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Issue Date: 17 April 2018

CASE NO.: 2017-STA-00058

In the Matter of:

DENNIS WATSON,
Complainant,

vs.

UNITED PARCEL SERVICE,
Respondent.

ORDER GRANTING SUMMARY DECISION

This is a claim under the employee-protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 ("STAA" or "the Act"). The hearing is currently set for May 3, 2018, in Denver, Colorado. Respondent United Parcel Service ("UPS") moves for summary decision in its favor, contending the undisputed facts show it did not discharge the Complainant, Dennis Watson, because he engaged in protected activity.

Procedural History

On October 24, 2017, Mr. Watson faxed a letter to the court requesting indefinite postponement of the hearing in this case, then scheduled for December 7, 2017, so he could retain counsel to represent him. On October 25, 2017, UPS filed a Motion for Summary Decision. On October 26, 2017, the court issued an Order Extending Time. Because a telephonic status conference was set for November 21, 2017, the court did not rule on Mr. Watson's request for a continuance of the hearing at that time. On its own motion, the court stayed consideration of Mr. Watson's Motion for Continuance and UPS's Motion for Summary Decision, pending the November 21 status conference, and ordered Mr. Watson "to make diligent efforts to retain counsel to represent him in this case between now and November 21, 2017." The court also observed in the order it would be "most unlikely to grant an indefinite extension" of the hearing date.

On October 28, 2017, Mr. Watson faxed a settlement demand to the court, suggesting UPS pay him one million dollars plus weekly payments of $982 "adjustable to inflation and cost of living." On October 30, 2017, the court issued a Notice of Ex Parte Communication, with a copy of Mr. Watson's letter attached, to all parties. On November 6, 2017, Mr. Watson faxed another letter to the court, suggesting OSHA's oversight of UPS was inadequate. There was no indication of service on UPS. On November 8, 2017, at the court's request, the parties conferred with the court by telephone. Mr. Watson represented himself, and Attorney Trey Overdyke III appeared for UPS. The court advised Mr. Watson to obtain counsel and cautioned him about following the applicable Rules of Procedure:

> JUDGE LARSEN: . . . I want to make sure, Mr. Watson, that you understand why the Court is treating you the way we do. . . .
>
> . . .
>
> Now, I understand that you don't have a lawyer and you've already received one order from me in which I strongly encouraged you to find a lawyer. And I've given you time until – I guess we have our next conference on the 21st of this month. And I've asked you to go out and look for a lawyer and report to me on the 21st on how that's going. I hope that you can have an attorney then.
>
> One of the reasons I'm so strongly recommending that is, as long as you are representing yourself, I have to treat you as if you knew what you were doing. I have to assume you know the rules of practice and that you're going to follow them. And I'm supposed to enforce them against you if you don't follow them.
>
> . . .
>
> So I guess I'm trying to give you a little heads up here. A lawyer can learn them a lot easier than you can. And the lawyer may already know them, in fact. And that's why it's so important for you to have a lawyer.
>
> One of the rules we have – and all court systems have a rule like this – limits what's called *ex parte* contact with the Judge. That means whenever you talk to me or whenever you send me a letter, the other side is entitled to know that you talked to me and they're entitled to know what you said. And that works the other way, too. If Mr. Overdyke were to pick up the phone and call me tomorrow morning and want to talk about this case, I wouldn't talk to him. I'd say, "Hold on. Hold on. We're not

> going to chat until Mr. Watson is here." And I'd get you on the line and we'd have a conversation. You'd be entitled to know absolutely anything he said to me about this case.
>
> Well, it works in the other direction, too. When you fax me a letter and you haven't sent a copy to UPS and Mr. Overdyke or Mr. Guiterriez or whoever it is you're dealing with over there, I'm supposed to send it back to you without reading it. And I'm not supposed to consider it.
>
> So from now on, I'm going to ask you, Mr. Watson, please not to do that. If you send me something, you must show that you've sent a copy to UPS, as well. Do you understand that?
>
> MR. WATSON: Yes, sir.
>
> JUDGE LARSEN: Okay. And that's not because I'm a jerk, although you're free to think I'm a jerk, if that's your opinion. But that's our rule and you've got to follow that.
>
> MR. WATSON: I'm actually a rule follower. I don't have a problem with that at all.
>
> JUDGE LARSEN: That's great.

(Transcript of Proceedings Held Telephonically, Nov. 8, 2017, at 5:6-8:18.)

The court told Mr. Watson where he could find the Rules of Procedure and admonished him not to fax documents to the court without prior permission. (*Id.*, at 8:19-9:3, 9:4-25.) Also on November 8, 2017, the court issued an order staying these proceedings until the November 21, 2017, telephonic status conference.

