



Issue Date: 30 November 2006

Case No.: 2006-STA-00040

In the matter of:

ESHETE K. WORKU,
Complainant,
v.

PREFLIGHT PARKING,
Respondent.

RECOMMENDED ORDER AND DECISION

**GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION
AND
DISMISSING COMPLAINANT'S CLAIM
AND
DENYING RESPONDENT'S REQUEST FOR REASONABLE COSTS AND
ATTORNEYS' FEES**

This case is before the undersigned Administrative Law Judge pursuant to the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), 49 USC § 31105 based on a complaint filed by Complainant on March 25, 2006. Federal Regulations set forth in 29 CFR Part 1978 and 20 CFR Part 18 apply to this case.

Procedural History

The Assistant Secretary for the Occupational Safety and Health Administration denied the complaint on June 22, 2006 and an appeal by Complainant was forwarded to the Office of Administrative Law Judges on July 20, 2006. On November 13, 2006, a Recommended Order and Decision was entered which recommended granting the Respondent's Motion for Summary Decision. On November 15, 2006, prior to receipt of the November 13, 2006, Recommended Order and Decision, the Complainant, still acting without representation, requested an enlargement of time to file a response to the Motion for Summary Judgment. By Order of November 16, 2006, the November 13, 2006 Recommended Order and Decision was rescinded and the Complainant was granted an enlargement of time, to November 29, 2006, to file his response. The Complainant's response was received November 24, 2006.

On September 7, 2006 a pre-hearing conference was held, pursuant to a pre-hearing order issued August 1, 2006, with the Complainant and counsel for the Respondent present. At the beginning

of the pre-hearing conference the Complainant advised he had not obtained representation and would proceed by himself. The Complainant was advised of his right to representation, possible sources of lawyer referral services through the Atlanta Bar Association, Atlanta Legal Aid Society, and Atlanta Volunteer Lawyers Foundation, his right to present documentary and testimonial evidence for consideration, his right to testify under oath, his right to examine witnesses under oath, his right to object to questions asked of witnesses by opposing counsel and the Administrative Law Judge, his right to enter into an agreement with Respondent as to facts not in dispute, and the opportunity to explain why he feels the evidence shows he is entitled to relief. After discussion of procedural matters, the hearing for October 12, 2006 was cancelled and dates were set to complete discovery and exchange documentary evidence and witness lists were set. Another conference call with the Complainant and Respondent's counsel was held on October 3, 2006 during the Complainant's deposition. The issue presented involved the Complainant's need to answer a question about possible witnesses with information concerning the underlying event and the vehicle involved in the complaint. Complainant was directed to provide the names of such potential witnesses and both Parties were reminded that no adverse actions could be taken against any witnesses for providing information about the complaint under the STAA.

On November 1, 2006, the Respondent filed a Motion for Summary Decision seeking to dismiss the complaint and recover reasonable costs and attorneys' fees. The Motion indicates that a copy of the Motion was delivered to the Complainant by federal express and certified mail on October 31, 2006. As noted above, the Complainant's response was received November 28, 2006.

The original allegation was that the Complainant "was discharged in reprisal for refusing to drive a broken bus." The Secretary found that the "Complainant refused to return to his originally assigned bus and stated that he experienced transmission problems with the bus coming out of park the previous week" and that he was discharged for insubordinate and unprofessional behavior.

Certain Complaints Beyond the Scope of the STAA

In his response to the Motion for Summary Decision, the Complainant states his supervisor, Mr. Dunson, "refuses to provide me an equal opportunity because of my national origin and I am black. As I mentioned above, I do have material evidence and witness regarding this matter. I request the court allow me to present these evidences and witness who are willing to testify the truth." Allegation of discrimination based on national origin and race are not within the scope of the STAA and beyond the jurisdiction of this Administrative Law Judge. Accordingly, such issues may not be litigated in this proceeding, though evidence of bias may be appropriate on the issue of credibility during a hearing.

In his response to the Motion for Summary Decision, the Complainant states his supervisor, "Ms. Head violate(d) employee harassment policy and she sexually harassed me inside the bus ... while I was inspecting the bus (on October 31, 2005 at 3:00PM)." Allegations of sexual harassment are also not within the scope of the STAA and beyond the jurisdiction of this Administrative Law Judge. Accordingly, such issues may not be litigated in this proceeding.

