



In the Matter of:

JAMES T. HOLLENBECK, JR.,

ARB CASE NO. 07-054

COMPLAINANT,

ALJ CASE NO. 2007-STA-003

v.

DATE: August 26, 2008

UNIVERSAL FUEL, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Respondent:

Chris Mitchell, Esq., Maynard, Cooper, & Gale, P.C., Birmingham, Alabama

FINAL DECISION AND ORDER

James T. Hollenbeck, Jr. complained that Universal Fuel, Inc. (UFI) violated the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended and recodified, 49 U.S.C.A. § 31105 (West 2008),¹ and its implementing regulations, 29 C.F.R. Part 1978 (2007), when it stopped giving him new driving assignments after January 2, 2006. We approve the Administrative Law Judge's Recommended Decision and Order (R. D. & O.) issued on February 27, 2007, granting summary decision for Universal.

¹ The STAA has been amended since Hollenbeck filed his complaint. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). Those amendments are not applicable to the issues presented for our review.

BACKGROUND

Since the facts are undisputed, we take them from the R. D. & O. and affidavits in support of UFI's Motion for Summary Decision. UFI was the fuel operations contractor at the Naval Air Station Patuxent River. Hollenbeck was a part time refueler/driver for UFI until January 8, 2006. Hollenbeck filed a complaint with the United States Department of Transportation (DOT) in January 2006, which included allegations that UFI was not in compliance with a mandatory drug and alcohol screening program. Thereafter, UFI adopted a more stringent testing program.

UFI offers three reasons why it did not assign work to Hollenbeck after January 8, 2006: (1) the Navy cut back its flight schedule in early February 2006, which resulted in fewer work opportunities for part time refuelers/drivers; (2) UFI covered most of the days in January through March 2006 when Hollenbeck signed up for work but was not used with other part time refuelers/drivers who had more seniority; and (3) there were approximately 11 days in February and March 2006 when UFI did not use Hollenbeck because it was in the process of training another driver.

Hollenbeck filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) on March 20, 2006, alleging that UFI stopped assigning him work in retaliation for his protected complaint to DOT. After investigation, OSHA issued a report on September 6, 2006, concluding that there was not reasonable cause to believe UFI violated the STAA. Hollenbeck appealed and requested an evidentiary hearing before an ALJ.

UFI moved for summary decision. Notwithstanding Hollenbeck's failure to file an opposition, the ALJ reviewed the merits of the motion. Because the ALJ concluded that UFI did not deny Hollenbeck driving assignments because of his protected activity, UFI was entitled to judgment as a matter of law. R. D. & O. at 7.

DISCUSSION

The Administrative Review Board has jurisdiction to decide this matter by authority of 49 U.S.C.A. § 31105(b)(2)(C), Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002), and 29 C.F.R. § 1978.109(c)(1). UFI filed a brief. Hollenbeck did not.

We review a grant of summary decision de novo, i.e., under the same standard the ALJ employs. As set forth at 29 C.F.R. § 18.40(d) and derived from Rule 56 of the Federal Rules of Civil Procedure, that standard permits summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise show that there is no genuine issue as to any material fact and a party is entitled to summary judgment as a matter of law. *Agee v. ABF Freight Sys., Inc.*, ARB No. 04-182, ALJ No. 2004-STA-040, slip op. at 2 (ARB Dec. 29, 2005).

The STAA, 49 U.S.C.A. § 31105(a)(1), 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 protected activity includes making a complaint of a “violation of a commercial motor vehicle safety regulation, standard, or order.” § 31105(a)(1)(A). To prevail on a STAA claim, the complainant must prove by a preponderance of the evidence that he engaged in protected activity; that his employer was aware of the protected activity; that the employer discharged, disciplined, or discriminated against him; and that the protected activity was the reason for the adverse action. *Harris v. Allstates Freight Sys.*, ARB No. 05-146, ALJ No. 2004-STA-017, slip op. at 3 (ARB Dec. 29, 2005); *Densieski v. La Corte Farm Equip.*, ARB No. 03-145, ALJ No. 2003-STA-030, slip op. at 4 (ARB Oct. 20, 2004). Failure to prove any one of these elements results in dismissal of a claim. *Harris*, slip op. at 3.

Assuming that Hollenbeck filed a complaint with DOT, that would qualify as protected activity under the STAA. If UFI stopped using his services as refueler/driver, that would satisfy the adverse action requirement. On summary decision, UFI provided three legitimate, non-discriminatory reasons why it did not give Hollenbeck work: (1) the Navy cut back its flight schedule; (2) UFI assigned drivers with more seniority in January through March 2006; and (3) UFI assigned work to a new driver it was training.

To defeat UFI’s motion for summary decision, Hollenbeck would have to create a genuine issue of material fact over whether the reasons UFI gave for not giving him driving assignments were the real reasons. He would have to proffer evidence that would tend to establish a causal connection between his DOT complaint and UFI’s failure to give him work between January and March 2006. Because Hollenbeck filed no opposition to UFI’s motion for summary decision, and no brief to us, UFI’s version of events is uncontested. Accordingly, UFI did not retaliate against Hollenbeck in violation of the STAA and is entitled to summary decision.

CONCLUSION

We accept the ALJ’s R. D. & O., grant summary decision for UFI, and **DENY** Hollenbeck’s complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge