

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 01 March 2010

Case No.: 2009-STA-00056

In the Matter of

STEPHEN GOULET
Complainant

v.

TRI-TECH
Respondent

Appearances:

Stephen Goulet
Pro-Se

Lori Baggett, Esq.
For Respondent

Before: Ralph A. Romano
Administrative Law Judge

RECOMMENDED
DECISION AND ORDER

This proceeding arises under the employee protection provisions of the Surface Transportation Act (“the Act”), 49 U.S.C. § 31105, which prohibits covered employers from discharging or otherwise discriminating against an employee who has engaged in certain protected activities. The implementing regulations are set forth at 29 C.F.R. part 1978.

Mr. Goulet (“Complainant”) filed his complaint on September 16, 2008 and on June 26, 2009, OSHA issued its decision denying the complaint. Complainant appealed OSHA’s decision and requested a formal hearing. This case was assigned to me on July 25, 2009. After a continuance, the hearing was held before me on October 30, 2009 in Tampa, Florida¹ at which time both parties were given the opportunity to present testimony and other evidence.²

Final briefs were filed by February 11, 2010.

¹ The transcript of the hearing consists of 243 pages and will be cited as “Tr. at--.”

² Complainant submitted 14 exhibits which were accepted into evidence and will be cited as “CX-1” through “CX-14”. Respondent had pre-marked Exhibits 1 through 10 and will be cited as “RX-1” through “RX-10” as previously marked and received.

THE LAW

49 U.S.C. § 31105. Employee protections

- (a) Prohibitions.—(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.

Complainant testified on his own behalf, and produced two witnesses, his father, Benoit, and Jack Anderson, a former employee of Respondent. Respondent called two witnesses, both management personnel.

Complainant was hired by Respondent in September, 2001, and employed as a commercial route truck driver and also as a warehouse/inside sales person (Tr. 39, 181-2). He was fired on September 12, 2008 (Tr. 43).

Complainant argues that he was fired because of safety complaints he made throughout his employment. Respondent insists that Complainant was fired for poor performance throughout his employment.

Apparently, Complainant does not seek reinstatement to his former job, but seeks back/front wage loss (Tr. 21-23). Essentially, his theory of recovery is that because he was paying a lot of attention to safety details and demanding of management its attention to these details, he was provoking management, and thus he was fired (Tr. 66-67).

ANALYSIS

I find that Complainant engaged in activity protected under the Act. This record is replete with instances where Complainant expressed his concerns involving safety. Pallets, used to secure loads on the trucks, were often not functional, and Complainant made this known to his superiors (Tr. 16, 17). Certain books containing safety information and regulations were missing from trucks Complainant was assigned to drive, and management was alerted to this by

Complainant (Tr. 17-20). In July 2008, a rental truck trailer was needful of repair to the mud flap and rear light, and Complainant brought this to management's attention (Tr. 59-62). A tire tread needed repair, and this situation too was relayed to his boss (Tr. 64).

It is noted that, at trial, Complainant was misinformed several times that no evidence of protected activity occurring prior to March, 2008 could be presented by him.³ By Order issued February 2, 2010, Complainant was notified of this error and invited to repair whatever evidence constriction may have resulted therefrom. By letter dated February 11, 2010 (hereby admitted as composite CX 15- over Respondent's objection), Complainant presented all additional evidence of protected activity pre-dating March, 2008 which he was erroneously prevented from presenting at trial.⁴ This new evidence includes instances in 2006, in which Complainant refused to sign inspection reports (CX 15; 13 of 84), made notations of defective equipment on such reports (CX 15-14 of 85), and made additional safety complaints throughout 2003 to 2007 (CX 15; 20-84).

Respondent nowhere disputes that it was aware of these expressions of concern for safety, nor that it fired Complainant in September, 2008.

To prevail under the Act, Complainant must prove by a preponderance of the evidence that he engaged in protected activity, that the employer was aware of the activity, that the employer took adverse employment action against the complainant, and that there was a causal connection between the protected activity and the adverse employment action (emphasis added). *Schwartz v. Young's Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 01-STA033, slip op. at 8-9 (ARB Oct. 1, 2003) *Assistant Sac's v. Minnesota Corn Processors, Inc.*, ARB No. 01-042, ALJ No. 2000-STA-0044. slip op at 4 (ARB July 31, 2003). If the employee is able to establish a prima facie case, he is entitled to a presumption that the protected activity was the reason for adverse action. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). However, when a case is tried fully on the merits, the proper inquiry is whether the adverse action was motivated by a discriminatory or legitimate, non-discriminatory purpose, and there is no need to determine whether the employee has established a prima facie case. *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714-16; *Pike v. Public Storage Companies, Inc.*, 98-STA-35 (ARB Aug. 10, 1999); *Ass't Sec'y & Ciotti v. Sysco Food Co. of Philadelphia*, 97-STA-30 (ARB July 8, 1998).

