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Issue Date: 26 June 2018

CASE NO.: 2018-STA-00033

In the Matter of:

ADRIANO BUDRI,
Complainant

v.

FIRSTFLEET, INC.,
Respondent

ORDER LIFTING STAY; AND DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

This case arises under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 (STAA), and its implementing regulations filed by Adriano Budri (Complainant) against FirstFleet (Respondent).

On June 22, 2018, the undersigned received the Administrative Review Board's ruling on Complainant's prior action (2017-STA-00086), affirming the undersigned's summary dismissal. ARB No. 18-025 (Jun. 19, 2018).[1] Upon consideration thereof, the stay in this matter issued on May 16, 2018, is hereby lifted.

Complainant initiated this action on January 23, 2018, with the Occupational Safety and Health Administration (OSHA), complaining that the negative and unfavorable employment information Respondent provided to Tenstreet, a consumer reporting agency specialized in trucking employment references, remained on his driving record. On May 15, 2018, Respondent filed its Motion for Summary Decision. Complainant filed his Opposition on May 18, 2018.[2] The decision that follows is based upon an analysis of the record, the arguments of the parties, and the applicable law.

[1] As a matter of law, therefore, Complainant's protected activities had no causal relationship to his termination. This is now the law of the case. Allegations concerning Complainant's termination and pre-termination employment actions are irrelevant to this matter.

[2] While pro se litigants are generally afforded "an extra measure of protection" in the course of litigation, I note that Complainant is not a stranger to the pro se litigation of whistleblower claims under the STAA, having filed five previous STAA complaints against Respondent and other employers (2017-STA-00086; 2017-STA-00029; 2014-STA-00032; 2011-STA-00015; and 2008-STA-00053).

I. SUMMARY DECISION STANDARD

Summary decision is appropriate "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.*, ARB No. 12-024, 2012 WL 6849447 (Dec. 28, 2012). At the summary decision stage of a STAA case, the administrative law judge assesses the evidence "for the limited purpose of deciding whether it shows a genuine issue as to a material fact…." If 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.*, ARB No. 05-050, 2007 WL 4107740 at 3-4 (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 non-moving 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 response to that 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, a motion for summary decision must be denied.

II. UNDISPUTED MATERIAL FACTS

For purposes of this Decision and Order, I find the following material facts undisputed:

1. Respondent and Complainant are subject to the STAA.

2. Complainant has engaged in protected activity, including reporting a burned out light bulb, complaining about hours of service, and filing an OSHA complaint and STAA litigation (2017-STA-00086).

3. On February 16, 2017, Complainant had an accident at a customer's facility, resulting in a door being torn off a trailer.

4. As an established matter of fact and law, Respondent terminated Complainant's employment for reasons unrelated to Complainant's protected activity on February 17, 2017.

5. Tenstreet, LLC, is a software applications company that provides various services to assist transportation companies in hiring employees by providing instantaneous information about their backgrounds and qualifications, including their driving histories and accident records.

6. Respondent's Handbook puts its employees on notice that it "reports information to employment information bureaus for all terminated drivers regardless of cause."

7. On June 12, 2017, Respondent's Recruiting Specialist, Laurie Brooks, reported Complainant's termination and the February 16, 2017 accident to Tenstreet, LLC.

8. On January 23, 2018, Complainant filed a complaint with OSHA alleging that he discovered on January 15, 2018, that his driving record, which included Respondent's report to Tenstreet, remained unchanged.

III. WHISTLEBLOWER PROTECTION UNDER THE STAA

A. Timeliness

Employees alleging employer retaliation in violation of the STAA must file their complaints with OSHA not later than 180 days after the alleged violation occurred. 49 U.S.C. § 31105(b)(1). The STAA limitations period is not jurisdictional and therefore is subject to waiver, estoppel, and equitable tolling principles. *See*, *e.g.*, *Miller v. Basic Drilling Co.*, ARB No. 05-111, slip op. at 3 (Aug. 30, 2007). Complaints not filed within 180 days of an alleged violation will ordinarily be considered untimely. 29 C.F.R. § 1978.102(d)(2). A STAA regulation provides for extenuating circumstances that will justify tolling of the 180-day period, such as when the employer has concealed or misled the employee regarding the grounds for discharge or other adverse action or when the discrimination is in the nature of a continuing violation.[3] The regulation also provides that "[t]he pendency of a grievance-arbitration proceeding[]" or "filing with another agency" are examples that do not justify tolling of the 180-day period. 29 C.F.R. § 1978.102(d)(3).