Finally, in his response to the Motion for Summary Decision, the Complainant states “I did not get any opportunity to present my evidence and witness (to the office of EEOC)” prior to the EEOC decision made on a complaint filed against Respondent. Actions taken under the provisions of the Equal Employment Opportunity Act and before that commission are not within the scope of the STAA and beyond the jurisdiction of this Administrative Law Judge. Accordingly, such issues may not be litigated in this proceeding.

Evaluation of Evidence

1. Complainant's Deposition Testimony.

At his deposition on October 3, 2006, the Complainant testified he began working for Respondent on May 8, 2001, as a driver of a passenger bus taking passengers and baggage to and from the airport. He testified that over the period of employment with Respondent, when he came to work in the morning he would pick up a bus key and inspection form, inspect the bus to identify safety and mechanical problems with the assigned bus, and write down on the inspection form any problems detected. He reported that he did not identify any safety problems with the assigned buses during the January to March 2006 timeframe, except on March 2, 2006. He testified that on March 2, 2006, he inspected Bus #12, identified problems with Bus #12, and wrote the problems on the inspection report form indicating that the gear shift indicator did not work. He stated that he had been driving the same Bus #12 every workday for the prior month and had verbally reported to his supervisor that there was a need to fix Bus #12. He testified that on March 2, 2006 he made his first passenger pick-up and airport drop-off in Bus #12 and that on his return he went to the office and received Bus #110 because Bus #12 had “a radio problem and gear shifting problem.” He testified that on March 2, 2006, he had a problem putting Bus #12 in the parking position because the bus was old and the problem was getting worse and worse” and he asked for another bus and was given Bus #110 which is known to leak oil. He reported that after driving Bus #110 and dropping off customers he was told by dispatch to see the manager. He testified that the manager told him to again drive Bus #12, he told the manager that Bus #12 had a problem and he would not drive Bus #12 “because I do not want to jeopardize my life and the customers' lives, so give me another bus.” He reported he then refused to clock out. Upon questioning by Respondent's counsel the Complainant provided several names of other employees who had knowledge of the mechanical problems of Bus #12 and Bus #110 in the March timeframe and stated that a supervisor, Mr. Dunson, terminated the Complainant's employment based on race because he is black.

Deposition Exhibit 31 was shown to the Complainant at the October 3, 2006 deposition (Deposition transcript at page 110). This exhibit is a “Pre Trip Inspection” form for Bus #12 completed by the Complainant on March 2, 2006 at 3:00PM. The inspection form notes that all exterior and interior inspection points “pass”, that a scratch is on the right side of the bus and that no mechanical problems or additional comments are noted by the Complainant.

Deposition Exhibit 32 indicates that Issuing Manager E.D. Dunson directed the termination of the Complainant on March 3, 2006 for insubordination based on the Complainant's March 2, 2006 refusal “to follow managers instructions when he was asked to switch units due to the leak on unit 110 ... to clock out after refusing to take unit 12 ... (and because) behavior was disruptive to the operation causing a shortage of a driver during a busy time of the shift.”

Exhibit 32 also indicates that manager McBride delivered the notice on March 3, 2006 and that the Complainant refused to sign the document.

Deposition Exhibit 33 indicates that a technician from Radio One inspected the radio in Bus #12 on March 2, 2006, and found no problem with the radio system on Bus #12 that day.

2. Complainant's Statements in Response to Respondent's Motion.

In his response to Respondent's Motion for Summary Decision, the Complainant states that he was assigned to Bus #12 at 3:00PM March 2, 2006 and that he complained and reported to Mr. Dunson about the "incident (which) occurred on my first trip", requested "to switch to another safe bus" and was told "to keep driving unsafe bus and I refused to drive unsafe bus."

The Complainant stated that he usually reported "new problems on a daily basis on the inspection form. Bus #12 gear shift indicator was an old problem, it broke sometime in 2003. I did report the problem during that time. Since the gear shift indicator was broken for the past 3 years, I kept reporting no action was taken. Finally, for about 2 months I stop reporting on the inspection form because the problem on the bus #12 is already known(as) an old problem prior to March 2, 2006."

