U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk - Suite 204
Newport News, VA 23606

(757) 591-5140
(757) 591-5150 (FAX)

Issue Date: 09 January 2014

Case No.: 2013-STA-00013

In the Matter of:

FERNANDO D. WHITE, *pro se*,

Complainant,

v.

CARL PERRY ENTERPRISE, INC.,

Respondent.

DECISION AND ORDER – GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION AND ORDER DISMISSING THE COMPLAINT

This proceeding arises from a complaint filed under the provisions of Section 31105 of the Surface Transportation Assistance Act of 1982, U.S. Code, Title 49, §31105, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53 ("STAA") and is governed by the implementing Regulations found in the Code of Federal Regulations, Title 29, Part 1978 and Part 18. The claim was referred to the Office of Administrative Law Judges for formal hearing upon appeal by Complainant of the July 13, 2012 Occupational Safety and Health Administration determination that "there is no reasonable cause to believe that Respondent violated 49 U.S.C. §31105.

It is specifically noted that both Parties continue to proceed without representation. This is an initial STAA event for Respondent. Complainant has an extensive background in STAA proceedings as a pro se complainant[1].

[1] *F. White v. Schneider National Bulk*, OALJ Case No. 2013-STA-0047 (pending before OALJ); *F. White v. Carl Perry Enterprise, Inc.*, OALJ Case No. 2013-STA-00013 (pending before OALJ); *F. White v. American Mobile Petroleum, Inc*., OALJ Case No. 2012-STA-00013 (pending before OALJ); *F. White v. Action Expediting, Inc.*, OALJ Case No. 2011-STA-00011 (ALJ, Oct. 31, 2012) - denied; *F. White v. Expert Moving and Delivery, Inc.*, OALJ Case No. 2009-STA-00063 (ALJ, Feb. 16, 2012), ARB Case No. 10-043 (Oct 26, 2011) – dismissed for bankruptcy; *F. White v. Salson Logistics, Inc*., OALJ Case No. 2009-STA-00065 (ALJ, Nov. 23, 2009), ARB Case No. 10-044 (May 27, 2010) – settled; *F. White v. Gemini Traffic Sales, Inc*., OALJ Case No. 2007-STA-00013

On August 20, 2013 Respondent filed a written request to dismiss the complaint with supporting attachments, including e-mail transmissions to and from the Complainant; and disputes that the Complainant was fired as alleged by the Complainant. The Respondent avers that the request to dismiss the complaint and the attached documents were sent to the Complainant by electronic mail on August 20, 2013.

By Order of September 24, 2013, the Complainant was notified that the Respondent had filed a Motion for Summary Decision with supporting documents; what possible adverse action could result if the Respondent did not file a response to the Motion for Summary Decision; and that any response must be filed no later than 4:00 PM, Monday, October 21, 2013.

On October 18, 2013, the Complainant filed a request to extend the response due date to November 17, 2013. For reason set forth in the Order issued October 22, 2013, the time to file Complainant's response was extended to November 12, 2013. The Complainant filed his response, with supporting documents, on November 12, 2013.

STATUTORY FRAMEWORK

Review of the administrative file and filings by the Parties reveals that this cause of action arose during the Complainant's employment as an over-the-road truck driver out of Decatur, Georgia. All relevant activity was within the jurisdictional area of the U.S. Court of Appeals for the Eleventh Circuit. Accordingly, the precedent of the Eleventh Circuit and the Administrative Review Board (ARB) governs this decision.

Whistleblower Protection under the STAA

"Congress amended the STAA on August 3, 2007[2] to incorporate the legal burdens of proof set forth in the Wendell H. Ford Aviation and Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. §42121(b)" *Smith v CRTS International, Inc*., No. 11-086, 2013 WL 2902809, *2 fn 1 (ARB June 6, 2013); 49 U.S.C. §31105(b). Since the complaint was filed on May 4, 2012, the post-2007 standards of proof apply.

