



In the Matter of:

ESHETE WORKU,

ARB CASE NO. 07-028

COMPLAINANT,

ALJ CASE NO. 2006-STA-040

v.

DATE: April 22, 2008

PREFLIGHT PARKING,

RESPONDENT.

FOR THE ADMINISTRATIVE REVIEW BOARD:

Appearances:

For the Complainant:

Eshete Worku, *pro se*, Atlanta, Georgia

For the Respondent:

**Jacqueline E. Kalk, Esq., Latesa K. Bailey, Esq., *Little Mendelson, P.C.*,
Atlanta, Georgia**

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended and recodified, 49 U.S.C.A. § 31105 (West 1997)¹, and its implementing regulations, 29 C.F.R. Part 1978 (2007).

¹ The STAA has been amended since the Complainant filed his complaint. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). We need not decide here whether the amendments are applicable to this

Eshete K. Worku filed a complaint alleging that his former employer, Preflight Parking (Preflight), violated the STAA when it discharged him on March 3, 2006. The Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) granting Preflight Parking's Motion for Summary Decision and dismissed Worku's complaint. We concur.

BACKGROUND²

Preflight is an off-airport parking provider. It employs drivers to transport passengers by bus to and from Hartsfield-Jackson Atlanta International Airport in Atlanta, Georgia. Preflight Drivers are not assigned to specific buses, but instead operate them in rotation. Preflight hired Worku as a bus driver on May 8, 2000.

At 3:00 p.m. on March 2, 2006, Preflight assigned Worku to Bus #12 in Preflight's fleet of vehicles. Bus #12 had a broken gear shift indicator. Worku had driven Bus #12 with the broken indicator since 2003.³

Worku was driving passengers in Bus #12 when he stopped to drop off one of the passengers. He left his seat to assist the passenger with his luggage, and the "bus [began] rolling." Worku "went quickly back to the bus" and was able to "stop the bus by holding the brake." At 3:40 p.m., Worku told a Preflight Dispatcher that he had a "problem," and later the same day he told the shift manager that Bus #12 was "not mechanically in a driving condition" and that it "need[ed] to be repair[ed] in order to operate properly."⁴

Preflight transferred Worku from Bus #12 to Bus #110. At approximately 6:40 p.m., a Preflight shift manager told Worku to return to Bus #12 because Bus #110 was leaking oil. Worku told the shift manager that he would not drive Bus #12 because it needed to be "repair[ed]."⁵ The shift manager told Worku "if you don't drive bus number

complaint because even if the amendments applied to this complaint, they are not implicated by the summary judgment issue presented here and thus, would not affect our decision.

² Worku appears pro se and, according to the record, English may not be his native language. We will therefore interpret his pleadings to raise the strongest arguments suggested therein. See, e.g., *Coates v. Southeast Milk, Inc.*, ARB No. 05-050, ALJ No. 2004-STA-060, slip op. at 8-9 (ARB July 31, 2007).

³ Response to Preflight Parking Company Motion for Summary Decision (Response), ¶ 4.

⁴ November 24, 2006 Letter from Worku to the ALJ, as attached to Response (Nov. 24, 2006 Letter), at pages 1-2. Bus #12 also had a broken radio, but Worku was able to use a hand held radio instead. *Id.* at 1.

⁵ *Id.* at 2.

12, you can go home,” but Worku refused to clock out.⁶ Following an exchange with the shift manager, Worku left the premises.⁷ The next day he received a call from Ed Wynn, Preflight’s General Manager, discharging him from employment.

Worku filed his STAA complaint on March 25, 2006. OSHA investigated Worku’s complaint and found that Preflight did not violate the STAA when it discharged Worku from employment. Worku requested a hearing by an ALJ on his complaint. On November 1, 2006, Preflight filed a Motion for Summary Decision (Motion), and a Memorandum of Law in Support of the Motion, with exhibits. Preflight argues that Worku did not engage in STAA-protected activity and that, if he did, there was no causal connection between that activity and his discharge. The Motion also requests attorney’s fees and costs. Worku filed his Response on November 28, 2006.⁸

On November 30, 2006, the ALJ issued a Recommended Decision and Order (R. D. & O.) granting Preflight’s Motion for Summary Decision.⁹ The ALJ concluded that Worku did not engage in STAA-protected activity when he refused to drive Bus #12 because his “complaint of the malfunctioning red-line gear shift position indicator on Bus #12 was not a safety or mechanical condition sufficient to raise a reasonable apprehension of serious injury from a real danger of accident, injury or serious impairment to health.”¹⁰ This case is now before the Administrative Review Board (Board) pursuant to the automatic review provisions of 49 U.S.C.A. § 31105(b)(2)(C) and 29 C.F.R. § 1978.109(c)(1).