In a separate attachment dated November 24, 2006, the Complainant stated that he worked for Pre-Flight Airport Parking Company as a driver taking customers to the parking lot at the airport. He reported that on March 2, 2006 he drove passengers to the airport in Bus #12 and when he assisted his second drop-off point passenger with baggage, Bus #12 began rolling backwards and he had to apply the brake to stop the bus from rolling. He essentially indicated he had not placed Bus #12 in the "park" because the gear shift position indicator was broken and "we drive by guess." He stated that he reported this incident and a problem with the radio to the dispatcher and was given Bus #110 to drive. At 6:40PM he reported to his supervisor that Bus #110 was leaking oil and requested another bus to drive. The Complainant states that he was assigned Bus #12 again, explained that the bus needed repaired to operate properly, and requested another bus to drive. He reported that the shift manager refused to assign another bus and told "if you don't drive bus number 12, you can go home." He reports that he went home "instead of operating the bus with a lot of mechanical problem(s) ... (because) I don't want take chance jeopardizing my safety and customers' safety." He states that the General Manager notified him on March 3, 2006 that he was no longer needed to work with the company.

It is noted that the other four documents attached to Complainant's response are copies of exhibits addressed in Respondent's Documentary Evidence section where relevant to the Motion for Summary Decision.

3. Respondent's Documentary Evidence in Support of Motion.

Respondent submitted a copy of EEOC Form 5(5/01), Charge of Discrimination, filed by the Complainant on June 2, 2006, alleging discrimination based on race for being discharged by Pre-Flight Parking on March 3, 2006.

Respondent submitted an unsigned typed statement of manager A. Jenkins indicating that on March 2, 2006, she noticed leaking oil on Bus #110 being driven by the Complainant, she told the Complainant to return to Bus #12, the Complainant refused to return to driving Bus #12, and when questioned by her as to why he would not drive Bus #12 the Complainant told her “the instrument panel would not show which gear he was in ... (and he was not going to drive unit 12 because he needed) “the proper tools for the job.”

Respondent submitted an unsigned statement of manager E.D. Dunson indicating on March 2, 2006, the Complainant told him he did not want to use Bus #12 because of the little red indicator that shows the unit is in park, reverse, neutral, and drive was broken.

By its Statement of Undisputed Material Facts in Support of Its Motion for Summary Decision, the Respondent does not dispute that the Complainant was hired on May 8, 2000, to work as a bus driver transporting customers to and from the Atlanta, Georgia, Hartsfield airport; that Sherrod McBride is a shift supervisor for Respondent; that Celeste Head is a shift supervisor for Respondent; that Erroll Dunson is a shift supervisor for Respondent; that Anita Jenkins is a shift supervisor for Respondent; that the red-line gear shift indicator on Bus #12 had not functioned properly for some time prior to March 2, 2006; and that on March 3, 2006 Respondent terminated Complainant’s employment.

DISCUSSION

In evaluating the Respondent’s Motion for Summary Decision, the issue is whether the Complainant has established a prima facie case under the STAA when the evidence is evaluated in a light most favorable to the Complainant. Credibility of the Complainant is not an issue at this phase of the proceeding and the Complainant is entitled to reasonable inferences in his favor. Likewise, any defense that may be raised by the Respondent, including a work evaluation history, is not material at this phase of the proceeding. *U.S. v. One Piece of Real Property Located at 5800 SW 74th Ave., Miami, Fla.*, 363 F.3d 1099 (11th Cir. 2004); *Byrd v Consolidated Motor Freight*, 97-STA-9 (ARB May 5, 1998). If the records taken as a whole would not lead a rational trier of fact to find for the non-moving party, (Complainant in this case) there is no genuine issue for trial and a summary judgment must be granted. *Matsushita Elec. Indus. Co., Ltd. V. Zenith Radio Corp.*, 475 US 574 (1986)