To prove unlawful retaliation under the STAA, the Complainant must show by a preponderance of the evidence (1) that he engaged in protected activity, (2) that the employer had knowledge of the protected activity, (3) that he was subjected to an adverse employment action amounting to discharge or discipline or discrimination regarding pay, terms, or privileges of employment, and (4) that the protected activity was a contributing factor in the adverse employment action. *Ferguson v. New Prime, Inc*., No. 10-75, 2011 WL 4343278 (ARB Aug. 31, 2011); *Clarke v.*

(ALJ, Feb. 27, 2008), ARB Case No. 08-057 (Apr. 23, 2008) - settled; *F. White v. Gresh Transport, Inc*., OALJ Case No. 2006-STA-00048 (ALJ, Apr. 27, 2010), ARB Case No. 10-096 (Aug. 30, 2011) – default decision limited to non-monetary relief; *F. White v. Naturally Fresh, Inc*., OALJ Case No. 2006-STA-00016 (ALJ, Sep. 4, 2007), ARB Case No. 08-005 (Oct 31, 2007) - settled; *F. White v. J.B. Hunt Transport, Inc*., OALJ Case No. 2005-STA-00065 (ALJ, Feb. 22, 2006), ARB Case No. 06-063 (May 23, 2008) - dismissed; *F. White v. J.B. Hunt Transport, Inc*., OALJ Case No. 2003-STA-00044 (ALJ, Jun. 10, 2004), ARB Case No. 04-118 (Jan. 25, 2005) – settled.

[2] Pub.L. 110-53, 9/11 Commission Act of 2007, 121 Stat.266 §1536

Navajo Express, Inc., No. 09-114, 2011 WL 2614326 (ARB June 29, 2011). Protected activity is a contributing factor if "the protected activity, alone or in combination with other factors, affected in some way the outcome of the employer's decision." 77 FR 44127 (July 27, 2012); *Benjamin v. Citationshares Management, LLC*, No. 12-029, 2013 WL 6385831 (ARB Nov. 5, 2013) "If the employee does not prove one of these elements, the entire complaint fails." *Coryell v. Arkansas Energy Services, LLC*., No. 12-033, 2013 WL 1934004, *3 (ARB Apr. 25, 2013)

If the Complainant establishes a prima facie case under the Act, the Respondent will not be held to have violated the Act if it establishes by clear and convincing evidence that the adverse employment action was the result of events and/or decisions independent of protected activity. "Clear and convincing evidence is 'evidence indicating that the thing to be proved is highly probable or reasonably certain.'" *Coryell v. Arkansas Energy Services, LLC*., No. 12-033, 2013 WL 1934004, *3 (ARB Apr. 25, 2013) quoting *Warren v. Custom Organics*, No. 10-092, 2012 WL 759335, *5 (ARB Feb. 29, 2012); *Klosterman v. E.J. Davies, Inc.*, No. 12-035, 2013 WL 143761 (ARB Jan. 9, 2013)

If the Respondent presents evidence of a nondiscriminatory reason for the adverse action, the burden then shifts to the Complainant to prove, by a preponderance of the evidence, that the proffered reason is a mere pretext for discrimination. "A complainant need not show that protective activity was the only or most significant reason for the unfavorable personnel action, but rather may prevail by showing that the respondent's reason [for the unfavorable personnel action], while true, is only one of the reasons for its conduct, and another contributing factor is the complainant's protected activity. … Thus, if a complainant shows that an employer's reasons for its [unfavorable personnel] action are pretext, [the complainant] may, through the inferences drawn from such pretext, meet the evidentiary standard of proving by a preponderance of the evidence that the protected activity was a contributing factor [in the unfavorable personnel action]." *Bechtel v. Competitive Technologies, Inc*., No. 09-052, 2011 WL 4889269, *7 (ARB Sep. 30, 2011), *pet. denied* 710 F.3d 443 (2nd Cir. 2013) At all times involving a decision on the merits of the complaint, the Complainant bears the burden of persuading the trier of fact that he was subjected to discrimination. *Calhoun v. U.S. Dept. of Labor*, 576 F.3d 201 (4th Cir. 2009); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

Standard for Awarding Summary Decision

Summary decision is appropriate in a proceeding before an Administrative Law Judge "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 a party is entitled to summary decision." 29 C.F.R. § 18.40(d); *see also Williams v. Dallas Indep. Sch. Dist.*, No. 12-024, 2012 WL 6849447 (ARB Dec. 28, 2012). "At the summary decision stage of a STAA case, the ALJ assesses the evidence for the limited purpose of deciding whether it shows a genuine issue as to a material fact ... If the complainant fails to establish an element essential to his case, there can be 'no genuine issue as to a material fact' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Coates v. Southeast Milk, Inc*., No. 05-050, 2007 WL 4107740, *3-4 (ARB Jul. 31, 2007)

For whistleblower complaints, the Administrative Review Board has held that the papers filed by a pro se party must be read liberally and interpreted in a manner that raises the strongest argument suggested therein. *Coates*, supra at *7. In this case, both Parties are proceeding pro se.