⁶ Deposition of Eshete K. Worku (Worku Dep.) at 117.

⁷ Nov. 24, 2006 Letter at 2.

⁸ The Response contains allegations of racial discrimination, national origin discrimination, and sexual harassment. These allegations are not within the scope of the STAA.

⁹ The ALJ issued a ruling in this case on November 13, 2006, which he rescinded following Worku’s submission of the Response.

¹⁰ R. D. & O. at 6.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under STAA.¹¹ We review a decision granting summary decision de novo. That is, the standard the ALJ applies, also governs our review.¹² The standard for granting summary decision under the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges is similar to that found in Federal Rule of Civil Procedure 56, which governs summary judgment in the federal courts. Accordingly, summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.¹³ The determination of whether facts are material is based on the substantive law upon which each claim is based.¹⁴ A genuine issue of a 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.”¹⁵

We view the evidence in the light most favorable to Worku, 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.¹⁶ To prevail on its motion for summary decision, Preflight must show that Worku failed to make a showing sufficient to establish the existence of an element essential to his STAA case, and on which he bears the burden of proof at trial.¹⁷

Furthermore, a party opposing a motion for summary decision may not rest upon the mere allegations or denials of its pleadings but must set forth specific facts which could support a finding that there is a genuine issue of fact for hearing.¹⁸

¹¹ Secretary’s Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1978.109(c)(1).

¹² 29 C.F.R. § 18.40 (2006).

¹³ Fed. R. Civ. P. 56(c); 29 C.F.R. § 18.40(d); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

¹⁴ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

¹⁵ *Celotex*, 477 U.S. at 322; *Anderson*, 477 U.S. at 248.

¹⁶ *Id.* at 255.

¹⁷ *Celotex*, 477 U.S. at 322.

¹⁸ 29 C.F.R. § 18.40(c); *see Anderson*, 477 U.S. at 252.

DISCUSSION

The STAA protects employees who engage in certain activities from adverse employment actions. To prevail on his complaint, Worku must prove by a preponderance of the evidence that he engaged in activity protected by the STAA, that Preflight was aware of the protected activity, that he suffered an adverse action (i.e., discharge, discipline, or discrimination), and that Preflight took the adverse action because of his protected activity.¹⁹

Preflight argues that Worku did not engage in STAA-protected activity, and protected activity is an essential element of Worku's case. If Preflight demonstrates that Worku lacks evidence on an element essential to his case, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element ... necessarily renders all other facts immaterial."²⁰ Worku must therefore set forth specific facts which could support a finding that he engaged in STAA-protected activity.

Worku proceeded with his case without the assistance of legal counsel. While a pro se litigant must of course be given fair and equal treatment, pro se complainants have "the same burdens of production and persuasion as complainants represented by counsel."²¹

A. Worku's Complaint and His Response to the Motion

Worku initiated his STAA complaint by contacting OSHA on March 25, 2006, but he did not file a written complaint.²² OSHA generated a Case Activity Worksheet for his case on April 3, 2006. The Worksheet indicates that Worku alleges that he "was discharged for refusing to drive a 'broken' bus as assigned by shift manager."

In conjunction with its Motion, Preflight submitted several documents containing descriptions of Worku's March 2, 2006 communications to Preflight's managers. Preflight cites to Worku's deposition for his own description of that day's events. Preflight also attached to its Motion statements from Anita Jenkins and Erroll D. Dunson,

¹⁹ *Ridgley v. C. J. Dannemiller*, ARB No. 05-063, ALJ No. 2004-STA-053, slip op. at 5 (ARB May 24, 2007).

²⁰ *Celotex*, 477 U.S. at 323.

²¹ *Coates*, slip op. at 9, citing *Canterbury v. Administrator*, ARB No. 03-135, ALJ No. 2002-SCA-011, slip op. at 3-4 (ARB Dec. 29, 2004).

