PUBLICATION

Safety First? When Safety and Employment Laws Collide

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In keeping with the old adage "Safety first!" employers in certain industries are quick to put safety concerns and compliance with those laws and regulations governing safety above a conservative compliance with employment laws. Indeed, in January 2015, the Eleventh Circuit supported this practice in its *Jarvela v. Crete Carrier Corporation* decision. There, a commercial truck driver's personal physician diagnosed him with alcoholism. As a commercial driver, he was subject to Department of Transportation (DOT) regulations, which prohibit anyone with a "current clinical diagnosis of alcoholism" from driving commercial trucks. Further, his employer's company policy refused to employ anyone who has had a diagnosis of alcoholism within the past five years. Accordingly, the employer terminated the driver's employment, citing as reasons both the DOT regulations and its company policy. When the employee sued for violations of the ADA and FMLA relating to the company's refusal to accommodate his disability or provide him necessary time off work, the Eleventh Circuit Court of Appeals upheld summary judgment in the employer's favor on both claims.

Ruling for the employer, the Eleventh Circuit agreed that the employee's alcoholism disqualified him as a commercial truck driver under the DOT regulations. As set forth in the opinion:

First, 49 C.F.R. § 391.11(a) forbade Crete to permit Jarvela to drive a commercial motor vehicle if Jarvela was not "qualified to drive a commercial motor vehicle." Second, 49 C.F.R. § 391.41(a)(3)(i) said that Jarvela had to "meet[ ] the physical qualification standards in paragraph (b)" of Section 391.41. Because one of those "qualification standards in paragraph (b)" of Section 391.41 was that Jarvela have "no current clinical diagnosis of alcoholism," Jarvela then could not perform an essential function of Crete's job description (and, indeed, Crete could not allow him to drive a commercial motor vehicle), unless he had "no current clinical diagnosis of alcoholism."

Because the employee was not "qualified" to drive under the DOT regulations, his termination did not violate the ADA (the Eleventh Circuit also affirmed summary judgment in favor of the employer on the FMLA claims as well).

Fast-forward one year, and on January 4, 2016, the Eighth Circuit reached a different result in *Nichols v. Tri-Nat'l Logistics, Inc.* The plaintiff, also a commercial truck driver, was first hired by the defendant employer in August 2011. Within three weeks of being hired, she was cited for non-operational tail lights and turn signals, stuck her truck in the mud and later damaged the door of the trailer she was driving. She was terminated after the employer determined both accidents were preventable.

The employer rehired her in October 2011, but informed her that she could not drive alone for safety reasons, and was responsible for finding her own driving partner. Her first driving partner was a woman, who testified Nichols took her hands and eyes off the road to use her cell phone while driving, used unapproved routes, had problems connecting her tractor to the trailer and forgot to latch the trailer doors. Her second and third driving partners also complained about her driving safety, and during that time she receiving a citation for driving through a stop sign and causing a three-car accident.

In May 2012, the plaintiff began driving with her fourth driving partner, whom she later contended sexually harassed her on multiple occasions during a ten-day period. She made numerous complaints to the company's

safety department about the harassment, but she was told another driver was not available to drive with her. On May 31, following another complaint regarding the sexual harassment, the plaintiff was assigned a fifth driving partner.

After about three weeks of driving with the plaintiff, the fifth driving partner advised management that she drove over the speed limit, kept her tractor brakes on, failed to anticipate traffic light changes, ran at least one red light and talked on her handheld cellphone while driving. Following this complaint regarding the plaintiff's safety, she was terminated for safety violations. The plaintiff subsequently filed suit, claiming her termination was retaliation for complaining about the sexual harassment, and violation of the Arkansas Civil Rights Act and Fair Credit Reporting Act regarding her background check.

The district court granted the defendant's Motion for Summary Judgment, but the Eighth Circuit reversed and remanded, in part, because the District Court refused to consider evidence of harassment that occurred during rest periods. However, in its analysis, the Eighth Circuit does not address the safety violations for which the employer contends the plaintiff was ultimately terminated.

Besides the claims asserted, there are some apparent differences between *Jarvela* and *Nichols* that may explain the different results. First, the driver in *Jarvela* was disqualified from driving per DOT regulations. It is unclear whether the *Nichols* driver's safety infractions disqualified her under DOT regulations, but, if it did, perhaps that fact would have bolstered the employer's defense that she was terminated for safety violations. Second, the driver in *Jarvela* was terminated almost immediately after he disclosed his alcoholism diagnosis. The *Nichols* driver had already been terminated one time for unsafe driving, re-hired and then allowed to continue driving even after three driving partners complained about her safety and asked to be reassigned. Allowing the plaintiff to continue driving despite safety violations weakens the employer's argument that her termination was based on safety and not in retaliation for her recent complaints. Also, had the employer terminated the plaintiff immediately when the safety issues resurfaced, the facts at issue in the lawsuit might not have transpired, so there likely would not have been a lawsuit.

The lessons learned from these two cases are that in order to rely on safety regulations and laws to essentially "trump" employment laws to protect employers when taking adverse employment actions, (1) the terminable conduct must truly be derivative or expressly addressed by a safety law or regulation, and (2) employers must act swiftly if the termination truly relates to safety concerns.