U.S. Department of Labor

Office of Administrative Law Judges
5100 Village Walk, Suite 200
Covington, LA 70433

(985) 809-5173
(985) 893-7351 (Fax)

Issue Date: 13 December 2017

Case No.: 2017-STA-00060

In the Matter of

SHERVIS R. SMITH
Complainant

v.

KAREEM TRANSPORTATION, INC. AND SERPRO LOGISITCS
Respondents

RULING ON RESPONDENTS' MOTIONS FOR SUMMARY DECISION AND ORDER OF DISMISSAL

1. Nature of Motion. This case arises under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 (STAA or Act), with implementing regulations at 29 C.F.R Part 1978. Pursuant to 29 C.F.R. § 18.72, Respondents each filed a Motion for Summary Decision on the grounds Complainant did not engage in a protected activity and Respondents did not take an adverse action against him under the STAA. In response, Complainant asserts Respondents terminated his employment after he refused to drive excessive hours.

2. Procedural History and Findings of Fact.

a. On July 20, 2017, the undersigned issued a Notice of Case Assignment and Prehearing Order. Due to Complainant's pro se status, the undersigned sent Complainant a letter confirming his intent to proceed without the assistance of counsel in this matter. Complainant returned and executed a Confirmation of Intent to Proceed Pro Se form on July 19, 2017. Complainant acknowledged that by proceeding pro se he was obligated to comply with all procedural requirements directed by the notices issued in this case.

b. The undersigned conducted a case scheduling teleconference with the parties on September 11, 2017. On September 14, 2017, the undersigned issued a Notice of Hearing Date and Filing Deadlines and scheduled the case for hearing on February 27, 2018 in Kansas City, Kansas.

c. On September 5, 2017, Complainant filed a document styled "Lawyer Conference." During the case scheduling teleconference, Complainant clarified that he intended this document to serve as his Pleading Complaint. The Pleading Complaint alleges Respondents "wrongfully

fired" Complainant because he "refused to drive illegally anymore." It generally suggests that Respondents required Complainant to drive for an impermissible and excessive amount of hours.

d. On September 25, 2017, Kareem Transportation, Inc. and Serpro, Inc. (Respondents) filed a Complaint Response. Each Complaint Response avers that Complainant cannot establish that: 1) he engaged in a protected activity, 2) Respondents were aware of a protected activity, 3) Respondents discharged, disciplined, or discriminated against him, and 4) the protected activity was the reason for an adverse action. Also on September 25, 2017, Respondents filed a Motion to Dismiss.

e. On October 2, 2017, Complainant, filed 34 pages of various documents and photographs. Some of the documents contain what appears to be video footage taken from a security camera with Kareem Transportation vehicles. It also contains documents styled "Driver's Daily Log" that details when Complainant was off duty, sleeping, driving, or on duty but not driving. The filing further included a written statement that provided: "What I'm sending you is direct proof within their fabrications." Complainant further stated this filing contained several "Bills of Lading" and photographs of Kareem Transportation trucks taken at various unidentified locations. Additionally, Complainant stated these documents "threw out their entire arguments that they claim I was never forced to violate H.O.S. I'm sending you info to prove that my packet of disclosure is true and direct." Complainant further stated his "11 days of driving has been exposed."

f. On October 5, 2017, each Respondent filed a Motion for Summary Decision. The motions are nearly identical in content. Respondents argue they were unaware of Complainant's refusal to drive more hours than permitted by U.S. Department of Transportation (DOT) regulations. Respondents attached an affidavit from Mr. Faris Alsalami, the president of Kareem Transportation. Mr. Alsalami declared:

> Kareem Transportation had no knowledge of any DOT regulations violations by Shervis Smith, including hours of service violations. Shervis Smith was required as a driver to keep an accurate log book reporting his hours of service and comply with federal regulations governing hours of service. Kareem Transportation in no way controlled the number of hours Shervis Smith was required to drive. The loads that Mr. Smith was assigned to drive did not require that Shervis Smith violate hours of service regulations. Shervis Smith was never instructed by Kareem Transportation to engage in violations of DOT Regulations, including hours of service violations. Kareem Transportation was never contacted by Shervis Smith regarding alleged hours of service violations or advised by Shervis Smith that he was ever in excess of the number of allowed hours. Kareem never took any adverse employment action against Shervis Smith. Kareem Transportation did not fire or take adverse action against Shervis Smith. Mr. Smith resigned via text message on 11/5/2016.

