



Issue Date: 27 September 2017

CASE NO.: 2017-STA-71

IN THE MATTER OF

STAN O. PEAVEY, JR.,
Pro-se Complainant,

vs.

TRANSPORT AMERICA,
Respondent

ORDER OF DISMISSAL

This proceeding arises under the Surface Transportation Assistance Act¹ (the “Act”) and the regulations promulgated thereunder.² The Secretary of Labor is empowered to investigate and determine “whistleblower” complaints filed by employees of commercial motor carriers who are allegedly discharged or otherwise discriminated against with regard to the terms and conditions of employment because they refused to operate a vehicle when it would violate a regulation, standard, or order of the United States related to commercial motor vehicles.

Procedural Background

It appears that Complainant contacted the Occupational Safety and Health Administration (OSHA) on 19 Jan 17. He identified maintenance and driving hours problems with Respondent, indicated that Respondent had been made aware of those problems, and stated that he is a former employee of Respondent. He did not allege any adverse action and specifically requested that his name not be revealed to his employer.

OSHA attempted to conduct an investigation and determine what, if any, adverse action was being alleged. On 4 Apr 17, OSHA Investigator Harrigan sent Complainant a letter noting that he had been unable to make phone contact with Complainant and that Complainant’s voicemail was full, so that he was unable to leave a message. He asked Complainant to contact him by 19 April 17. On 27 Apr 17, OSHA sent Complainant a letter noting that the investigator had attempted to contact him by phone and certified mail, but Complainant had failed to respond. On 5 May 17, Complainant wrote a letter to the Department of Labor Office of Inspector General to complain about Inspector Harrigan. On 22 May 17, Complainant responded by fax that he had

¹ 49 U.S.C. § 31105.

² 29 C.F.R. § 1978.

contacted the investigator with a call from a 254 area code landline on 9 May 17 and suggesting that instead of playing phone tag, OSHA should assign an investigator to interview him in person. On 1 Jun 17, Complainant sent a fax accusing investigator Harrigan of lying in the 4 Apr 17 letter and asking for a new investigator. On 6 Jun 17, Complainant again responded by fax that a new investigator needed to be assigned. On 9 Jun 17, OSHA sent Complainant a letter instructing him to contact the investigator within ten days of receipt of the letter to arrange for a telephonic interview. On 19 June 17, Complainant responded by fax asking that contact information for the investigator's supervisor be left on his voicemail.

On 26 Jun 17, OSHA dismissed the complaint, noting that it had been unable to determine what, if any, adverse action Complainant was alleging and was therefore unable to determine whether or not the complaint was timely or had any substantive merit. On 26 Jul 17, Complainant faxed his objection to the dismissal of his complaint and requested a hearing, noting that the OSHA investigators were dishonest and unethical and had repeatedly violated his due process rights.

The complaint was assigned to me and my staff attempted to contact Complainant by both the email address and phone numbers he provided. He did not respond, and on 17 Aug 17, I issued an order directing complainant to explain in writing the specific protected activity and adverse actions he was alleging in his complaint. I directed him to file that explanation within 30 days of receiving my order and warned him that his failure to do so could result in the dismissal of his complaint. My order was delivered to him on 23 August 17.

Applicable Law

The Act provides that:³

- (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 ... has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety ... regulation, standard, or order, or ...
 - (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, health or security;...
- b) Filing complaints and procedures.--(1) An employee alleging discharge, discipline, or discrimination in violation of subsection (a) of this section, or another person at the employee's request, may file a complaint with the Secretary of Labor not later than 180 days after the alleged violation occurred.

³ 49 U.S.C. § 31105.

To prevail on his claim, a complainant must prove by a preponderance of the evidence *that he engaged in protected activity, that the respondent took an adverse employment action against him, and that his protected activity was a contributing factor in the unfavorable personnel action*. Under the Act, an employee alleging adverse action in violation of subsection (a) must file a complaint with the Secretary of Labor not later than 180 days after the alleged violation occurred.⁴

A complaint may be dismissed where the complainant is determined to have abandoned it.⁵ It may similarly be dismissed where the complainant refuses to comply with the judge's orders.⁶

Discussion

Complainant's initial communication with OSHA indicates only that (1) there were maintenance and hours of service safety issues in Respondent's operations; (2) Respondent had been made aware of those problems; and (3) he at one time worked for Respondent. Whether or not his failure to clarify and specify that information was his fault or the fault of the investigators, the fact remains that the current record does not contain an allegation of whistleblower retaliation that would fall within the Act.

Complainant was ordered to disclose the protected communications he made, specifying what he said and when, where, and to whom he said it. He was also ordered to identify the adverse actions Respondent took against him as a result of those communications. Respondent was not required to any specific format or language, as long he explained what he said or did that constituted protected activity and what Respondent did to him because of it. Complainant was given 30 days to respond and warned that his failure to do so could result in his complaint being dismissed.

A review of the administrative file discloses a history of Complainant's contumacious and truculent conduct. His refusal to respond and provide even the most fundamental information makes it impossible for Respondent to determine exactly what allegations are being made and sabotages the judicial process. He was warned in advance that if he continued to refuse to participate, his complaint could be dismissed. Given that he engaged in the same type of behavior during his interaction with OSHA, I concluded that no lesser sanction would be useful.

⁴ 49 U.S.C. § 31105 (2010).

⁵ *Bowens v. Infrastructure*, ARB No. 08-073, ALJ No. 2008-STA-17 (ARB Mar. 30, 2009).

⁶ *Howick v. Campbell-Ewald Co.*, ARB Nos. 03-156 and 04-065, ALJ Nos. 2003-STA-6 and 2004-STA-7 (ARB Nov. 30, 2004) (factors to consider in the decision to dismiss include (1) prejudice to the other party, (2) the amount of interference with the judicial process, (3) the culpability, willfulness, bad faith or fault of the litigant, (4) whether the party was warned in advance that dismissal of the action could be a for failure to cooperate or noncompliance, and (5) whether the efficacy of lesser sanctions were considered).

Accordingly, I find that Complainant has, through his refusal to comply with my orders, abandoned his case. His complaint is dismissed for both abandonment and noncompliance.

ORDERED This 27th day of September, 2017, at Covington, Louisiana.

PATRICK M. ROSENOW
Administrative Law Judge

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, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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).

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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).