In evaluating whether the Respondent is entitled to a Summary Decision, all facts and reasonable inferences therefrom are considered in the light most favorable to the non-moving Complainant. *Battle v. Seibles Bruce Ins. Co*., 288 F.3d 596 (4th Cir. 2002) citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574 (1986) "However, even when all evidence is viewed in the light most favorable to the nonmoving party, the non-moving party cannot defeat a properly supported summary judgment motion without presenting 'significant probative evidence.'" *Pueschel v. Peters*, 340 Fed. Appx 858, 860 (4th Cir. 2009), *unpub*, citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 249 (1986) When the information submitted for consideration with a Motion for Summary Decision and the reply to the motion demonstrates that there is no genuine issue as to any material fact, the request for summary decision should be granted. Where a genuine question of a material fact remains, the request for summary decision must be denied. 29 CFR §§18.40 and 18.41

The first step of the analysis is to determine whether there is any genuine issue of a material fact. If the pleadings and documents that the parties submitted demonstrate the existence of a genuinely disputed material fact, then summary decision cannot be granted. Denying summary decision because there is a genuine issue of material fact simply indicates that an evidentiary hearing is required to resolve some factual questions and is not an assessment on the merits of any particular claim or defense." *Johnson v. WellPoint Cos., Inc.*, No. 11-035, 2013 WL 1182309, *7 (ARB Feb. 25, 2013).

As the ARB has earlier explained,

> Determining whether there is an issue of material fact requires several steps. First, the ALJ must examine the elements of the complainant's claims to sift the material facts from the immaterial. Once materiality is determined, the ALJ next must examine the arguments and evidence the parties submitted to determine if there is a genuine dispute as to the material facts. The party moving for summary decision bears the burden of showing that there is no genuine issue of material fact. When reviewing the evidence the parties submitted, the ALJ must view it in the light most favorable to the nonmoving party, the complainant in this case. The moving party must come forward with an initial showing that it is entitled to summary decision. The moving party may prevail on its motion for summary decision by pointing to the absence of evidence for an essential element of the complainant's claim.
>
> In responding to a motion for summary decision, the nonmoving party may not rest solely upon his allegations, speculation or denials, but must set forth specific facts that could support a finding in his favor. *See* 29 C.F.R. § 18.40(c). If the moving party presented admissible evidence in support of the motion for summary decision, the nonmoving party must also provide admissible evidence to raise a genuine issue of fact.

Williams, supra at *4, quoting *Hasan v. Enercon Servs., Inc.*, No. 10-061, 2011 WL 3307579, *3 (ARB Jul. 28, 2011).

DISCUSSION

Position of the Parties

In his May 4, 2012, complaint the Complainant "alleges that he refused to return to work until he was released by his doctor who was treating him for a work related injury … [and] that Respondent attempted to force him to return to work and when he refused he was fired." He submitted numerous e-mails, W-2 statements and other documents, several not related to the original complaint. In his Bill of Particulars filed May 1, 2013, the Complainant also complained that he notified the Respondent on May 3, 2012 that "by refusing to pay him moneys owed, provided (sic) his 2011 W2 and defrauding $3744.82 from his Social Security and Internal Revenue accounts" his rights under the STAA were being violated. The STAA at §31105(b)(1) requires that all violations of employee protected activity under the STAA must be filed "not later than 180 days after the alleged violation occurred." Since it was well over 180 days after May 3, 2012 when the Complainant filed his bill of particulars adding the additional complaint, the additional complaint was not timely filed and is not further considered.

The Respondent submits that the Complainant was not fired but was laid off due to the unavailability of work. Respondent requests that the complaint be dismissed and submitted three documents related to the Complainant's application and award of unemployment benefits by the State of Georgia for the period commencing April 15, 2012.