²² See Case Activity Worksheet ("Complaint was 'verbalized' on 3/25/06").

two of Preflight's shift supervisors. These statements indicate that the only problem Worku complained about on March 2, 2006, was the broken gear shift indicator.²³

Worku's three-page Response contains statements describing his concern about Bus #12.²⁴ In addition to his Response, Worku submitted five documents: (1) his 2003 performance appraisal; (2) his 2004 performance appraisal; (3) a copy of the Jenkins Statement; (4) a copy of the Dunson Statement; and (5) a letter dated November 24, 2006, from Worku to the ALJ. This final document contains a further description of his concern regarding Bus #12.²⁵

Worku's Response and letter, both dated November 24, 2006, are pleadings and do not constitute evidence for purposes of summary decision. His 2003 and 2004 performance appraisals contain no information about any statements he made during his employment at Preflight. The Jenkins and Dunson Statements, which Worku attached to his Response, indicate that the only problem Worku complained about on March 2, 2006, was the broken gear shift indicator. Accordingly, there is no dispute that the "problem" identified by Worku on March 2, 2006, was the broken gear shift indicator in Bus #12.

²³ See Motion, Exhibit C (Jenkins Statement) ("He explained to me that the instrument panel would not show which gear he was in He told me he was not going to drive unit 12 because he needed 'the proper tools for the job He again refused to drive or punch out."); Exhibit D (Dunson Statement) ("Eshete told me that he did not want to use this unit because of the little red indicator that shows the unit is in park, reverse, neutral, and drive was broken").

²⁴ See Response, ¶¶ 2-6 ("I asked my supervisor Mr. Dunson to switch to another safe bus in order to perform my duty safely and professionally. However, Mr. Dunson ignores my request and told me to keep driving unsafe bus and I refused to drive the unsafe bus I refused to drive unsafe bus Bus #12 gear shift indicator was an old problem, it was broke sometime in 2003. I did report the problem during that time. Since then gear indicator was broken. For the past 3 years I kept reporting no action was taken I did refuse to drive bus #12 because the bus mechanically was not safe.").

²⁵ See Nov. 26, 2006 Letter at 1-2 ("I did explain to the shift manager that the bus is not mechanically in a driving condition The shift manager told me to drive the bus number 12 which I had previously reported has problems to drive. I tried to explain to him by saying for customers safety and my safety this bus need to be repair in order to operate properly. ... I choice to go home instead of operating the bus with lots of mechanical problem ... they simply expelled me from my job for revealing the problem about the bus number 12").

B. Worku Did Not Engage in Protected Activity under the “Complaint Clause” of the STAA

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 complained about a violation of “a commercial motor vehicle safety regulation, standard, or order.”²⁶

In its Memorandum, Preflight states that Worku did not engage in protected activity because “the regulations of the STAA” do not indicate that a broken gear shift indicator constitutes a safety violation, and “the gear shift indicator is simply a tool of convenience, not a necessary item of safety.”²⁷ Preflight also states that “on January 24, 2006 the Department of Transportation conducted its annual inspection and certified that Bus 12 was safe to operate even though the gear shift indicator did not work.”²⁸ In support of its Motion, Preflight submitted a copy of Worku’s March 2, 2006 pre-trip inspection report for Bus #12 and a January 24, 2006 “Annual Vehicle Inspection Report” for Bus #12. Preflight also cites to statements in Worku’s deposition indicating that he frequently drove Bus #12 for three years with the broken indicator and that it did not affect his ability to safely operate the vehicle.

To meet his burden on summary decision, Worku must identify specific facts (by reference to his deposition or specific exhibits) indicating that his complaints about Bus #12 related to a violation of a commercial motor vehicle safety regulation, standard, or order. Those complaints must be specific, and Worku must reasonably believe that his complaints related to a safety violation.²⁹

Worku’s Response does not set forth specific facts showing that the operation of Bus #12 with a broken indicator constituted a violation of a commercial motor vehicle safety regulation, standard, or order. On summary decision, Worku bears the burden of establishing a genuine issue for hearing. He has not met this burden because he failed to present any evidence to show that the gear shift indicator on Bus #12 was “a necessary item of safety.”

²⁶ 49 U.S.C.A. § 31105(a)(1)(A).

²⁷ See Memorandum of Law In Support of Motion for Summary Decision (Memorandum) at 4.

²⁸ Memorandum at 4, citing Preflight Parking’s Statement of Undisputed Material Facts in Support of Its Motion for Summary Decision, ¶ 26 (which, in turn, cites Exhibit B, “Annual Vehicle Inspection Report, dated January 24, 2006).

²⁹ See, e.g., *Luckie v. United Parcel Serv., Inc.*, ARB Nos. 05-026, 054, ALJ No. 2003-STA-039, slip op. at 13 (ARB June 29, 2007).