Complainant alleges that he "discovered" on January 15, 2018, that the report to Tenstreet remained unchanged, ostensibly following an investigation Complainant initiated with Tenstreet during which Respondent "confirmed" the information contained in the 06/12/17 report. Assuming all facts in the light most favorable to Complainant, he had 180 days from the time when he discovered that Respondent had supplied allegedly damaging information for inclusion in the Tenstreet report to file his STAA claim, because this was when he received "final, definitive, and unequivocal notice" of an alleged adverse employment action by Respondent. *Thissen v. Tri-Boro Constr. Supplies, Inc.*, ARB No. 04-153, slip op. at 5 (Dec. 16, 2005).

[3] I note that the law has recognized three situations in which tolling is proper. *School Dist. of Allentown v. Marshall*, 657 F.2d 16, 19-20 (3rd Cir. 1981). Complainant has not alleged that any of those three situations apply here.

On March 15, 2018, Complainant filed his Pre Hearing Statement of Position. Documents submitted therewith indicate that Complainant first learned of Respondent's report to Tenstreet on June 12, 2017, the date the report was made. On that date, Andrea Foss, Retention Specialist for Tenstreet, emailed Complainant and enclosed the employment verification supplied by Respondent. That report contains the identical information provided to Complainant on January 15, 2018, in response to his investigation request. Thus, Complainant knew by June 12, 2017, that Respondent provided the alleged negative, disparaging, and unfavorable employment reference—and the bases therefor—to a third party employment consumer reporting agency. Additionally, there is no continuous violation here because Respondent took only one adverse employment action—reporting the information to Tenstreet. That Tenstreet's report is still accessible as maintained by the consumer reporting agency does not create a continuous violation. *See Eubanks v. A.M. Express, Inc.*, ARB Case No. 08-138 (Sep. 24, 2009). For a timely complaint, Complainant should have filed with OSHA no later than December 9, 2017, 180 days from June 12, 2017. He did not file his OSHA complaint until January 23, 2018.

Accordingly, I find Complainant's complaint untimely as it was filed more than 180 days after learning that Respondent provided allegedly damaging information to Tenstreet.

B. The Merits of Complainant's Whistleblower Complaint

Assuming, arguendo, that the 180-day period began when Respondent confirmed to Tenstreet the information contained in its 06/12/17 report, I turn to Respondent's Motion for Summary Decision regarding the merits of Complainant's whistleblower complaint.

The STAA provides that an employer may not "discharge," "discipline," or "discriminate" against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activity. The STAA protects an employee who makes a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order"; who "refuses to operate a vehicle because…the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health"; or who "refuses to operate a vehicle because…the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition." 49 U.S.C.A. § 31105(a)(1).

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). Pub. L. 110-53, 212 Stat. 266 § 1536; *Smith v CRTS International, Inc.*, ARB No. 11-086, 2013 WL 2902809 at 2 fn. 1 (Jun. 6, 2013); 49 U.S.C. § 31105(b). In order to prove a violation under the STAA, Complainant must show by a preponderance of evidence: (1) that he engaged in protected activity; (2) that Respondent took an adverse employment action against him; and (3) that his protected activity was a contributing factor in the adverse action. *Williams v. Dominos Pizza*, ARB No. 09-092, slip op. at 5 (Jan. 31, 2011). "If the employee does not prove one of these elements, the entire complaint fails." *Coryell v. Arkansas Energy Services, LLC*, ARB No. 12-033, 2013 WL 1934004 at 3 (Apr. 25, 2013). If a complainant establishes that "the protected activity, alone or in combination with other factors, affected in some way the outcome of the employer's decision," then he has

met element (3). 77 Fed. Reg. 44127; *Benjamin v. Citationshares Management, LLC*, ARB No. 12-029, 2013 WL 6385831 (Nov. 5, 2013).

