U.S. Department of Labor

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Issue Date: 27 August 2015

Case No.: 2015-STA-00033

In the Matter of

PETER KLOSTERMAN
Complainant

v.

BURTIS CONSTRUCTION CO., INC.
Respondent

DECISION AND ORDER GRANTING SUMMARY DECISION

This case arises under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C.A. § 31105 (Thomson/West Supp. 2012) ("STAA"), and its implementing regulations at 29 C.F.R. Part 1978, 77 FR 44121-01, 2012 WL 3041790 (F.R.) (Jul. 27, 2012). Complainant Peter Klosterman, a trucker, filed a complaint with the Occupational Safety and Health Administration ("OSHA") on July 29, 2013, alleging that Respondent Burtis Construction Company ("BCC") violated the STAA when he was assigned to operate a non-air conditioned truck on or about July 17, 2013. After completing an investigation, OSHA dismissed the complaint in its letter dated January 5, 2013. Complainant timely requested a hearing before the Office of Administrative Law Judges ("OALJ").

A Notice Of Hearing And Pre-Hearing Order was issued on March 20, 2015, scheduling this matter for hearing on July 22, 2015.

Respondent filed a Notice of Motion dated July 1, 2015 with supporting documentation including an affirmation of Respondent's counsel dated July 1, 2015 and an affidavit of Linda Bellino Richardson dated July 1, 2015, as well as a Memorandum of Law. The Notice of Motion states that Respondent is seeking either (1) dismissal of the complaint for failure to state a claim upon which relief can be granted pursuant to 29 C.F.R. 18.70 or (2) summary decision in its favor as a matter of law pursuant to 29 C.F.R. 18.72 and any other relief deemed appropriate under the law.

A recorded teleconference was held with the parties on July 8, 2015, attended by counsel for Complainant and Respondent. During the teleconference, the scheduled hearing was postponed to allow for consideration of Respondent's dispositive motion of July 1, 2015 and Complainant, through his counsel, was directed to submit his response to Respondent's

dispositive motion for receipt by no later than July 30, 2015.[1] Teleconference Transcript at 9. To date, Complainant has not submitted any response to BCC's dispositive motion.

In its Memorandum of Law, Respondent contends the following:

1. Complainant cannot establish a violation of the STAA because he was not subject to any adverse action within the meaning of the STAA.

2. Assuming he was subject to an adverse action, Complainant cannot show there is a causal connection between such action and his protected activity under the STAA.

3. A claim may not be asserted under 49 U.S.C. 31105(a)(1)(B)(ii).

I. ISSUE PRESENTED

Has Complainant raised a genuine issue of material fact regarding any essential element of his claim, making summary decision inappropriate?

II. APPLICABLE LAW

Whistleblower Protection under the STAA

Congress amended the STAA on August 3, 2007 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).[2] *Smith v CRTS International, Inc*., No. 11-086, 2013 WL 2902809, *2 fn 1 (ARB Jun. 6, 2013); 49 U.S.C. §31105(b). Because the complaint was filed on July 29, 2013, the post-2007 standards of proof apply.

The employee protection provisions of the STAA provide in relevant part:

(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 vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding;

49 U.S.C. § 31105(a).

The "Complaint" clause of the STAA protects an employee who has "filed a complaint or begun a proceeding related to a violation of a regulation, standard, or order, or has testified or

[1] Respondent's July 1, 2015 "Notice Of Motion" states that Respondent will move on some future date and time to be set for dismissal or summary decision in this matter. However, Respondent's Notice Of Motion is deemed to be Respondent's actual dispositive motion as described therein, as per discussion during the July 8, 2015 teleconference in this matter.

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

will testify in such a proceeding." 49 U.S.C. §31105(a)(A)(i). The statute covers internal complaints to supervisors as well as external complaints to government officials. *See Nix v. Nehi-RC Bottling Co., Inc.*, 84 STA-1 (Sec'y Jul. 13, 1984); *Davis v. H.R. Hill, Inc.*, 86-STA-18 (Sec'y Mar. 19, 1987); *Harrison v. Roadway Express, Inc*., 1999 STA 37 (ARB Dec. 31, 2002). Employee's complaints cannot be too generalized or informal. *Calhoun v. U.S. DOL*, 576 F.3d 201, 213-14 (4th Cir. 2009). If the "internal communications are oral, they must be sufficient to give notice that a complaint is being filed." *Jackson v. CPC Logistics*, ARB No.07-006, ALJ No. No 2006-STA-4 (ARB Oct. 31, 2008); *see Clean Harbor Env't Servs., Inc. v. Herman*, 146 F.3d 12, 22 (1st Cir. 1998) (finding that a driver "filed a complaint" when he sent letters to his superiors explaining various safety precautions he had been taking in an attempt to explain his slow pick-up times). All complaints, whether internal or external, must "relate to" safety violations. Courts have construed "relate to" broadly to encompass violations of both federal and state laws. *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 356-57 (6th Cir. 1992). However, in order to qualify for protection, the complaint must be based on a "reasonable belief that the company was engaging in a violation of a motor vehicle safety regulation." *Calhoun*, 576 F.3d at 213.