The affidavit further provided that Mr. Alsalami sent and received several text messages from Complainant on November 5, 2016, which were also attached to Respondents' motions. In the text messages, Complainant makes no mention or complaints about working more hours than permitted by DOT regulations. Rather, the text messages show Complainant's animosity towards Mr. Alsalami because Mr. Alsalami told Complainant he did not need to go to "UPS" on the morning of November 5, 2016. In these text messages, Complainant directed a variety of colorful and profane-laced language towards Mr. Alsalami. Complainant told Mr. Alsalami that he could "find another driver." At the end of the exchange of text messages, Complainant asked Mr. Alsalami if he needed to continue working. Mr. Alsalami asked Complainant if he wanted instead to drive the "Springfield" route. In response, Complainant used an expletive and told him to talk to his lawyer. Mr. Alsalami then told Complainant "[w]ell thank thats you last world. anyway thank. (sic)"[1] Respondents contend Complainant cannot establish he suffered an adverse action because he voluntarily resigned his employment in a November 5, 2016 text message.

g. On October 13, 2017, Complainant filed a response to Respondents' Motions for Summary Decision. Complainant does not dispute the authenticity of the text messages between him and Mr. Alsalami on November 5, 2016. Complainant stated his "goal was to get evidence threw (sic) text messages because when he gotten (sic) tired of me complaining to him over the phone, he'll get kiddish and hide behind his phone not answering my calls leaving me stuck under a DOT violation, load that was issued by him (him & Serpro, Inc.)." Complainant did not make any specific statements providing any protected activity he relies upon with a date or detailed description of the protected activity. Other than being "wrongfully fired," Complainant did specifically allege any other details surrounding the claimed adverse action that Respondents took against him in retaliation for any specific protected activity.

3. Applicable Law and Analysis.

a. *Motions for Summary Decision.* A party may move for summary decision, identifying each claim or defense - or the part of each claim or defense - on which summary decision is sought. The judge shall grant summary decision if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law. 29 C.F.R. § 18.72.

A "genuine issue" exists if a fair-minded fact-finder (the ALJ in whistleblower cases) could rule for the non-moving party after hearing all the evidence. A "material fact" is the one that "could establish an element of a claim or defense and, therefore, affect the outcome of the action." *Menefee v. Tandem Transp. Corp.*, ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 4 (ARB Apr. 30, 2010). The party moving for summary decision bears the burden of showing that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party may prevail by pointing to the absence of evidence for an essential element of the complainant's claim or by presenting admissible evidence in support of its motion. In responding to a motion for summary decision, the non-moving party may not rely solely on his allegations, speculation, or denials, but must set forth specific facts that could

[1] The undersigned interprets this typographical error from Mr. Alsalami to Complainant to mean this was Complainant's last day of work with Respondents.

support a finding in his favor. *Smith v. CRST Int'l, Inc.*, ARB No. 11-086, ALJ No. 2006-STA-031, slip op. at 2 (June 6, 2013).

If the moving party submitted evidence supporting its motion, the non-moving party must also provide admissible evidence to raise a genuine issue of fact. The burden of producing evidence "is not onerous and should preclude [an evidentiary hearing] only where the record is devoid of evidence that could reasonably be construed to support the [complainant's] claim." *Franchini v. Argonne Nat'l Lab.*, ARB No. 11-006, ALJ No. 2009-ERA-014, slip op. at 7 (ARB Sept. 26, 2011)(citing *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 400 (6th Cir. 2008)).

b. *Elements of STAA Claim.* 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. § 42121(b). *Smith v. CRTS Int'l, Inc.*, ARB No. 11-086, ALJ No. 2006-STA-031 (ARB Jun. 6, 2013); 49 U.S.C. § 31105(b). The STAA provides that a person may not "discharge," "discipline," or "discriminate" against an employee "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activities. 49 U.S.C. § 31105 (a) The legal burden of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21) governs STAA complaints. 49 U.S.C. § 31105(a)(1). To prevail on a STAA claim, a complainant must prove by a preponderance of the evidence that he (1) engaged in protected activity, (2) that his employer took an adverse employment action against him, and (3) that the protected activity was a contributing factor in the unfavorable personnel action. *Carter v. CPC Logistics, Inc.*, ARB No. 15-050, ALJ No. 2012-STA-061, slip op. at 5 (ARB Dec. 22, 2016) *citing* 49 U.S.C. § 42121(b)(2)(B)(iii). Failure to establish any one of these elements requires dismissal of the complaint. *Luckie v. United Parcel Serv. Inc.*, ARB Nos. 05-026, 054; ALJ No. 2003-STA-039, slip op. at 6 (ARB June 29, 2007).

c. *Protected Activity.* To prevail on a STAA claim, the complainant must prove by a preponderance of the evidence that he engaged in protected activity and that the respondent was aware of the protected activity. *Litt v. Republic Servs. of S. Nevada*, ARB No. 08-130, ALJ No. 2006-STA-014, slip op at 5-6 (ARB Aug. 31, 2010) *citing Regan v. Nat'l Welders Supply*, ARB No. 03-117, ALJ No. 2003-STA-014, slip op. at 4 (ARB Sept. 30, 2004).

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 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). An employee's complaint 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).

