UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 20 August 2020

CASE NO.: 2019-STA-00064

In the Matter of:

CHRIS ARMY,
Complainant,

v.

LEVEILLE'S AUTO RECYCLING,
Respondent.

DECISION & ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

This proceeding arises from a complaint filed under the Surface Transportation Assistance Act, 49 U.S.C. § 31105 ("STAA" or the "Act"), and the procedural regulations found at 29 C.F.R. Part 1978.

The STAA protects whistleblowers from retaliation based upon their whistleblowing activities. Complainant, a truck driver, alleges that he was terminated when he engaged in whistleblowing activity – he refused to drive an unsafe truck. Respondent has moved for summary decision, asserting the Complainant was terminated for legitimate business reasons, and not for any whistleblowing activity.

I. STAA WHISTLEBLOWER PROTECTIONS

"The STAA provides that an employer may not discharge or otherwise retaliate against an employee … because the employee engaged in STAA-protected activity." *White v. Carl Perry Enterprise, Inc.*, ARB Case No. 14-024, 2015 WL 10001627, at *2 (Dec. 10, 2015) (per curiam). The employee is protected by the STAA if, among other activities, he "refuses to operate a vehicle because … [he] has a reasonable apprehension of serious injury to [himself] … or the public because of the vehicle's hazardous safety or security condition." 42 U.S.C. § 31105(a)(1)(B)(ii); *White*, 2015 WL 10001627, at *2.

"All complaints initiated under this section shall be governed by the legal burdens of proof set forth in section 42121(b)." 42 U.S.C. § 31105(b)(1). Under that standard,

Complainant "must prove by a preponderance of the evidence" that he "engaged in protected activity that was a contributing factor" in his termination. *Fort v. Landstar Transp. Logistics, Inc.*, ARB Case No. 2018-0026, 2020 WL 1816336, at *2 (Mar. 6, 2020) (per curiam). "The employer can overcome that showing only if it demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected conduct." *Abbs v. Con-Way Freight, Inc.*, ARB Case No. 12-016, 2012 WL 5379567, at *3 (Oct. 17, 2012) (per curiam) (*citing* 49 U.S.C.A. § 42121(b)(2)(B)(ii)).

II. THE MOTION FOR SUMMARY DECISION

Complainant – who is proceeding without counsel – alleges that when he complained to Respondent about "driving an unsafe tow truck … he was laid off." Respondent's Exhibit ("RX") 2. He alleges that he "complained to the dispatcher, Blair, that the truck was unsafe, and refused to drive the vehicle as it was unsafe for towing." RX-2. Further, he alleges that "Respondent hired a new driver in his place, and has not returned him to work as promised in retaliation for making the safety complaints." RX-2. Complainant alleges that the retaliation occurred on November 2, 2017. RX-2.

On July 21, 2020, Respondent filed a Motion for Summary Decision ("Motion"). Respondent argues that there was no genuine dispute that Complainant was terminated for legitimate business reasons, and not for retaliatory reasons. That same day, July 21, 2020, Complainant filed his "Objection to Respondent's Motion for Summary Judgment."[1] Complainant argues that he has "a strong case," that he has "sent multiple exhibits to prove my case," and that with "more experience or a lawyer, I may have been able to get information" to prove his case.

The next day, July 22, 2020, Respondent filed a Motion for Default. It argues that Complainant's response to Respondent's Motion is so deficient, and in such violation of this court's orders, that a default judgment should be entered against Complainant. Complainant thereupon filed a "Response to Respondent's Motion for Summary Decision" on July 27, 2020,[2] possibly in an attempt to comply with the court's orders (but without any actual explanation). This Response is substantively identical to Complainant's Objection.

A. Summary Decision Standard

"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

[1] That is the name the document was given in the Computer Tracking System ("CTS"). Complainant did not label the document (an email), and refers to it as "my objection to this motion for summary judgment." There is no unique CTS number by which I can identify this document.

[2] That is the CTS name of the document. Complainant entitles it "Respondent's Motion for Summary Decision – Defendants [*sic*] Response).

