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Issue Date: 27 April 2009

CASE NO.: 2009-STA-00011

In the Matter of:

DWIGHT TOLAND,
Complainant

v.

FIRSTFLEET, INC.,
Respondent

**RECOMMENDED ORDER GRANTING EMPLOYER'S MOTION FOR SUMMARY
DECISION**

The Background

Procedural Background

A hearing under the employee protection provisions of the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 2305, *et seq.*, ("Act") and the implementing regulations at 29 C.F.R. Parts 18 and 1978 in the above-captioned matter is scheduled to begin on June 16, 2009 in Columbus, Ohio. On April 7, 2009, Respondent's counsel filed a Motion for Summary Decision pursuant to 20 C.F.R. § 18.40. Complainant filed a Motion in Opposition to Summary Decision on April 21, 2009. On April 23, 2009, Respondent's counsel filed its Reply to Complainant's Opposition to Summary Decision.

Complainant filed a complaint with the Occupational Safety and Health Administration ("OSHA") on or about October 17, 2008. On December 12, 2008, the complaint was dismissed by OSHA. On December 26, 2008, Complainant objected to that determination, and requested a hearing before an Administrative Law Judge. Generally, Complainant alleges that Respondent terminated him because he refused to operate a commercial motor vehicle because he was too ill to drive.¹

¹ Complainant cites 49 C.F.R. § 392.3 which states, "[n]o driver shall operate a motor vehicle, and a commercial motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle."

History and Facts

Complainant began working for FirstFleet, Inc. (“FirstFleet”) on April 11, 2008. His last day of work was Saturday September 6, 2008. The following week, on September 10, 2008, Complainant called FirstFleet’s Benefits Representative and reported that he was unable to work due to a non-work-related medical condition. As a follow-up to the conversation, FirstFleet’s Benefits Representative sent Complainant a letter stating that Complainant’s request for medical leave was approved for the period of September 7, 2008 through October 18, 2008. A short-term disability benefits (“STD”) claim form and a “Request for Family/Medical Leave” memo (“Memo”) were enclosed with letter.² (Respondent’s Motion for Summary Decision, Exhibit 1; Complainant’s Motion in Opposition to Summary Decision, Exhibit 1).³

On September 26, 2008, Complainant spoke with FirstFleet’s Director of Human Resources and Risk Management (“Director”). During the conversation, Complainant discussed his medical condition with the Director and told Director that he did not have a doctor’s excuse for the period of September 7, 2008 to September 26, 2008. The Director told Complainant that company policy required a medical excuse for absences greater than three days and the Complainant was given until October 3, 2008 to provide a written medical excuse. He was further told that if he did not provide a medical excuse, FirstFleet would consider him to have voluntarily resigned. Complainant states that he told Director that per the September 11, 2008 company letter and enclosures he did not have to provide a medical excuse. The Director authored a letter confirming the conversation. (Respondent’s Motion for Summary Decision, Exhibit 2; Complainant’s Motion in Opposition to Summary Decision, Exhibit 2).

On September 30, 2008, a second telephone call took place between Complainant and Director. STD benefits were discussed. That same day or one day later, on October 1, 2008, Complainant faxed two documents to Director: a progress note from Mt. Carmel St. Ann’s Hospital and a letter from Dr. Linda Strout, with Ohio State Medical Center, wherein Dr. Strout requested that Complainant be excused from work from September 30, 2008 to a date to be determined in the future. (Respondent’s Motion for Summary Decision, Exhibits 3 and 4).

The Director wrote Complainant a second letter on October 3, 2008, wherein she informed Complainant that the October 1, 2008 letter from Dr. Strout did not excuse his absence from September 7, 2008 through September 30, 2008. Director also reminded Complainant that he had failed to provide a medical excuse by October 3, 2008 as set forth in the September 26, 2008 letter. The October 3, 2008 letter states that company policy requires a medical excuse for absences of greater than three days. The letter further states that Complainant will be allowed leave for the entire period of September 7, 2008 through October 18, 2008 if he provides a medical excuse for the entire period and that if he fails to return to work after the expiration of the leave, he will be terminated. (Respondent’s Motion for Summary Decision, Exhibit 5; Complainant’s Motion in Opposition to Summary Decision, Exhibit 5).

² Complainant asserts that he did not receive the Memo until September 17, 2008.

³ FirstFleet’s Employee Handbook has been submitted by the Respondent as Exhibit 7 in support of its Motion for Summary Decision.