Complainant may also prevail under the "Refusal to Drive" clause of the STAA. A refusal to operate a commercial motor vehicle is protected under two provisions. The first provision, 49 U.S.C. §3115(a)(1)(B)(i), deals with "actual violations" of the law and requires Complainant to "show that the operation [of a motor vehicle] would have been a genuine violation of a federal safety regulation at the time he refused to drive." *Yellow Freight Sys. v. Martin*, 983 F.2d 1195, 1199 (2d Cir. 1993). "DOT regulations extend beyond federal motor vehicle safety regulations to include any relevant motor vehicle regulation, standard, or order." *Canter v. Maverick Transp., LLC*, 2009-STA-00054, slip. op. at 11 (ALJ Oct. 28, 2010); *see also Chapman v. Heartland Express of Iowa*, ARB No. 02-030, ALJ No. 2001-STA-35 (ARB Aug. 28, 2003). Accordingly, refusing to drive when the contemplated run would cause the driver to violate the Federal hours of service regulations is also protected activity under the STAA. *See Ass't Sec'y & Brown v. Besco Steel Supply*, 93-STA-30 (Sec'y Jan. 24, 1995); s*ee also Hamilton v. Sharp Air Freight Serv., Inc.*, 91-STA-49, slip op. at 1-2 (Sec'y Jul. 24, 1992); *Greathouse v. Greyhound Lines, Inc.*, 92-STA-18 (Sec'y Aug. 31, 1992); *BSP Trans, Inc., v. United States Dep't of Labor,* No. 97-2282 (1st Cir. 1998), *aff'g Michaud v. BSP Transp., Inc*., 95-STA-29 (ALJ Sept. 6, 1996).

Under the second "Refusal to Drive" provision, 49 U.S.C. §31105(a)(1)(B)(ii), Complainant must demonstrate that he had a reasonable apprehension of serious injury to himself or the public because of the vehicle's unsafe condition. *Eash v. Roadway Express, Inc.*, ARB No. 04-036, ALJ No. 1998-STA-28 (ARB Sept. 30, 2005). "This clause of the STAA covers more than just mechanical defects of a vehicle - it is also designed to ensure 'that employees are not forced to commit . . . unsafe acts.' " *Canter*, 2009-STA-00054, slip op. at 11 (citing *Garcia v. AAA Cooper Transp*., ARB No. 98 -162, ALJ No. 1998-STA-023, slip op. at 4 (ARB Dec. 3, 1998)). The "apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous danger of accident, injury, or serious impairment to health." 49 C.F.R. § 31105(a)(2). In determining whether a "refusal to drive" merits STAA protection, the Court must consider the totality of the circumstances surrounding the refusal. *Johnson v. Roadway Express Inc*., ARB No. 99-011, ALJ No. 1999-STA-005, slip op. at 7-8 (ARB Mar. 29, 2000).

The STAA prohibits an employer from discharging or discriminating against an employee because the employee has engaged in certain protected activity. 49 U.S.C.A. § 31105(a)(1). To prove a STAA violation, Complainant must show, by a preponderance of evidence, that he engaged in protected activity, that Employer took an adverse employment action against him, and that his protected activity was a contributing factor in the adverse action. *Williams v. Dominos Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011). If Complainant proves by a preponderance of evidence that his protected activity was a contributing factor in the adverse personnel action, Respondent can avoid liability if it "demonstrates by clear and convincing evidence" that it would have taken the same adverse action in any event. *Id.* at 5 (citing 49 U.S.C.A. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a)).

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).

Respondent will not be held to have violated the STAA if it establishes by clear and convincing evidence that the adverse employment action was the result of events 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).

Standards for Summary Decision

Summary decision is appropriate in a proceeding before an ALJ "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. § 18.72; *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).

In evaluating if Respondent is entitled to a summary decision in this matter, 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)). A party opposing a motion for summary decision "may not rest upon the mere allegations or denials of [a] pleading; [the

response] must set forth specific facts showing that there is a genuine issue of fact for the hearing." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

When the information submitted for consideration with a motion for summary decision and the reply to that motion demonstrates that there is no genuine issue as to any material fact, the request for summary decision should be granted.[3] Where a genuine question of a material fact remains, a motion for summary decision must be denied.