Respondents claim Complainant did not engage in a protected activity and they had no knowledge of Complainant's protected activity. Complainant's Pleading Complaint, response to Respondents' Motions for Summary Decision, and other case filings do not identify or allege a specific protected activity. Nonetheless, recognizing Complainant's pro se status, the undersigned interpreted Complainant's statements in the broadest manner possible in order to accord him the benefit of any possible doubt. In this context, the undersigned interprets Complainant's filings as asserting an allegation that he engaged in a protected activity by refusing to drive more hours than permitted under DOT regulations in contravention of 49 U.S.C. § 31105(a)(1)(B)(i)-(ii) .

A complainant may 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 deals with "actual violations" of the law and requires the 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." 49 U.S.C. § 31105(a)(1)(B)(i); *Yellow Freight Sys. v. Martin*, 983 F.2d 1195, 1199 (2d Cir. 1993). Under the second "Refusal to Drive" provision, the complainant must demonstrate that he had a reasonable apprehension of serious injury to himself or the public because of the vehicle's unsafe condition. 49 U.S.C. § 31105(a)(1)(B)(ii); *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 v. Maverick Transp., LLC*, 2009-STA-00054, slip op. at 11 (*citing Garcia v. AAA Cooper Transp.,* ARB No. 9-162, ALJ No. 1998-STA-023, slip op. at 4 (ARB Dec. 3, 1998)).

The only evidence Complainant has presented in support of his claim that he engaged in protected activity is his Pleading Complaint assertion that he "refused to drive illegally anymore." Complainant implied his refusal to drive was due to Respondents' directive that he drive for an excess of hours prohibited by applicable safety regulations. However, Complainant has not set forth any detailed specific factual circumstances concerning his refusal to "drive illegally." Notably, in the text message exchange between Complainant and Mr. Alsalami, Mr. Alsalami directed Complainant not to drive a specific route on November 5, 2016. There is no mention in the text messages or any other evidence in the record that Complainant expressed concerns to Mr. Alsalami or any other Respondent employee that his required driving hours were in excess of applicable regulations. There is also no evidence that Complainant communicated to Respondents a specific or unequivocal refusal to drive due to concerns about violating state or federal regulations at any time during his employment. To the contrary, Respondents produced an affidavit from Mr. Alsalami who declared that Complainant never contacted Respondents regarding any alleged hours of service violations or that he was driving in excess of the number of hours allowed. Complainant had the opportunity to submit additional evidence or supporting factual arguments in his response to Respondents' Motions for Summary Decision to rebut this evidence and raise a genuine dispute of material fact, but failed to do so. Consequently, the record is devoid of any evidence that could reasonably support a finding in Complainant's favor

that he communicated a protected activity to Respondents or engaged in protected activity under the STAA.

d. *Adverse Action.* Under the STAA, any discharge by an employer constitutes an adverse action. *Minne v. Star Air, Inc.*, ARB No. 05-005, ALJ No. 2004-STA-026, slip op. at 15 (citations omitted) (Oct. 31, 2007). A discharge is any termination of employment by an employer. *Id.* at 13. Under Board precedent, "except where an employee actually has resigned, an employer who decides to interpret an employee's actions as a quit or resignation has in fact decided to discharge that employee." *Id.* at 14 (citations omitted). An employee who resigns from employment without coercion has not been subjected to an adverse employment action within the meaning of STAA's whistleblower provision. *Hoffman v. NOCO Energy Corp.*, ARB Nos. 15-070, 16-009, ALJ No. 14-STA-055, slip op. at 4 (ARB June 30, 2017).

Complainant's Pleading Complaint alleges he was "wrongfully fired" and thus implicitly argues Respondents took an adverse action against him by terminating his employment. Throughout the exchange of text message between Complainant and Mr. Alsalami, Complainant directed a variety of profanities and insults towards Mr. Alsalami. Despite Complainant's insults, Mr. Alsalami told Complainant he would find an alternative route for Complaint to drive as Respondents no longer needed him to drive the route Complainant preferred or believed he would drive on November 5, 2016. After being offered an alternate route, Complainant directed Mr. Alsalami to speak with his lawyer. Respondents also submitted an affidavit from Mr. Alsalami who declared that Respondents did not terminate Complainant's employment. In response to Respondents' motions, Complainant did not refute or provide any facts or evidence to rebut Respondents' claims. Thus, the undersigned finds that Complainant voluntarily resigned his employment on November 5, 2016 in a text message. Consequently, Respondents did not engage in adverse action by terminating Complainant's employment. Because Complainant cannot establish Respondents engaged in adverse action, there is no genuine dispute of material fact and this claim must fail as a matter of law.

4. **Ruling.**

   a. Respondents' Motions for Summary Decision are GRANTED.

   b. This case is dismissed with prejudice.

   c. The hearing scheduled for February 27, 2018 in Kansas City, Kansas is cancelled.

SO ORDERED this day at Covington, Louisiana.

TRACY A. DALY
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).