On October 14, 2008, the Complainant was told by the Director, during a telephone conversation, that he had until October 18, 2008 to provide a written medical excuse. Otherwise, his employment would end. On October 20, 2008, the Director sent a letter to Complainant terminating his employment, effective October 18, 2008. The Director stated that Complainant was being terminated due to his failure to provide evidence of excused off duty status for September 7, 2008 through September 30, 2008 by October 18, 2008. (Respondent's Motion for Summary Decision, Exhibit 6).

Respondent's Contentions

FirstFleet argues that its Motion for Summary Decision should be granted because the Complainant was terminated for failing to provide a physician's note in support of his taking medical leave and for failing to return to work after the expiration of the medical leave. In sum, FirstFleet's main argument is that the Complainant was fired for a legitimate non-discriminatory reason. Respondent also argues that Complainant was never required to operate a commercial motor vehicle.

Complainant's Contentions

Complainant opposes the Motion for Summary Decision averring that he was not required to provide a medical excuse for his absence. In support of this, Complainant cites to the Memo enclosed with the September 11, 2008 letter. Complainant also argues that he did not receive the STD benefits which he was entitled to.

The Law

Surface Transportation Assistance Act

The employee protection provision of the Act prohibits an employer from discharging, disciplining or otherwise discriminating against an employee with respect to the employee's pay, terms or conditions of employment based upon the following reasons: the employee has filed a complaint related to a violation of a commercial motor vehicle safety regulation or order; the employee has refused to operate a vehicle because the operation of the vehicle violates a regulation or standard related to commercial motor vehicle safety; or the employee refuses to operate a vehicle because he has a reasonable fear of serious injury to himself or the public because of the vehicle's unsafe condition. 49 U.S.C. § 31105(a)(1). 49 U.S.C. § 31105(a)(2) states that "the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition" to recover under 49 U.S.C. § 31105(a)(1)(B)(ii).

To prevail a claimant must prove by a preponderance of the evidence that: (1) he engaged in protected activity; (2) the employer was aware of the protected activity; (3) the employer discharged, disciplined, or discriminated against him; and (4) the protected activity was the reason for the adverse action. *Calhoun v. United Parcel Service*, ARB No. 04-108, ALJ No. 2002-STA-31 (ARB September 14, 2007). A respondent may rebut this prima facie showing by producing evidence that the adverse action was motivated by a legitimate nondiscriminatory reason. The complainant must then prove that the proffered reason was not

the true reason for the adverse action and that the protected activity was the reason for the action. *See Byrd v. Consolidated Motor Freight*, 97-STA-9 (ARB May 5, 1998); *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993).

Upon finding that the Act has been violated, a Respondent may be ordered to take affirmative action to abate the violation, and to pay compensatory damages. 49 U.S.C.A. § 31105(b)(3)(A). A complainant may be awarded compensatory damages for mental pain and suffering, embarrassment, and other consequences related to the violation. *Scott v. Roadway Express, Inc.*, ARB No. 99-013, ALJ No. 1998-STA-8 (ARB July 28, 1999). *See also* 49 U.S.C.A. § 31105(b)(3)(A).

Summary Judgment

Any party may move, with or without supporting affidavits, for summary decision on all or any part of a proceeding. 29 C.F.R. § 18.40(a). The Administrative Law Judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that the moving party is entitled to summary decision. 29 C.F.R. § 18.40(d).⁴

The Administrative Review Board has offered specific guidance on the issue of summary decision. In *Reddy*, the Board announced the following procedure for adjudicating such motions:⁵

Once the moving party has demonstrated an absence of evidence supporting the nonmoving party's position, the burden shifts to the nonmoving party to establish the existence of an issue of fact that could affect the outcome of the litigation. The nonmoving party may not rest upon mere allegations, speculations, or denials in his pleadings, but must set forth specific facts in each issue upon which he would bear the ultimate burden of proof. If the nonmoving party fails to sufficiently show an essential element of his case, there can be no genuine issue as to any material fact since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Reddy* at 4-5.