Undisputed Material Facts

In July 2013, Complainant, a member of local teamsters' union, was employed by BCC as a driver whose responsibilities include driving and staffing an attenuator truck at various job sites for BCC. Richardson Affidavit at 2-3, ¶¶ 4. On or about July 17, 2013, Complainant was assigned an attenuator truck for BCC which lacked air conditioning. *Id*. at 3, ¶13. Complainant was unable to exchange that truck for one with air conditioning as he had requested. *Id.*

In July 2011, while employed by BCC, Complainant submitted numerous "Driver's Inspection Vehicle Reports" ("DIVRs") outlining his concerns about equipment safety. Complainant's Pre-Hearing Statement, Exhibit ("Ex.") 1. Those DIVRs were raised at a hearing held before the OALJ in February 2013 regarding Claimant's prior STAA action against another employer. Complainant's Prehearing Statement, Ex. 2 and 3.

Findings and Analysis

When the evidence is viewed in the light most favorable to Complainant, he has failed to demonstrate the existence of the essential alleged element, i.e., that Respondent subjected him to an adverse action when he was assigned a non-air conditioned vehicle in July 2013.

In *Melton v. Yellow Transportation, Inc.,* the two member majority of the Board adopted the Title VII "materially adverse" standard which the Supreme Court applies to the anti-retaliation provisions under 42 U.S.C.A. § 2000e-3(a). *Melton v. Yellow Transp., Inc.*, ARB No. 06-052, ALJ No. 2005-STA-2 (ARB Sept. 30, 2008); *see Burlington Northern and Santa Fe Railway Co. v. Sheila White*, 548 U.S. 53 (2006). In adopting the "materially adverse" standard, the Administrative Review Board ("ARB") noted that the "purpose of the employee protections that the Labor Department administers is to encourage employees to freely report noncompliance with safety, environmental, or securities regulations and thus protect the public. Therefore, we think that testing the employer's action by whether it would deter a similarly situated person from reporting a safety or environmental or security concern effectively promotes the purpose of the anti-retaliation statutes." *Melton,* ARB No. 06-052, slip. op. at 20.

As the Administrative Review Board ("ARB") summarized:

> [N]ot every action taken by an employer that renders an employee unhappy constitutes an adverse employment action. The employee protections that the Labor Department administers are not 'general

[3] Here, Complainant did not submit a reply to Respondent's Notice of Motion as allowed during the July 8, 2015 teleconference in this matter. Nonetheless, consideration has been given to Complainant's submitted "Pre-Hearing Statement" dated March 4, 2015 with its voluminous Exhibits 1 through 5, attached.

> civility codes,' nor do they make ordinary tribulations of the workplace actionable. Actions that cause the employee only temporary unhappiness do not have an adverse effect on compensation, terms, conditions, or privileges of employment[.] . . . [O]ur task has always been, and will continue to be, to separate harmful employer action from petty, minor workplace tribulations.

Id. at *17 (internal citations and footnotes omitted); *see also Hirst v. Southeast Airlines, Inc*., USDOL/OALJ Reporter, ARB Nos. 04-116, 04-160, ALJ No. 2003-AIR-47 at (ARB Jan. 31, 2007), *available at* 2007 WL 352447, at *5.

Here, the affidavit of Linda Bellino Richardson submitted by Respondent with its Notice Of Motion indicates Ms. Richardson is the President of BCC and that the trucks used by BCC drivers are either owned by BCC or leased from third-party vendors like Hertz Rental. Richardson Affidavit ("Aff.") at ¶¶1 and 9. According to Ms. Richardson, most of the trucks owned or leased by BCC lack air conditioning and that "[i]t is not common practice at [BCC] or in the broader industry to provide air conditioned trucks to workers as a matter of right." *Id*. at ¶10. In addition, Ms. Richardson averred that BCC management does not select or assign specific attenuator trucks to drivers, but rather that the drivers themselves choose their trucks based on seniority or trucks are assigned to drivers by the union shop steward. *Id*. She maintained that, on the date at issue in July 2013, the union steward attempted to locate an air conditioned truck for Complainant at Hertz Rental, but was unsuccessful. Richardson Aff. at ¶13.

Complainant's allegations in this matter implicate the "Complaint" clause of the STAA.[4] Specifically, Complainant contends that his assignment to a truck which lacked air conditioning in July 2013 occurred because of his safety complaints or DIVRs to BCC. In 2013, Complainant also participated in OALJ proceedings regarding his prior STAA complaint involving a different employer than BCC. Complainant's Prehearing Statement, Ex. 2 and 3. In his Objections And Request For Hearing, Complainant stated that he "engaged in protected activity which is [sic] included, but was not limited to, filing a complaint related to violation of a commercial motor vehicle safety regulation or standard; refusing to operate a vehicle because its operations violated a regulation or standard related to commercial motor vehicle and had a reasonable apprehension of serious injury to himself or others because of the vehicles [sic] unsafe condition," and that he was subject to termination for such protected activity. Complainant's Objections And Request For Hearing dated February 4, 2015 at 1.