If a complainant successfully proves that he suffered an adverse employment action and that his protected activity was a contributing factor to the respondent's decision to take that action, then the respondent may nonetheless avoid liability if it demonstrates by clear and convincing evidence that the adverse employment action was the result of events or decisions independent of protected activity. 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a)). 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*, ARB No. 12-033, 2013 WL 1934004 at 3 (Apr. 25, 2013), *quoting Warren v. Custom Organics*, ARB No. 10-092, 2012 WL 759335 at 5 (Feb. 29, 2012); *Klosterman v. E.J. Davies, Inc.*, ARB No. 12-035, 2013 WL 143761 (Jan. 9, 2013).

For purposes of this Decision and Order, I assume that Respondent's confirmation of its report to Tenstreet constitutes an adverse employment action. Case law recognizes that it may be difficult to present direct evidence on issues such as motive, animus, or contribution, and disfavors the dismissing cases for failing to establish genuine issues of material fact based on those issues. Thus, a non-moving party may rely on circumstantial evidence to satisfy the causation element. To withstand a motion for summary decision, a complainant must present evidence of specific facts that, if true, would allow a reasonable jury to find that the complainant's protected activities were a contributing factor to the adverse employment action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

In his Opposition, Complainant does not allege facts indicating that Respondent's "confirmation" to Tenstreet was retaliatory. Rather, he complains that Respondent provided a negative, disparaging, and unfavorable employment reference "concerning a supposed company policy violation" and an involuntary termination of employment. *See* Complainant's Opposition, p. 2. Those actions have been deemed not to be retaliatory in nature. 2017-STA-00086, *aff'd.*, ARB No. 18-025 (Jun. 19, 2018). That is, the law of the case is that Complainant could not raise any facts or point to any evidence to dispute Respondent's position that he actually violated company policy and was terminated as a result. Thus, I find Respondent's confirmation to Tenstreet in January 2018 is based on true information unrelated to Complainant's protected activity.

Turning to the motivation behind Respondent's confirmation of its report to Tenstreet, Respondent's position is that it "made its true and accurate report…as part of its normal course of business." *See* Respondent's Motion, p. 6. Complainant alleges that the report has "only the purpose to undermine the qualities of the complainant in the trucking business…." *See* Complainant's Opposition, p. 3. However, Complainant points to no facts or evidence to support his allegation. Complainant cannot defeat Respondent's Motion for Summary Decision without presenting "significant probative evidence." *Pueschel v. Peters, supra*, citing *Anderson v. Liberty Lobby, Inc., supra*. Moreover, Complainant "may not rest upon the mere allegations or denials of [a] pleading; [his response] must set forth specific facts showing that there is a genuine issue of fact for the hearing." *Celotex Corp. v. Catrett, supra*. Simply put, Complainant has presented no

"significant probative evidence" or "specific facts" that raise a genuine issue of fact regarding Respondent's motivation for the confirmation of its report to Tenstreet.

Complainant primarily complains that Respondent improperly released the information to Tenstreet without his authorization. He argues that he never signed the Acknowledgement Form in Respondent's Handbook and never received a hard copy of the Handbook. *See* Complainant's Opposition, p. 2. This issue is immaterial to Respondent's motivation behind the confirmation of its report to Tenstreet. I further note that the Handbook indicates Respondent's general policy to "report[] information to employment information bureaus for all terminated drivers regardless of cause." *Id.*, *quoting* Complainant's Exhibit B. A negative employment reference communication must be motivated at least in part by protected activity to constitute retaliation. *Odom v. Anchor Lithkemko*, ARB Case No. 96-189 (Oct. 19, 1997). Complainant has presented no facts or evidence to support any such allegation or to dispute Respondent's position that it reported (or confirmed its report) to Tenstreet in the ordinary course of business. Accordingly, I find that Complainant cannot establish a genuine issue of material fact sufficient to survive summary decision.

IV. ORDER

Based upon the foregoing and upon the entire record, Respondent's Motion for Summary Decision is hereby **GRANTED.** Case No. 2018-STA-00033 is **DISMISSED WITH PREJUDICE.**

So ORDERED.

LARRY W. PRICE
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).