerate such conduct and could take further disciplinary action. (RX 3). Mr. Hill testified that he feared a beating or killing by Mr. Huskisson and was on edge. He sought advice from the Urbana police. The police subsequently appeared at the work site and questioned Mr. Huskisson. When asked if he had "called" the police, Mr. Hill answered literally he had not. Parts and Maintenance Supervisor, Pat Grady, testified about his observations of the

second incident. He saw them arguing. He believed they posed no threat of violence to anyone, but each other and confirmed they had no passenger contact.

Mr. Napper discussed the matter with Mr. Moore and recommended both probationary employees be terminated. On July 6, 2009, Mr. Moore terminated Mr. Hill and Mr. Huskisson. (RX 4). Mr. Napper testified that other probationary employees had been terminated for insubordination, tardiness, accidents, and not doing their jobs correctly. Mr. Moore testified that neither employee had followed instructions and were disrupting the shop. As far as he was concerned, neither had raised any matter relating to the protection of passengers or equipment.

B. Protected Activity

The complainant alleges that he engaged in protected activity under the NTSSA when he expressed his concerns about Huskisson to his superiors. It is also possible that Mr. Hill's complaints to the Urbana police department could constitute protected activity under the NTSSA. If the complainant can prove that he engaged in protected activity, he will need to do so under the provisions of § 1142 (b). His alleged protected activity does not fall under subpart (a) as he does not allege a violation of federal law, he did not refuse to work, and he was not assisting a safety investigation. If his conduct constituted protected activity as defined by the NTSSA, it would be under subpart (b)(1)(A). This section states that "reporting a hazardous safety or security condition" can be protected activity under the act.

Mr. Hill complained to his superiors, Mr. Napper and Mr. Moore, that he was concerned for his safety working with or near Mr. Huskisson after the incident on June 7, 2009. After the incident on June 28, 2009, he stated in his incident report that he did "not feel safe" around Mr. Huskisson. Feeling that his complaints were not being adequately addressed, he went to the Urbana police department to ask for advice regarding Mr. Huskisson's conduct.

On their face, the concerns expressed by Mr. Hill could constitute "reporting a hazardous safety or security condition." The important question, however, is whether the Act actually protects complaints like those made by Mr. Hill. To answer this question, it is useful to look at how "protected activity" has been defined by the Administrative Review Board ("ARB") in cases arising under statutes with whistleblower protection provisions analogous to the NTSSA. In *Williams v. Mason & Hanger Corp.*, ARB No. 98-030, ALJ No. 1997-ERA-14 (Nov. 13, 2002), the Administrative Review Board pointed out that the purpose of federal whistleblower statutes differs from that of anti-discrimination statutes such as Title VII of the Civil Rights Act. Employee protection provisions encourage employees to report safety violations and provide a mechanism for protecting them against retaliation for doing so. The Board went on to say that an employee need not cite to a specific statute or rule being violated, but a whistleblower must reasonably believe that compliance with applicable safety standards is in question.¹ The notion that the complaints of the plaintiff must relate to public or environmental safety has been confirmed in cases arising under other whistleblower statutes. In *Harrison v. Administrative Review Board*, 390 F.3d 752 (2nd Cir. 2004), a case arising under the Surface Transportation

¹ See also *Caldwell v. EG&G Defense Materials, Inc.*, ARB No. 05-101, ALJ No. 2003-SDW-001 (October 31, 2008) (stating that protected activity furthers the purpose of environmental whistleblower statutes to protect the public health and environment).

Assistance Act, the court confirmed an ARB holding that the complainant did not engage in protected activity when his complaints related to the operation of “yard horses.” These were vehicles that never left the employer’s lot. The court held that because the yard horses were never used on public roadways, a complaint relating to a yard horse could not relate to a violation of a motor vehicle safety regulation. Similarly, in *Luckie v. United Parcel Service*, ARB No. 05-026, ALJ No. 2003-STA-39 (June 29, 2007), the complainant alleged that expressing concerns about and investigating the source of a fire at a parcel facility was protected activity. The ARB found that these complaints related to employee safety, but to be protected activity the complaints must relate to motor vehicle safety. There was no evidence that the complainant’s concerns about the suspicious fire were out of a concern for motor vehicle safety. In cases arising under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, the ARB has also held that a plaintiff’s complaints must relate to aviation safety to be protected activity.²

Under a very broad reading of § 1142 (b), the complainant may have engaged in protected activity when he made complaints to MTD management and the Urbana police department. Precedent from the Administrative Review Board suggests, however, that a complaint must relate to public transportation safety or security to be protected activity under the NTSSA. Much like the complainant in *Luckie*, Mr. Hill’s complaints that Mr. Huskisson posed a physical threat and that management was not taking that threat seriously related to employee safety. Mr. Hill’s complaints did not in any way reflect a concern that public transportation security or safety was at risk. ARB precedent makes it clear that a whistleblower does not need to cite to a specific regulation or law that is being violated in order to engage in protected activity. But to be protected activity, the complaint made by the aggrieved employee must further the goal of the statute, which is to promote public transportation safety by fostering an environment where employees are free to voice concerns about potential security and safety hazards. Mr. Hill’s complaints about Mr. Huskisson do not further the aim of the statute. Accordingly, I find that he did not engage in protected activity under the NTSSA.

C. Termination

Even if Mr. Hill’s complaints constituted protected activity, the evidence does not establish that the complaints contributed to the MTD’s decision to terminate his employment. The complainant has the burden of proof to show that retaliation for protected activity was a reason for his termination. As part of this burden, the complainant must show that the respondent had knowledge of complainant’s protected activity at the time of employer’s adverse action. See *Homen v. Nationwide Trucking, Inc.*, 1993-STA-45 (Sec’y Feb. 10, 1994); *Stiles v. J.B. Hunt Transportation, Inc.*, 1992-STA-34 (Sec’y Sept. 24, 1993). If the complainant meets such burden, the respondent has the burden to prove a legitimate, nondiscriminatory reason for termination. A complainant may show that the employer’s reason for termination is pretext by evidence that the employer’s proffered reasons have no basis in fact, that the proffered reasons did not actually motivate his discharge, or that the reasons were insufficient to motivate the discharge. *Manzer v. Diamond Shamrock Chemical Company*, 29 F.3d 1978 (6th Cir. 1994).

² See, e.g., *Malmanger v. Air Evacs EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-AIR-008 (July 2, 2009).

There is no dispute that MTD management was aware of Mr. Hill's complaints. The MTD asserts that it had a legitimate, nondiscriminatory reason for discharging Mr. Hill. Mr. Moore testified that both Mr. Hill and Mr. Huskisson were being disruptive in the workplace and as both were probationary employees he agreed with Mr. Napper's recommendation that they both be terminated. The MTD's policy on probationary employees states that during the probationary period the MTD shall be the sole judge of an employee's competency and fitness and its ability to discharge an employee shall not be questioned.³ (RX 5). Mr. Napper and Mr. Moore testified that both Hill and Huskisson were warned after the initial incident that further disruptive behavior could lead to action being taken against them. When presented with the situation of two probationary employees that were causing repeated disturbances in the workplace, the MTD made the decision to terminate both employees. The evidence clearly establishes that this decision was based on a desire to cease workplace disruptions. There is no evidence to suggest that the articulated reason for Mr. Hill's termination was pretext for a discriminatory motive. To establish pretext, it is not sufficient for a complainant to show that the action taken was not "just, or fair, or sensible . . . rather he must show that the explanation is a phony reason." *Gale v. Ocean Imaging*, ARB No. 98-143, ALJ No. 97-ERA-38, slip op. at 9 (ARB July 31, 2002). Mr. Huskisson, who made no safety complaints to management or the Urbana police department, was also fired for his disruptive conduct. That the MTD treated both employees equally proves it was not motivated by a desire to retaliate when it terminated Mr. Hill's employment. Thus, even if Mr. Hill was able to prove that his conduct was protected activity, the evidence does not establish that the MTD's decision to terminate his employment was motivated in any part by his protected activity. There is no evidence that its decision to simultaneously fire Mr. Hill and Mr. Huskisson was motivated by any reason other than a desire to have a workplace free of disruptive behavior.

VI. Conclusions

Mr. Hill did not engage in protected activity under the NTSSA when he made complaints to management and to the Urbana police department about the threat he perceived from Mr. Huskisson. Complaints must relate to public transportation safety or security to constitute protected activity under the Act. Even if his complaints did constitute protected activity, the evidence establishes that the MTD terminated his employment for a legitimate, nondiscriminatory reason.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, Complainant's relief requested is hereby DENIED. It is hereby ordered that the complaint filed by Simon Hill be dismissed.

A

RICHARD A. MORGAN
Administrative Law Judge

³ It should be noted that had the complainant engaged in protected activity, the MTD could not have discharged him on that basis, even given his probationary status.

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. 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. § 1982.110(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. § 1982.110(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. § 1982.110(a).

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. §§ 1982.109(e) and 1982.110(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. §§ 1982.110(a) and (b).