C.F.R. 18.72(a) (my emphasis).[3] I view the evidence in the light most favorable to the non-moving party; I do not weigh the evidence or attempt to discern the truth of the matter. *See Jennings v. McLane Co.*, ARB Case No. 2017-0045, 2020 WL 624341, at *2 (January 7, 2020). A genuine issue as to a material fact exists "if a fair-minded fact-finder could rule for the nonmoving party after hearing all the evidence, recognizing that in hearings, testimony is tested by cross-examination and amplified by exhibits and presumably more context." *Id.*

The initial burden is on the moving party, which must "demonstrate the absence of any material factual issue genuinely in dispute." *Elias v. Celadon Trucking Services, Inc.*, ARB Case No. 12-032, 2012 WL 6085127, at *2 (Nov. 21, 2012) (per curiam). This burden "is not onerous," but will support summary decision only if the movant shows that "the record is devoid of evidence that could reasonably be construed to support the [complainant's] claim." *Id.*

Bearing in mind that Complainant is proceeding without counsel, I will construe his papers "liberally in deference to [his] … lack of training in the law and with a degree of adjudicative latitude." *Wyatt v. J.B. Hunt Transport, Inc.*, ARB Case No. 11-039, 2012 WL 4753931, at *2 (Sept. 21, 2012) (per curiam), And, since he is both *pro se* and the non-moving party here, I will extend to him "any benefit of the doubt in considering [the] … record." *Elias*, 2012 WL 6085127, at *3.

Viewing the Motion in light of the governing law, then, Respondent must show that there is nothing in the record showing, or from which I can reasonably infer, that Complainant was terminated because he refused to drive an unsafe truck.

B. Undisputed Facts

On or about November 6, 2017, the commercial motor vehicle ("CMV") being driven by Complainant was taken out of service to be inspected and repaired at Tri-State Diesel. *See* Joint Prehearing Statement ("JPHS") ¶ I.

[3] *See Jennings v. McLane Co.*, ARB Case No. 2017-0045, 2020 WL 624341, at *2 (January 7, 2020) ("an ALJ must enter summary judgment for a party if the pleadings, affidavits, material obtained by discovery, or matters officially noticed show that there is no genuine issue as to any material fact and that the party is entitled to summary decision"). I acknowledge that other decisions of the Administrative Review Board ("ARB") state that summary decision is "permitted," or that the Administrative Law Judge ("ALJ") "may" grant it, under these circumstances. *See Fort v. Landstar Transp. Logistics, Inc.*, ARB Case No. 2018-0026, 2020 WL 1816336, at *1 (Mar. 6, 2020) (per curiam) ("Summary decision is permitted where 'there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law.'"); *White v. Carl Perry Enterprise, Inc.*, ARB Case No. 14-024, 2015 WL 10001627, at *2 (Dec. 10, 2015) (per curiam) ("an ALJ may 'enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery, 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'"). Since I find no authority that permits me to *deny* summary decision even where the moving party has shown its entitlement to it, I harmonize these decisions by concluding that I "must" grant summary decision – since if I "must" grant it, then I am also "permitted" to do it – where the moving party has shown its entitlement to it.

C. Respondent's Version of the Facts

Respondent has submitted, in support of its Motion, Respondent's Exhibit 1, the July 16, 2020 Affidavit of Charles Arcangelo ("Arcangelo"), who attests that he is a "member" of Respondent, and that he has personal knowledge of the facts stated in the affidavit. Arcangelo at 1 ¶ 2. The following are the Respondent's version of the facts, as sworn to by Arcangelo.

Complainant was hired to drive one of Respondent's "Roll Off Trucks," which is a commercial motor vehicle ("CMV"), and which appears to be a type of tow truck. Arcangelo at 1 ¶ 6. Complainant held a Commercial Driver's License ("CDL"), which is required to drive a CMV. Arcangelo at 1 ¶ 6. On November 6, 2017, Complainant's CMV "was taken out of service to be inspected and repaired." Arcangelo at 2 ¶ 8; JPHS ¶ I.

While Complainant's truck was being repaired, he was laid off, "so that he could collect unemployment benefits." Arcangelo at 2 ¶ 9. During that period, Respondent used "outside towing companies in order to keep up with its towing needs." Arcangelo at 2 ¶ 11. And, Respondent learned during that period, that "it was more cost effective" to use the "outside independent contractor towing companies," than to use its own CDL drivers on its own CMVs. Arcangelo at 2-3 ¶ 12.