For the most part, Complainant continues throughout this proceeding to insist that he was safety conscious (Tr. 45). But, to show this disposition does not alone establish that he was fired for being safety conscious! When queried about his proof relative to this crucial element of his case (Tr. 67, 69, 72, 241), he simply repeats his assertion that he was always concerned about safety. He alleges, for instance, no disparate treatment involving other employees perceived by management as poor (slow) performers who were less safety conscious than he but kept on the

³ This misinformation was no doubt occasioned by a confusion between evidence of retaliation, restricted to 180 days prior to complaint filing (See ALJ 1 @ 5, 6), and evidence of protected activity which has no time restrictions.

⁴ Two instances of alleged retaliation (bonus denials in June, 2004 and October, 2004, and demotion in June, 2007 – see pgs. 17, 19-CX 15), are found to be time-barred as allegedly occurring more than 180 days prior to complaint filing.

job. He doesn't claim that Respondent has a history of disciplining other safety conscious employees (Tr. 68).

What Complainant has clearly shown is the tension and frustration between himself and his superior, Russell Hays, generated by his record keeping problems (Tr. 145-9) and, in Hays' view, overtime excess and slowness in completing his routes (Tr. 158-162; 200) as well as his own perception of being rushed all the time (Tr. 50, 68) and lack of being appreciated despite apparent praise by some customers (Tr. 42; CX 3).

The testimony of Complainant's witnesses fails to improve Complainant's effort to establish a causal link between his safety complaints and his firing. His father merely confirms that Complainant was fearful of management due to perceived low productivity, without providing evidence that Complainant's termination was caused, in any sense, by his expression of safety concerns. Anderson, while confirming Complainant's safety consciousness and an incident involving a crude gesture by Hays (pants dropping), adds nothing to Complainant's proof threshold on causality.

I found Complainant to be a credible witness, but unable to establish retaliatory discharge. That is, he failed to establish that his firing was motivated by discriminatory, illegitimate purpose(s). There is no question that some animus existed between himself and Hays, but it has not been shown that such animus led to his termination by reason of his expression of safety concerns. Nor has it even been shown that such animus arose as a result of such expression. Hays' concern with Complainant evolved from Complainant's poor record-keeping, excessive over time when compared to other drivers, and time management problems from the onset of his employment. He gave Complainant several written and verbal warnings about these matters throughout his employment (Tr. 145-9; 154-6; 157; 158-60; 164-66; RX 2, 3, 4, 5), but was beset with Complainant's insistence that he would continue "...to do this the way [he thinks]...best" (Tr. 165) and that certain company policies were "...unfair" (Tr. 114-5). Richardson corroborates all of this, as well as the effort to correct Complainant's time management issues on a continuous basis through his employment.

What the evidence demonstrates in this case is that both Complainant and management were often not satisfied with each other. Complainant needed to do his job in his way and in his time, and in his way and his time only (Tr. 220). And management's efficiency demands to perform the work tasks within certain time frames and record-keeping constraints conflicted with Complainant's agenda. But, this scenario has not provided sufficient evidence to show that management fired Complainant, either in part or entirely, because of Complainant's expression of safety concerns.

I find that Respondent has convincingly demonstrated that Complainant was fired, not for his complaints about safety, but because of his poor performance below standards clearly and repeatedly expressed to Complainant (see, e.g. Tr. 210; 222-25).

Finally, it is specifically noted that the scope and extent of safety consciousness experienced by Complainant such that so materially affected his time management, was experienced by no other of Respondent's drivers (Tr. 179-80; 182-3; 211-12; 216; 220). This

evidence is uncontroverted in this record, and dramatically supports Respondents' assertion of non-discriminatory termination.

RECOMMENDED
ORDER

The complaint of Stephen Goulet is DISMISSED.

A

Ralph A. Romano
Administrative Law Judge

Cherry Hill, New Jersey

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.