Truck assignment is determined by either the driver or the union steward, according to the undisputed statement of Ms. Richardson. Thus, there is no employer action, i.e., no action by BCC, involved in the assignment of trucks. Moreover, Ms. Richardson averred that air conditioning in such trucks is the exception rather than the rule, as the majority of the trucks used by BCC lack air conditioning. Therefore, the record does not support finding Complainant was

[4] Even assuming those allegations were meant to implicate the "Refusal to Drive Clause" of the STAA, Respondent's assertions that Claimant fails to state a claim has merit because even if Complainant possessed a "reasonable apprehension" of injury to his hearing amplification systems from operating a non-air conditioned truck, Ms. Richardson averred that Complainant neither refused to drive that truck nor was Complainant fired from BCC. Richardson Aff. at ¶¶5 and 14.

discriminated against regarding a privilege of his employment with BCC when not assigned an air conditioned vehicle on the single occasion in July 2013 at issue in this matter. Even assuming it were an action taken by the employer, the subject assignment to a non-air conditioned truck constitutes, at worst, a workplace 'tribulation' and not a materially adverse action which the STAA is intended to remedy.

As for the "termination" referenced in Complainant's Objections And Request For Hearing, Ms. Richardson averred that Complainant has not been terminated by BCC and remains currently employed by BCC. Richardson Aff. at ¶5. Again, there is no adverse employer action – an essential element of a cognizable claim under the STAA.

In his Prehearing Statement, Complainant contends the denial of an air conditioned vehicle constitutes BCC's failure to provide him with reasonable accommodation.[5] The STAA does not confer jurisdiction on the OALJ to address the issue of reasonable accommodation, so it is not appropriately raised here. Nonetheless, Complainant's mere allegation of entitlement to reasonable accommodation does not create an employment privilege under the STAA.

Even if employer action could be imputed to the union steward and even if assignment to an air conditioned truck were shown to be an employment privilege, a causal connection has not been shown between Complainant's truck assignment at issue and his protected activity. In its Notice Of Motion, Respondent appears to concede that Complainant did engage such activity under the STAA prior to the incident at issue in this matter. However, there has been no evidence proffered by Complainant to support finding the union steward was aware of that protected activity and took action regarding Complainant's truck assignment on the date at issue in July 2013 because of such activity. Evidence of a causal connection between STAA-protected activity and the adverse action is lacking.

The nonmoving party may not rest upon mere allegations, speculation, or denials of the moving party's pleadings to carry the burden of establishing there is a factual issue in the case. Rather, the non-moving party must set forth specific facts on each issue upon which he would bear the ultimate burden of proof. Here, Complainant has set forth no specific facts on the issue of adverse employment action and causal connection between such action and his STAA-protected activity.[6]

Because Complainant failed to adduce evidence countering BCC's affidavit and pleadings, he has raised no genuine issue of material fact regarding essential elements of his claim: that Respondent subjected him to an adverse employment action and that a causal connection exists between his STAA-protected activity and such action.

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[5] Presumably, Complainant refers to the protections afforded qualified individuals with disabilities under the Americans With Disabilities Act ("ADA") of 1990, Pub. L. No. 101-336, § 1, 104 Stat. 328, as amended. Enforcement of the ADA fails under the jurisdiction of the U.S. Equal Employment Opportunity Commission. There may also be applicable state and local laws which govern an employer's provision of reasonable accommodation to such qualified individuals, as well.

[6] In his Prehearing Statement, Complainant contends that Respondent "was seeking to create false complaints against" him about his work performance based on unlawful retaliatory animus, but this also constitutes mere allegation with no correlation shown to circumstances surrounding the non-air conditioned truck assignment at issue in this matter. Complainant's Prehearing Statement at 2.

III. CONCLUSION

Complainant has not presented sufficient evidence to create a genuine issue of fact that Respondent subjected him to an adverse employment action because he engaged in STAA-protected activity. Respondent is therefore entitled to summary decision in its favor.

ORDER

Complainant's complaint is DISMISSED.

SO ORDERED.

Digitally signed by LYSTRA HARRIS
DN: CN=LYSTRA HARRIS, OU=Administrative Law Judge, O=US DOL Office of Administrative Law Judges, L=CHERRY HILL, S=NJ, C=US
Location: CHERRY HILL NJ

LYSTRA A. HARRIS
Administrative Law Judge

Cherry Hill, New Jersey