The parties next telephonically conferred with the court on November 21, 2017. Mr. Watson reported he had not yet obtained counsel. The court issued an order continuing the hearing to March 20, 2018; setting another telephonic status conference for December 20, 2017; and extending the stay of proceedings pending a further order of the court.

The parties conferred telephonically with the court again on December 20, 2017, and January 8, 2018. On both occasions, Mr. Watson reported he had conferred with various attorneys, but none had agreed to represent him in this case. On January 8, 2018, the court issued an order: 1) lifting the stay; 2) granting Mr. Watson an extension of time until February 9, 2018, to file opposition to the Motion for Summary Decision; 3) explaining Mr. Watson could defeat the motion only by submitting evidence to show a genuine issue of material fact; 4) informing Mr.

Watson that if the court granted the Motion, the court would deny Mr. Watson's claim without further hearing; and 5) continuing the hearing to May 3, 2018.

On February 3, 2018, Mr. Watson filed a six-page letter with the court "requesting a stay with unspecified extension." There was no certificate of service accompanying it. On February 9, 2018, Mr. Watson filed another letter with the court, again without proof of service, in support of his request for a stay. In response, on February 12, 2018, the court issued its Order for Determination of Pending Motions that: 1) treated Mr. Watson's letters as a single Motion for Stay; 2) allowed UPS until March 1, 2018, to oppose the Motion for Stay; and 3) extended Mr. Watson's time, on the court's own motion, until February 28, 2017, to oppose the Motion for Summary Decision, again reminding him of the need to oppose the motion with admissible evidence, and recommending he obtain counsel. Mr. Watson filed no opposition to the Motion for Summary Decision.

On March 8, 2018, the court denied UPS's Motion for Summary Decision due to insufficient evidentiary support and a failure to address the issue of retaliation. UPS submitted a Renewed Motion for Summary Decision on March 26, 2018, with an appendix of forty-five exhibits ("EX"). I review the motion de novo. Mr. Watson, again, has filed no opposition.

Discussion

Legal Standard for Summary Decision

On a motion for summary decision, the court must determine, after viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine disputes of material fact, and whether the moving party is entitled to summary decision as a matter of law. *See* 29 C.F.R. § 18.72(a); *O'Hara v. Weeks Marine, Inc.,* 294 F.3d 55 (2d Cir. 2002); *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied,* 498 U.S. 1026 (1991). The court must look at the record as a whole, and determine whether a fact-finder could rule in the non-moving party's favor. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary decision is proper "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

"[A] party cannot rest on the allegations contained in his complaint in opposition to a properly supported summary judgment motion made against him." *First Nat. Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289 (1968); *see also* Fed. R. Civ. Pro. Rule 56(e); 29 C.F.R. § 18.72(c).

> A moving party without the ultimate burden of persuasion at trial . . . has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment. In order to carry its burden of production, the moving party must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial. In order to carry its ultimate burden of persuasion on the motion, the moving party must persuade the court that there is no genuine issue of material fact.

Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Companies, Inc., 210 F.3d 1099, 1002-03 (9th Cir. 2000) (citations omitted).

Legal Standard for Unlawful Retaliation

The STAA reads in relevant part:

> (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because –
>
> (A)(i) 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 motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding; 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; or
>
> (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition;

49 U.S.C. § 31105(a).

To establish unlawful retaliation under the STAA, the complainant initially must show by a preponderance of the evidence that protected activity was a "contributing factor" in the alleged adverse personnel action. *See Beatty v. Inman*

Trucking Mgmt., Inc., ARB No. 13-039, ALJ Nos. 2008-STA-20/21 (ARB May 13, 2014). A contributing factor is "any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the [adverse personnel] decision." *Id.* (citing *Evans v. Miami Valley Hosp.*, ARB Nos. 07-118/121, ALJ No. 2006-AIR-022, slip op. at 17 (ARB June 30, 2009)). A complainant can provide either direct proof of contribution or indirect proof through circumstantial evidence. *See id.* (citing *Clark v. Pace Airlines, Inc.*, ARB No. 04-150, ALJ No. 2003-AIR-028, slip op. at 12 (ARB Nov. 30, 2006)). Circumstantial evidence may include temporal proximity, pretext, inconsistent application of policies, an employer's shifting or contradictory explanations for its actions, antagonism or hostility toward a complainant's protected activity, or a change in the employer's attitude toward the complainant after he or she engages in protected activity. *See id.* (citing *Bechtel v. Competitive Techs.*, Inc., ARB No. 09-052, ALJ No. 2005-SOX-033, slip op. at 13, 28 (ARB Sept. 30, 2011); *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 13 (ARB June 24, 2011)). If the complainant meets his or her initial burden, the burden shifts to the employer to prove by "clear and convincing evidence" it would have taken the same adverse action in the absence of the protected conduct. *See id.*

Analysis

UPS concedes it took adverse employment action when it terminated Mr. Watson. (Resp't Br. 14.) But UPS denies Mr. Watson engaged in protected activity, and denies his termination was related in any way to any protected activity. (*Id*; EX 41, ¶ 12; EX 42, ¶ 15; EX 43, ¶¶ 13-14.) Having failed to file any opposition to the Motion whatever, despite considerable leniency and repeated warnings from the court, Mr. Watson essentially admits as much.