To establish a prima facie case, the Complainant must show that he engaged in protected activity, that he was subjected to an adverse employment action, and that there was a causal connection between the protected activity and the adverse action (i.e.: the employer was aware of the protected activity when it took the adverse action). *Bechtel Construction Co. v. United States Sec’y of Labor*, 50 F.3d 926 (11th Cir. 1995); *Self v. Carolina Freight Carriers Corp.*, ARB No. 89-STA-9 (Jan. 12, 1990); *Clean Harbors Environmental Services, Inc. v. Herman*, 1998 WL 293060 (1st Cir. June 10, 1998); *Moon v. Transport Drivers, Inc.*, 836 F.2d 226 (6th Cir. 1987)

There is no question that the Complainant was subjected to an adverse employment action when his employment was terminated on March 3, 2006. The evidence also establishes that, prior to any confrontational events on March 2, 2006, the Complainant communicated to Respondent’s supervisors his concern that the Bus #12 red-line gear shift position indicator was not functioning

properly. However, under the facts presented in this case, the communication to his superiors of the non-functioning gear shift location red-line marker is not protected activity under the STAA.

The STAA at 49 USC § 31105 prohibits the discharge or discipline of an employee because an employee refuses to operate a vehicle that the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition. The 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 this provision the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition. See also *Yellow Freight Systems, Inc. v. Reich*, 38 F.3d 76 (2nd Cir. 1994); *Castle Coal & Oil Co., Inc. v. Reich*, 55 F.3d 41 (2nd Cir. 1995)

Here the only unaddressed alleged unsafe vehicle condition was a non-functioning gear shift location red-line marker on Bus #12. Under the facts of this case, Complainant has failed to establish that the condition of Bus #12 red-line gear shift position indicator on March 2, 2006, would create a reasonable apprehension of a real danger of accident, injury or serious impairment to health. The evidence, and reasonable inferences therefrom, establishes that the Complainant drove Bus #12 in rotation for three years with the red-line indicator not working properly; that several other drivers in rotation routinely drove Bus #12 during the three years preceding March 2, 2006, with the red-line indicator not functioning properly; and that none of the supervisors or other drivers demonstrated concern that the Bus #12 red-line indicator was a danger or serious safety hazard to themselves, passengers or the general public. Evidence showing that the Complainant drove Bus #12 for a three year period with "the red-line gear shift position indicator not functioning properly" also indicates the Complainant safely operated the bus over that period of time and properly infers the minimal concern such a condition would have on safe operation of the vehicle. The self-reported incident of Bus #12 rolling on the Complainant's first trip on March 2, 2006, did not indicate a change in operating or mechanical conditions of Bus #12 but merely the driver's failure to properly utilize the bus parking brake.

It is noted that the Annual Safety Inspection Report of January 24, 2006 on Bus #12 submitted in support of Respondent's Motion fails to indicate whether the red-line gear shift position indicator was inspected or its condition known to the inspector at the time; and, accordingly, is given no weight by this Administrative Law Judge.

After deliberation on all the evidence of record, this Administrative Law Judge finds that the Complainant's complaint of the malfunctioning red-line gear shift position indicator on Bus #12 was not a safety or mechanical condition sufficient to raise a reasonable apprehension of serious injury from a real danger of accident, injury or serious impairment to health; that the Complainant has failed to establish that his complaint of the malfunctioning red-line gear shift position indicator on Bus #12 was protected activity under the STAA; and that the Complainant has failed to establish a prima facie case of discrimination under the STAA.

The STAA provides for shifting an employee's reasonable costs and attorney fees where the employee prevails in a complaint. 29 CFR § 1978.109(a). There is no authority under the STAA to shift an employer's costs and attorney fees to the complaining employee. see *Somerson v.*

Mail Contractors of America, ARB No. 03-042 (Oct. 14, 2003); *Settle v. BWD Trucking Co., Inc.*, 92-STA-16 (Sec’y May 18, 1994). Therefore, Respondent’s request for reasonable attorney fees and costs must be denied.

RECOMMENDED ORDER

It is hereby ORDERED that:

1. Respondent’s Motion for Summary Decision is GRANTED,
2. Complainant’s Pending Complaint under the Surface Transportation Act is DISMISSED, and,
3. Respondent’s Request for Reasonable Costs and Attorneys Fees is DENIED.

A

Alan L. Bergstrom
Administrative Law Judge

ALB/jcb
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, 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