In the Matter of:

ROBERT HOLLAND,

COMPLAINANT,

v.

AMBASSADOR LIMOUSINE/RITZ TRANSPORTATION,

RESPONDENTS.

ARB CASE NO. 07-013

ALJ CASE NO. 2005-STA-050

DATE: October 31, 2008

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

ORDER OF REMAND

Ambassador Limousine and its affiliate, Ritz Transportation (hereinafter referred to, collectively, as Ambassador) provide limousine and bus service in Las Vegas, Nevada. Robert Holland filed a complaint with the United Stated Department of Labor alleging that Ambassador violated the employee protection section of the Surface Transportation Assistance Act (STAA)[1] when it terminated his employment on May 2, 2005, after he refused to drive a bus on April 30, 2005. A Labor Department Administrative Law Judge (ALJ) granted summary decision to Ambassador. We reverse and remand.

[1] 49 U.S.C.A. § 31105 (West 2005). Regulations that implement the STAA are found at 29 C.F.R. Part 1978 (2007). The STAA has been amended since Holland filed his complaint. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). Even if the amendments were applicable to this complaint, they would not affect our decision.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board (ARB or the Board) the authority to issue final agency decisions under, inter alia, the STAA.[2] The Board automatically reviews an ALJ's STAA decision.[3]

We review an ALJ's recommended grant of summary decision de novo.[4] That is, the standard the ALJ applies, also governs our review.[5] The standard for granting summary decision is essentially the same as that found in the rule governing summary judgment in the federal courts.[6] Accordingly, summary decision is appropriate if there is no genuine issue of material fact. The determination of whether facts are material is based on the substantive law upon which each claim is based.[7] A genuine issue of material fact is one, the resolution of which "could establish an element of a claim or defense and, therefore, affect the outcome of the action."[8]

We view the evidence in the light most favorable to the non-moving party and then determine whether there are any genuine issues of material fact and whether the ALJ correctly applied the relevant law.[9] "To prevail on a motion for summary judgment, the moving party must show that the nonmoving party 'fail[ed] to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial.'"[10] Accordingly, a moving party may prevail by pointing to the "absence of evidence proffered by the nonmoving party."[11]

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2 Secretary's Order 1-2002, 67 Fed Reg. 64,272 (Oct. 17, 2002).

3 29 C.F.R. § 1978.109(a).

4 *King v. BP Prod. N. Am., Inc*., ARB No. 05-149, ALJ No. 2005-CAA-005, slip op. at 4 (ARB July 22, 2008).

5 29 C.F.R. § 18.40 (2008).

6 Fed. R. Civ. P. 56.

7 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

8 *Bobreski v. United States EPA*, 284 F. Supp. 2d 67, 72-73 (D.D.C. 2003).

9 *Lee v. Schneider Nat'l, Inc.*, ARB No. 02-102, ALJ No. 2002- STA-025, slip op. at 2 (ARB Aug. 28, 2003); *Bushway v. Yellow Freight, Inc.*, ARB No. 01-018, ALJ No. 2000-STA-052, slip op. at 2 (Dec. 13, 2002).

10 *Bobreski*, 284 F. Supp. 2d at 73 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

11 *Bobreski*, 284 F. Supp. 2d at 73.

Furthermore, 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."[12]

THE LEGAL STANDARD

Covered employers violate the STAA when they discharge an employee because the employee refused to operate a vehicle when doing so would violate a commercial motor vehicle safety or health regulation.[13] To prevail on a claim of unlawful discrimination under the STAA's whistleblower protection provisions, the complainant must allege and later prove by a preponderance of the evidence that he is an employee and the respondent is an employer; that he engaged in protected activity; that his employer was aware of the protected activity; that the employer discharged, disciplined, or discriminated against him regarding pay, terms, or privileges of employment; and that the protected activity was the reason for the adverse action.[14] If the complainant fails to allege and prove one of these requisite elements, his entire claim must fail.[15]

DISCUSSION

Ambassador argued to the ALJ that it was entitled to summary decision because Holland did not present any evidence of protected activity, or evidence that Ambassador knew about protected activity, or evidence that it terminated Holland for protected activity. It asserts that it terminated Holland because he refused the April 30 bus run after he had previously agreed to make that trip. Holland's June 21, 2005 Labor Department complaint and his June 8, 2006 Pre-Trial Statement allege that he refused the bus run because if he had made that trip, he would have violated the Federal maximum driving time regulation.[16] Thus, he claimed that he had engaged in STAA-protected activity. But in his July 20, 2005 letter to the Office of Administrative Law Judges, he stated that he "should not [have been] required to drive while fatigued." Then, later, during his August 25, 2006 deposition, he testified that when his dispatcher called on April 30 at 7:00 p.m. to remind him of the bus run scheduled for 10:00 p.m., he did not

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[12] 29 C.F.R. § 18.40(c). *See Webb v. Carolina Power & Light Co.*, No. 1993-ERA-042, slip op. at 4-6 (Sec'y July 17, 1995).

[13] 49 U.S.C.A. § 31105 (a)(1)(B)(i). Ambassador stipulated that it was governed by the STAA. Motion for Summary Decision at 2.

[14] *Bettner v. Crete Carrier Corp.*, ARB No. 06-013, ALJ No. 2004-STA-018, slip op. at 12-13 (ARB May 24, 2007).

[15] *Cf. Forrest v. Dallas & Mavis Specialized Carrier Co.*, ARB No. 04-052, ALJ No. 2003-STA-053, slip op. at 4 (ARB July 29, 2005).

[16] *See* 49 C.F.R. § 395.5.

refuse the run because of the maximum hours rule but because he was "tired and had had a beer."[17]

As noted, in determining whether genuine issues of material fact exist, we must view the evidence and draw all inferences in the light most favorable to Holland. Thus, despite his conflicting versions of what constituted protected activity, like the ALJ we will infer that when Holland told his dispatcher that he was tired, he meant that he could not safely drive the bus. This is evidence of STAA-protected activity in that Holland refused to drive because he would have violated the Federal regulation prohibiting a fatigued or ill driver from operating a commercial motor vehicle.[18] Furthermore, since Holland was fired just two days later, we agree with the ALJ that Holland has presented some evidence that he was fired because of his protected refusal.

The ALJ found that Ambassador had a "good faith belief that [Holland's] inability to perform the previously-scheduled bus run was entirely due to his own volitional acts." Therefore, he found that Ambassador had articulated and presented a legitimate reason for terminating Holland, and since Holland did not present evidence to discredit this reason, Ambassador was entitled to summary decision. But according to Ambassador's own pleadings, it terminated Holland "for failing to do a bus run that he agreed to do." "Holland refused to do the scheduled bus run, that he had agreed to do the day before, and was terminated for that." "Holland was fired for not doing the bus run."[19] Thus, since the record contains evidence that Holland refused the bus run because he was tired, a protected activity, at the very least a question of fact exists as to whether Ambassador terminated Holland because of protected activity. Therefore, Ambassador is not entitled to summary decision.

Accordingly, we **REVERSE** the ALJ, **DENY** Ambassador's motion for summary decision, and **REMAND** this matter for further proceedings.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

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[17] Deposition at 73, 94-95, 102.

[18] 49 C.F.R. § 392.3.

[19] Motion for Summary Decision at 5; Supplement to Motion for Summary Decision at 2.