Indeed, Respondent no longer uses any CMVs. Arcangelo at 3 ¶ 16 (Complainant's CMS "has not been driven since … November 21, 2017 nor has another CMV been put on the road"). Instead, its own fleet now consists solely of "three non-commercial trucks which are driven by three non-CDL drivers." Arcangelo at 3 ¶ 15. Non-CDL drivers drive non-commercial trucks "at a lower rate of pay than CDL drivers." Arcangelo at 2 ¶ 10.

Accordingly, Respondent decided for business reasons not to return the CMV to the road, and accordingly did not take Complainant back. Respondent did not replace Complainant.

D. Complainant's Version of the Facts.

Complainant alleges that on or about November 2, 2017, he reported that Respondent's truck was unsafe and that he refused to drive it. EX-2 ("Complaint"). In support, Complainant has filed his "written safety complaint." *See* CL-9. The safety complaint is entitled "Truck is unsafe to drive," and dated November 2, 2017. CL-9. Respondent has not filed an objection to this exhibit, and so for purposes of this motion, I accept it as evidence that Complainant engaged in protected activity, namely, that he refused to drive Respondent's truck because it was unsafe to do so.

Next, Complainant alleges that he complained about the unsafe truck to "Blair," the dispatcher, who "informed him that she was going to write him up for a bad attitude, and he was sent home." Complaint. However, none of Complainant's exhibits support this allegation, and Complainant has offered no affidavit, declaration or other sworn testimony that this conversation ever happened.

Finally, Complainant alleges that the owner, "Charlie," told him that "maybe" he would get the truck back once it was repaired, but that instead, "Respondent hired a new driver in his place, and has not returned him to work as promised in retaliation for making the safety complaints." Complaint. Once again, Complainant has submitted no evidence to support any of these allegations: that he was told he might get his job back; that a new driver replaced him; or that he was not returned to work in retaliation.

E. Resolution

For purposes of this Motion, Complainant has shown that he engaged in protected activity. At a minimum, he has created a genuine dispute on that issue.

However, in order to avoid summary judgment, Complainant must also show that there is evidence in the record to support his *allegation* that Respondent retaliated against him because of his protected activity. Complainant has failed to produce any such evidence.

Complainant's Exhibit 20 is the unemployment notice showing that he was laid off on November 2, 2017, for "Lack of Work." CX-20. However, simply being laid off in this circumstance does not appear to be evidence of retaliation. Both parties agree that the truck needed repair, and was taken off the road for that purpose. Moreover, it is undisputed that Complainant refused to drive the truck because it was unsafe. Accordingly, I do not believe that a reasonable inference of retaliation can be drawn from his being laid off, when his truck was no longer available for work.

Complainant questions why he was not simply hired back into a non-CDL position when the CMV was taken permanently out of service. EX-4 (Request for Hearing). However, Complainant's *question* is not evidence, and is not enough for me to draw an inference of any kind. Indeed, the only evidence on this matter is provided by Respondent, whose sworn statement attests that at the time Complainant was laid off, "[t]here were no open positions for either CDL or non-CDL drivers." Arcangelo at 2 ¶ 10.

The remainder of Complainant's exhibits – many of which Respondent objects to – address the safety issue itself, not the alleged retaliation. *See* Complainant's Proposed Exhibits List (filed July 10, 2020). Accordingly, even considering all of these exhibits, they have no bearing on Complainant's failure to produce any evidence of retaliation. Complainant also indicates that he has witnesses who could testify in his behalf. *See id.* However, Complainant does not provide an affidavit, declaration or any kind of statement from the witness. In any event, the testimony of the witness again purports to pertain only to the safety issue, not the alleged retaliation.

Construing the evidence that exists in the light most favorable to Complainant, I find no evidence nor reasonable inference to be drawn therefrom, that he was retaliated against because of his refusal to drive Respondent's unsafe truck.

III. ORDER

For the reasons given above, **IT IS HEREBY ORDERED** that:

1. Respondent's July 21, 2020, Motion for Summary Decision is **GRANTED**;

2. Respondent's evidentiary objections in the July 10, 2020, JPHS are **OVERRULED** as moot;

3. Respondent's July 14, 2020, Supplemental Objections to Complainant's Exhibits are **OVERRULED** as moot;

4. Respondent's July 22, 2020, Motion for Default is **DENIED** as moot;

5. The September 1, 2020 formal hearing is **CANCELLED**; and

6. This matter is **DISMISSED** with prejudice.

SO ORDERED.

NORAN J. CAMP
Administrative Law Judge

Boston, Massachusetts

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-EFSRHelp@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, 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).