The Board further emphasized that, in a summary decision ruling, the evidence must be viewed in the light most favorable to the nonmoving party. *Id.* at 5. Additionally, the summary decision ruling shall not include a weighing of the evidence or determination of the truth of the matters asserted. *Id.*

Therefore, the Board has put forth a two-step burden-shifting process, whereby summary decision may only be granted if, given the parameters stated above, the moving party meets its burden AND the nonmoving party fails to meet its own. Conversely, if EITHER the moving

⁴ In *Reddy v. Medquist, Inc.*, No. 04-123 (September 30, 2005), the Administrative Review Board ("Board") elaborated on the meaning of "genuine issue of material fact." It stated, "[a] 'material fact' is one whose existence affects the outcome of the case. A 'genuine issue' exists when the nonmoving party produces sufficient evidence of a material fact so that a fact-finder is required to resolve the parties' differing versions at trial. Sufficient evidence is any probative evidence." *Reddy* at 4.

⁵ The Board noted that, because it reviews issues of law *de novo*, its procedure for reviewing a grant of summary decision is the same as the Administrative Law Judge would follow in ruling on the motion.

party fails to meet its burden OR the nonmoving party succeeds in meeting its burden, summary decision must be denied.

Discussion of Facts and Law

As previously stated, FirstFleet argues that its Motion for Summary Decision should be granted as the complainant was terminated because he did not provide a medical excuse justifying a portion of his leave of absence and could not return to work at the expiration of the available leave.⁶

FirstFleet's Motion for Summary Decision is granted because the complainant has failed to show that a material issue of fact exists on the ultimate question of whether his protected activity was a contributing factor in FirstFleet's decision to terminate his employment. FirstFleet has demonstrated an absence of evidence supporting the complainant's position and the complainant has failed to establish an issue of fact that could affect the outcome of the case.

As previously stated, FirstFleet asserts, as its legitimate non-discriminatory reason for the Complainant's termination, that the Complainant failed to provide a written medical excuse for the entire period in which he was on medical leave and for failing to return to work at the end of the medical leave. In support of its Motion, FirstFleet has attached two letters addressed to the complainant stating that a medical excuse for the entire leave period is required. The letters additionally state that a failure to provide a medical excuse will result in voluntary resignation and that a failure to return to work after the leave period will result in termination. FirstFleet's Motion also details several conversations wherein Complainant was told the same.

Complainant has not disputed the facts as set forth by FirstFleet. He acknowledges that he was told numerous times by telephone and letter that he was required to provide a written medical excuse.⁷ Complainant admits that he did not provide a medical excuse for the period of September 7, 2008 through September 30, 2008. However, Complainant maintains that he was not required to provide a medical excuse for his absence per the September 11, 2008 letter and Memo enclosure. Complainant relies on the Memo which states that medical certification of a serious health condition is not required.

The above facts provide no indication that Complainant was fired in retaliation for refusing to drive because he was too ill. Complainant was told on numerous occasions that company policy required that he provide a medical excuse and he failed to do so. Complainant's reliance on the Memo is misplaced. The issue in the case *sub judice* is whether Complainant was terminated in retaliation for engaging in protected activity, not whether he was required to provide a medical excuse.⁸ Additionally, the Memo states that the complainant is not eligible for leave under the Family Medical Leave Act, and therefore, the document is not applicable to his

⁶ For purposes of Summary Decision, the Complainant is treated as having established a prima facie case under the Act.

⁷ A letter from Dr. Stout excusing the complainant from work from October 1, 2008 to a future date was received by the employer. This excuse, however, did not cover the entire period the complainant was on leave.

⁸ Furthermore, there is no allegation that FirstFleet concocted the requirement to retaliate against Complainant for his protected activity and there are no facts to support such an allegation.

situation. Complainant was also told on several occasions subsequent to the Memo that a medical excuse for the entire leave period was indeed required.

Complainant devotes much time in his Motion addressing his non-receipt of STD benefits. To the extent Complainant alleges a denial of such benefits in retaliation for engaging in protected activity, Complainant has brought forth no facts to support the allegation. Any other claims related to the denial of STD benefits fall outside the purview of this case.

Conclusion

In summary, I find that FirstFleet has carried its burden of showing that no issue of material fact exists as to ultimate question of whether Complainant's protected activity contributed to FirstFleet's decision to termination his employment and that FirstFleet is entitled to decision on this issue as a matter of law. Complainant has failed to carry his burden of setting forth specific facts from which some issue of material fact could be discerned. Therefore, FirstFleet's Motion for Summary Decision should be granted.

RECOMMENDED ORDER

It is hereby ORDERED that the Respondent's Motion for Summary Decision be GRANTED and the Complainant's complaint be DISMISSED. It is FURTHER ORDERED that the hearing scheduled to begin on June 16, 2009, in Columbus, Ohio is cancelled.

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RICHARD A. MORGAN
Administrative Law Judge

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.