Material Facts in Existence

a. That Respondent is a commercial motor carrier within the meaning of the STAA is not in dispute.

b. That the Complainant was hired by Respondent as an over-the-road commercial motor vehicle truck driver on or about October 18, 2011, is not in dispute.

c. That the Complainant drove a tractor-trailer over the nation's highways is not in dispute.

d. That the Complainant did not drive a commercial motor vehicle for Respondent on or after January 3, 2012, is not in dispute.

e. That the Complainant received State worker's compensation benefits from on or about January 3, 2012 to on or about March 26, 2012 as it related to a December 2011 work-related injury is not in dispute.

f. That the Complainant submitted a copy of his commercial driver's license to Respondent on February 22, 2012, as one of two missing documents for the 2012 Annual Driver's FMCSR Compliance Review paperwork required for work is not in dispute.

g. That Dr. M. Bray-Ross issued the Complainant a Medical Examiner's Certificate on April 10, 2012 is not in dispute.

h. That the Complainant filed for State unemployment benefits on or about April 15, 2012 is not in dispute.

i. That the Complainant did not sign the April 10, 2012 Medical Examiner's Certificate until April 17, 2012 is not in dispute.

j. That the Complainant submitted a copy of his DOT Medical Card clearing him for driving duties to Respondent on April 17, 2012, as one of two missing documents for the 2012 Annual Driver's FMCSR Compliance Review paperwork required for work is not in dispute.

k. That on Saturday, April 21, 2012, the Respondent offered the Complainant driving duties that were to commence on Tuesday, April 24, 2012, is not in dispute.

l. That the Complainant followed Respondent's direction to contact T. Elder on Monday, April 23, 2012 to "find out what you need to do to be able to go out Tuesday" is not in dispute.

m. That the Complainant did not begin a driving assignment for Respondent on Tuesday, April 24, 2013 after talking to T. Elder is not in dispute.

n. That the Respondent had contacted T. Elder on Wednesday, April 25, 2012 in order to ascertain what was required to get the Complainant back to work is not in dispute.

o. That the Complainant was approved for State unemployment benefits on May 3, 2012 in the amount of $197.00 per week for 14 weeks commencing April 15, 2012, is not in dispute.

p. That the reason for the State unemployment benefits were being paid was "You were let go by your employer because there was no work to do. You are unemployed due to a lack of work. You can be paid unemployment." is established by State documents.

q. It is officially noticed that 14 weeks of unemployment benefits commencing on Sunday, April 15, 2012 would end on Saturday, July 21, 2012.

r. It is officially noticed that the unemployment benefits program for the State of Georgia is governed by the Official Code of Georgia Annotated (OCGA) at Title 34, Chapter 8. Under the program, unless the Commissioner determines otherwise, an individual is disqualified from receiving unemployment benefits from the State if the individual left the most recent employer voluntarily without good cause or if the individual has been discharged or suspended from employment by the most recent employer for various reasons, including failure to discharge duties for which employed, failure to obey rules and regulations, physical assault or bodily injury to another employee, theft of money or goods, absenteeism without justification, and violating drug-free workplace policies, OCGA §34-8-194.

s. It is officially noticed that, with regard to the State of Georgia unemployment benefits program, OCGA §34-8-256(a) provides –

> "Any person who knowingly makes a false representation or knowingly fails to disclose a material fact to obtain or increase any benefit or payment under this chapter or under an employment insurance act of any other state or government, either for himself or herself or for any other person, whether such benefit or payment is actually received or not, shall upon conviction be guilty of a misdemeanor. Each such act shall constitute a separate offense. However, if a false representation or failure to disclose a material fact occurs with respect to more than one claim, which claim was made in more than one benefit year, or if the benefits received under this chapter which were the subject of a false representation or failure to disclose a material fact exceed $4,000.00, any such person shall upon conviction be guilty of a felony and shall be punished by imprisonment for not less than one nor more than five years or fined not less than $1,000.00 or shall be subject to both such fine and imprisonment."

Essential Elements of Violation of §31105 of the STAA not in Evidence

a. When the evidence is view in the light most favorable to the Complainant, he has failed to demonstrate the existence of the essential alleged element, that his employment was terminated on May 3, 2012.

