



Issue Date: 25 July 2005

CASE NO.: 2004-STA-17

In the matter of:

JACK D. HARRIS, JR.
Complainant

v.

ALLSTATES FREIGHT SYSTEMS
Respondent

RECOMMENDED DECISION AND ORDER GRANTING MOTION FOR SUMMARY
JUDGMENT AND CANCELLING HEARING

This case arises under the Surface Transportation Assistance Act, 49 U.S.C. § 3110. A hearing has been scheduled before the undersigned in Cleveland, Ohio on August 3, 2005. On June 30, 2005 the Respondent filed a Motion for Summary Judgment. Complainant was granted an extension until July 21, 2005 to file a response and filed a timely response.

Complainant filed a complaint under the Act alleging that he had been terminated by Respondent on July 14, 2003 for refusing to transport a load of roofing material from Twinsburg, Ohio to the Boston, Massachusetts area because it would cause him to violate the Hours of Service regulations at 49 CFR § 395.3. On the morning of July 14, 2003, Complainant received a telephone call from Respondent's dispatcher, Julie Ward-Geisse, assigning him the load of freight from Twinsburg to Boston. Deposition of Complainant at 8, Affidavit of Julie Ward-Geisse. Complainant testified that he asked her if other loads were available because he did not like the rate of pay. Depo. of Complainant at 9. Complainant did not tell Ms. Ward-Geisse that he was declining the load because it would force him to violate the hours of service regulation. He testified that "the issue of work hours never came up in that conversation." Id at 23. See also Complainant's affidavit, affidavit of Ward-Geisse. John Ward, Respondent's president, then got on the phone and discharged Complainant. Affidavit of John Ward.

A motion for summary judgment under the STAA is governed by 29 CFR § 18.40. The non-moving party may not rest upon mere allegations or denials of such pleading but must set forth specific facts showing that there is a genuine issue of fact for the hearing. The party opposing summary judgment must present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Anderson v. Liberty Lobby*, 477 U. S. 242, 256-257 (1986). The determination of whether a genuine issue of material fact exists must be made in the light most favorable to the non-moving party. *Agristor Leasing v. Farrow*, 826 F. 2d 732, 734 (8th Cir. 1987).

Section 31105(a)(1) provides that:

A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because:

(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;

To make a *prima facie* case under the Act, the complainant must show that he engaged in protected activity, that he was subjected to an adverse employment action, that Respondent was aware of his protected activity when he took the adverse employment action, and in addition he must raise an inference that his protected activity was the likely reason for the adverse employment action. *Mace v. Ona Delivery Systems, Inc.*, 91-STA-10 (Sec'y Jan 27, 1992).

Complainant stated in his affidavit in response to the Motion that he asked Respondent's dispatcher if other loads were available because his previous experience with such loads had resulted in violation of the hours of service regulation. His statement is in direct contradiction to his deposition testimony that he did not want the load due to the rate of pay. However, even assuming that Complainant asked for another load due to his concerns about violating DOT regulations, he did not convey his concerns to Respondent's dispatcher or president. A complainant has made out a *prima facie* case only where the respondent was aware of his protected activity. See *Anderson v. Eagle Carriers, Ltd.*, 1997-STA-33 (ARB Apr 16, 1999), *Greathouse v. Greyhound Lines, Inc.*, 92-STA-18 (Sec'y Dec. 15, 1992), *Melton v. Morgan Drive-Away, Inc.*, 90-STA-41 (Sec'y Apr 26, 1991). Complainant admitted that Ward discharged him before he was able to express any concerns about violating the hours of service regulation, and therefore Respondent was unaware of any protected activity Complainant may have engaged in. Interpreting the facts most favorably to the non-moving party, I find that Complainant has not made out a *prima facie* case under the Act. The Motion for Summary Judgment will therefore be granted.

RECOMMENDED ORDER

IT IS ORDERED THAT Respondent's Motion for Summary Judgment is GRANTED and that Complainant's complaint is DISMISSED.

IT IS FURTHER ORDERED THAT the hearing scheduled for August 3, 2005, in Cleveland, Ohio be, and it is hereby, CANCELLED.

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DANIEL L. LELAND
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210. 29 C.F.R. § 1978.109(a). The parties may file with the Administrative Review Board, United States Department of Labor, briefs in support of or in opposition to Recommended Decision and Order within thirty days of the issuance of this Recommended Decision unless the Administrative Review Board, upon notice to the parties, establishes a different briefing schedule. 29 C.F.R. § 1978.109(c).