Mr. Watson produced no evidence or argument to oppose the Motion for Summary Decision. He did not dispute any of UPS's evidence or characterizations of that evidence, so I consider these facts undisputed. *See* 29 C.F.R. § 18.72(e). These undisputed facts include no evidence suggesting UPS terminated Mr. Watson as retaliation for protected activity. The record contains no obvious temporal proximity between any potential protected activity and the termination, no evidence of pretext, no inconsistent applications of policy or explanations from UPS, and no hostility toward Mr. Watson for his criticisms of the company. Although given the opportunity, Mr. Watson has not shown a causal connection through additional evidence.

Rather, the undisputed facts show Mr. Watson's employment was replete with violations of company policy and insubordination. In May 2011, his manager reprimanded him for disregarding multiple stop signs. (Resp't Br. 2; EX 2; EX 3.) In 2012, UPS disciplined him on three different occasions for unsafe lane usage, logging more than his maximum number of miles, and receiving a speeding citation. (Resp't Br. 2-3; EX 4 - EX 8.) He received another warning for speeding in June

2013. (Resp't Br. 3; EX 9; EX 10.) In January 2014, Mr. Watson threatened to physically hurt his co-driver and disobeyed his manager's instruction to alter his route because of a high wind advisory. (Resp't Br. 3-4; EX 42 ¶ 5; EX 43 ¶ 6-8; EX 11; EX 12; EX 13.) The following month, Mr. Watson fell asleep at the wheel of his truck during an hour-long road closure. (Resp't Br. 3; EX 11.) His co-driver complained about him using racial and homophobic slurs, and temporary drivers from a staffing company began refusing assignments with UPS because of Mr. Watson's behavior. (Resp't Br. 4-5; EX 11; EX 16; EX 42 ¶ 5.) And in March 2014, a member of the public reported Mr. Watson for driving unsafely. (Resp't Br. 5; EX 41 ¶ 6; EX 15.)

UPS claims it fired Mr. Watson because of a final incident on March 2, 2014, and the record overwhelmingly supports this. (Resp't Br. 6-7; EX 41 ¶¶ 9-10; EX 21.) On that day, Mr. Watson aggressively tried to pass another car in his truck. (Resp't Br. 6; EX 42 ¶ 7; EX 20.) The other driver honked, flashed his lights, and had to move onto the shoulder of the road. (*Id.*) A state trooper pulled Mr. Watson over approximately fifteen minutes later and found he had not kept proper driving logs in violation of two regulations set by the Federal Motor Carrier Safety Administration. (Resp't Br. 5; EX 17; EX 18.) Mr. Watson did not inform his manager of these violations. (Resp't Br. 6; EX 41 ¶ 13; EX 43 ¶ 10.) UPS only became aware of them after receiving a letter from the Oregon Department of Transportation stating it never received notice Mr. Watson had corrected his violations. (Resp't Br. 6; EX 43 ¶ 11; EX 41 ¶ 7; EX 19.) UPS then began an investigation and learned Mr. Watson had also disobeyed the trooper's instructions to stay in his cab during the stop. (Resp't Br. 6; EX 41 ¶ 6-7; EX 15; EX 43 ¶ 11.) After finishing their investigation, UPS decided to fire Mr. Watson because of his violations and his failure to inform his manager of them. (EX 41 ¶ 9-10; EX 21.)

UPS has provided a large amount of compelling and undisputed evidence showing it terminated Mr. Watson only for disobeying company policy, and Mr. Watson has submitted no direct or indirect evidence to show any protected activity was a contributing factor to his termination. Even when one reads the record in the light most favorable to Mr. Watson, a fact-finder could not rule he has enough evidence of this essential element to carry his ultimate burden of persuasion at trial. Mr. Watson also has not shown by affidavit or declaration this matter warrants additional time or discovery. *See* 29 C.F.R. § 18.72(d). Even assuming some of his complaints might, under some circumstances, comprise "protected activity," in this case Mr. Watson cannot show "protected activity" had anything to do with his termination.

Conclusion

I vacate the May 3, 2018, hearing date in this matter, and grant summary decision in favor of UPS.

SO ORDERED.

CHRISTOPHER LARSEN
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).