   The Complainant has established that he was not cleared to drive until Dr. Bray-Ross, M.D. issued the Complainant a Medical Examiner's Certificate on April 10, 2012. He submitted a copy of this certificate to Respondent on April 17, 2012 and was immediately thereafter directed by Respondent to contact T. Elder to ascertain what he would be required to do in order to begin driving again on Tuesday, April 24, 2012. No further evidence was submitted as to the reason(s) the Complainant did not begin driving again on or after April 24, 2012.

   The Complainant established that he had applied for unemployment benefits on April 15, 2012, before he signed Medical Examiner's Certificate and submitted a copy to Respondent as part of his 2012 Annual Driver's FMCSR Compliance Review. The State certificate awarding the Complainant unemployment benefits on May 3, 2012 affirms the Respondent's position that the Complainant's employment had not been terminated. The Complainant's acceptance of State unemployment benefits further contradicts his allegation that his employment had been terminated for refusing to drive before being medically cleared to drive on April 10, 2012, since his acceptance of State unemployment benefits would be a criminal offense under Georgia law had his employment been terminated. The State unemployment Quarterly Statement for the period ending June 30, 2012 indicates that the Complainant collected his entire 14 weeks of unemployment benefits.

b. When the evidence is viewed in the light most favorable to the Complainant, he has failed to demonstrate the existence of the essential alleged element, that his alleged refusal to drive before he was cleared by medical personnel was a contributing factor to an adverse employment action.

   The Complainant established that he was not medically cleared to return to driving duties in 2012 until Dr. Bray-Ross, M.D. issued the Complainant a Medical Examiner's Certificate on April 10, 2012. The evidence also demonstrates that after the Complainant submitted a copy of the last document required for his 2012 Annual Driver's FMCSR Compliance Review on

April 17, 2012, Respondent attempted to arrange for the Complainant to return to driving duties as of Tuesday April 24, 2012. The evidence also demonstrates that the Respondent began actions to return the Complainant to driving status on April 25, 2012, after the Complainant notified Respondent that he had difficulties with T. Elder assigning driving duties when contacted on April 23, 2012 as directed by the Respondent. Such actions contradict Complainant's allegation of termination for refusing to drive until medically cleared to return to driving duties.

Additionally, there is no evidence to suggest that Respondent directed the Complainant to drive commercial vehicles between January 3, 2012 and the April 17, 2012 submission of the Complainant's Medical Examiner's Certificate clearing the Complainant to return to driving duties.

The Complainant's April 15, 2012 application for unemployment benefits and the State certificate awarding the Complainant unemployment benefits on May 3, 2012 affirms the Respondent's position that the Complainant's employment had not been terminated for any refusal to drive until medically cleared, as alleged by the Complainant.

Respondent is entitled to a Decision and Order on Summary Decision Dismissing the Complaint

The original complaint in this case is –

> "Complainant alleges that he refused to return to work until he was released by his doctor who was treating him for a work related injury. Complainant alleges that Respondent attempted to force him to return to work and when he refused he was fired."

As noted above, if the Complainant does not prove any one of the essential elements required to establish a prima facie complaint under the STAA, the entire complaint fails. *Coryell v. Arkansas Energy Services, LLC*., No. 12-033, 2013 WL 1934004 (ARB Apr. 25, 2013) Here the Complainant has failed to demonstrate either (1) that his alleged adverse employment action of termination occurred or (2) that his refusal to drive until medically cleared was a contributing factor to the alleged adverse employment action. Accordingly, the Respondent is entitled to a Decision and Order dismissing the complaint as alleged.

ORDER

It is **ORDERED** that –

1. **Respondent's Motion for Summary Decision is GRANTED**; and ,

2. The **Complaint filed May 4, 2012 is hereby DISMISSED**.

Digitally signed by Alan L. Bergstrom
DN: CN=Alan L. Bergstrom,
OU=Administrative Law Judge, O=Office
of Administrative Law Judges,
L=Newport News, S=VA, C=US
Location: Newport News VA

ALAN L. BERGSTROM
Administrative Law Judge

ALB/jcb
Newport News, Virginia

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for

review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1978.110(b).