The Response also indicates that Worku's statements about the broken indicator did not contain any specific information relating to a violation of a commercial motor vehicle safety regulation, standard, or order. Preflight presented evidence that Worku approved Bus #12 for operation at the beginning of his shift on March 2, 2006. On that date, both Preflight and Worku already knew that the gear shift indicator was broken. Because Worku had driven Bus #12 for three years with the broken indicator, Preflight had no reason to believe that Worku was accusing Preflight of violating a motor vehicle safety regulation, standard, or order when he again complained about the broken indicator.

Finally, Worku has failed to show that he had a reasonable belief that the operation of Bus #12 constituted a safety violation. He drove Bus #12 with a broken gear shift indicator for three years prior to March 2, 2006. When he started his shift on March 2, he knew that the gear shift indicator on Bus #12 was broken, yet he proceeded to drive the vehicle.

In sum, Worku has failed to establish a genuine issue of fact that he complained to Preflight about a violation of a commercial motor vehicle safety regulation, standard, or order.

C. Worku Did Not Engage in Protected Activity Under The "Refusal To Drive" Clause of the STAA

Protection is afforded under the STAA where an employee "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"³⁰ Worku refused to drive Bus #12 on March 2, 2006. However, as described above, he has presented no evidence indicating that he refused to drive because doing so would have violated a regulation, standard, or order related to motor vehicle safety.

A refusal to operate a vehicle may also be premised on an employee's "reasonable apprehension of serious injury to [oneself] or the public because of the vehicle's unsafe condition."³¹ The STAA provides that "an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health."³²

³⁰ 49 U.S.C.A. § 31105(a)(1)(B)(i).

³¹ 49 U.S.C.A. § 31105(a)(1)(B)(ii).

³² 49 U.S.C.A. § 31105(a)(2).

Preflight says that “Worku did not have a reasonable apprehension that the bus was unsafe. He simply preferred not to drive Bus 12 because it was an older bus.”³³ In support of this statement, Preflight cites to Worku’s Deposition.³⁴ To oppose the Motion, Worku must set forth specific facts to establish that he refused to drive because he had a reasonable apprehension that Bus #12 was unsafe to drive. He has failed to do so.

Worku states that he asked “to switch to another safe bus in order to perform [his] duty safely and professionally,” and that he refused to drive Bus #12 “because the bus mechanically was not safe.”³⁵ But he also states that he and other Preflight drivers regularly drove Bus #12 with the broken gear shift indicator. When Worku completed his pre-trip inspection report for Bus #12 on March 2, he did not report any concern about the gear shift indicator,³⁶ and he does not indicate that the mechanical condition of Bus #12 changed while he was driving it on March 2.

The Dunson Statement indicates that, after Dunson told Worku to clock out, Worku “changed his mind and decided to drive Bus #12.” Worku’s willingness to drive Bus #12 after refusing to do so does not support his argument that he had reasonable apprehension that serious injury would result if he drove the bus.

The mere possibility that the fact finder might reject the moving party’s evidence on credibility grounds is not enough to forestall summary judgment for the moving party. In its motion for summary decision, Preflight presented evidence that, if not rebutted by Worku, would entitle Preflight to summary decision. Worku has not presented sufficient evidence to create a genuine issue of fact that he engaged in STAA-protected activity when he refused to drive Bus #12 on March 2, 2006. Because he has failed to establish an essential element of his case, Preflight is entitled to summary decision as a matter of law.

In addition to summary decision on the complaint, Preflight seeks attorney’s fees and costs. Although Preflight Parking has prevailed on its Motion, the STAA provides for the award of attorney’s fees and costs only to prevailing complainants.³⁷ Preflight therefore is not entitled to attorney’s fees and costs.

³³ Memorandum at 6.

³⁴ *Id.*, citing Worku Dep. 115.

³⁵ Response, ¶ 6.

³⁶ See Worku Dep., Ex. 31 (March 2, 2006 Pre-Trip Inspection Report).

³⁷ 49 U.S.C.A. § 31105(b)(3)(B) (allowing assessment of “costs” (including reasonable attorney’s fees) against respondent that complainant incurred in bringing complaint). See *Somerson v. Mail Contractors of America*, ARB No. 03-055, ALJ No. 2002-STA-044, slip op. at 9 (ARB Nov. 25, 2003) (citing *Abrams v. Roadway Express, Inc.*, No. 1984-STA-002, slip op. at 1-2 (Sec’y May 23, 1985)).

CONCLUSION

Worku has not presented sufficient evidence to create a genuine issue of fact that he engaged in STAA-protected activity. Accordingly, we **GRANT** Preflight Parking's Motion for Summary Decision, **DENY** the Complaint, and **DENY** Preflight Parking's request for attorney's fees and costs.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

DAVID G. DYE
Administrative Appeals Judge